THE COURT OF APPEAL

Neutral Citation Number: [2017] IECA 317

Record Number: 2016 100

Finlay Geoghegan J.
Peart J.
Irvine J.

BETWEEN:

M.Y.

- AND -

R.Y.

- AND–

N.Y (A MINOR SUING BY HIS FATHER AND NEXT FRIEND M.Y)

- AND -

Z.Y (A MINOR SUING BY HIS FATHER AND NEXT FRIEND M.Y)

- AND -

F.Y (A MINOR SUING BY HIS FATHER AND NEXT FRIEND M.Y)

APPELLANTS

- AND -

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

RESPONDENTS

- AND -

THE MINISTER FOR FOREIGN AFFAIRS AND TRADE

NOTICE PARTY

JUDGMENT OF MR. JUSTICE MICHAEL PEART DELIVERED ON THE 6TH DAY OF DECEMBER 2017

1. The first and second named applicants are nationals of the Islamic Republic of Pakistan. They arrived in this State in August 2001 and April 2002 respectively, and have resided here at all times since their arrival. For convenience I shall refer to them collectively as Y, except where the context may require that I refer to them individually.

2. Y are parents of, firstly, their son N, the third named applicant, born in this State on the 5th May 2002, and who is accordingly an Irish citizen by birth. On or about 12th June 2002 solicitors acting for Y sent their application to the Minister for leave to remain in the State based on their parentage of an Irish born child. As explained in an affidavit of Michael Flynn (see para. 11 thereof) filed by the Minister in these proceedings, their application was never considered because of a change of policy on the part of the Minister with effect from 13th February 2003. This change followed the judgment of the Supreme Court in *L and O v. Minister for Justice, Equality and Law Reform* delivered on the 23rd January 2003 ([2003] 1 I.R. 1), and the insertion of s. 6A into the Irish Nationality and Citizenship Act, 1956 by way of amendment, and to which I refer in more detail in para. 3. No actual permission to remain in the State ever issued to Y on foot of their 12th June 2002 application for permission to remain. The Minister did not inform Y that their application would not be considered due to this change of policy, and failed to do so despite a number of letters and inquiries from Y's solicitors, all of which received no acknowledgement or response of any kind.

3. On the 1st January 2005 the Minister introduced the Irish-Born Child 05 residency scheme ("the IBC05 scheme"). Under this scheme the non national parents of a child born in Ireland could apply for leave to remain on the basis of their parentage of an Irish-born child. Y made such an application on the 2nd February 2005. Their application was returned by the Minister's office on the 31st March 2005 as the forms had not been correctly completed. Corrected forms were sent to the Minister, but seem to have become mislaid. Thereafter, Y's solicitor sent further forms by registered post on the 4th April 2005. By letter dated 19th July 2005 Y's application for permission to remain under the IBC05 scheme was granted for a period of two years. There have been subsequent renewals of that permission.

4. Y are also the parents of their twin sons, Z and F, the fourth and fifth named applicants who were born in the State on the 30th June 2005 (19 days prior to the leave to remain permission just referred to). They did not acquire Irish citizenship from birth, as N had done, since their date of birth post-dated the 1st January 2005, being the date on which the Oireachtas gave effect to the amendment to the Constitution approved by the people of Ireland in 2004 and by which a child born to non-Irish parents was excluded from *automatic* Irish nationality and citizenship (viz. s. 6A of the Irish Nationality and Citizenship Act, 1956, inserted by s. 4 of the Irish Nationality and Citizenship Act, 2004), as the position had been previously. However, under s. 6A, they were entitled to make application for Irish citizenship, and to be granted citizenship provided one of their parents met the specified period of reckonable residence in the State, namely that during the period of 4 years immediately preceding the birth of Z and F the parent had been resident on the island of Ireland for a period of not less than three years.

5. In the belief and understanding that Z and F were entitled to Irish citizenship and therefore to Irish passports on the basis that they (Y) met the required period of reckonable residence for the purposes of s. 6A(1), Y made Irish passport applications for Z and F . These applications were refused for a reason which has given rise to these proceedings.

6. The reason for refusal was essentially that the Minister considered that Y were not lawfully residing in the State until they received a permission to do so by letter dated 19th July 2005, and therefore were in contravention of s. 5 of the Immigration Act, 2004 which came into force on the 13th February 2004, and therefore did not have the required period of reckonable residence prior to the birth date of Z and F for them to be Irish citizens by birth. Section 5, subsections (1) and (2) provide:

> "5.(1) No non-national may be in the State other than in accordance with the terms of any permission given to him or her before the passing of this Act, or a permission given under this Act after such passing, by or on behalf of the Minister.
>
> (2) A non-national who is in the State in contravention of subsection (1) is for all purposes unlawfully present in the State. [Emphasis provided]

7. I have noted already that no permission to reside in the State was ever granted to Y on foot of their June 2002 application. I have also noted that from the 13th February 2004 no non-national was permitted to be in the State other than on foot of a permission granted prior to that date, or a permission granted under the Immigration Act, 2004. I have further noted that the first occasion on which Y were granted such a permission (under the IBC05 scheme) was by the Minister's letter dated 19th July 2005 after the passing of the 2004. The Minister has now accepted (contrary to a previously stated position) that Y are considered to have been lawfully in the State up to the 13th February 2004 – in other words until the introduction of s. 5 of the 2004 Act. It is because no such permission was granted to Y until the 19th July 2005 that the Minister considers that the hiatus period between 13th February 2004 and 19th July 2005 is not reckonable for the purpose of s. 6A of the 1956 Act as amended since they were in contravention of s. 5(1). Z and F can be considered to be Irish citizens and therefore entitled to Irish passports, only if Y meet the s. 6A residency requirement on the date of their birth. If the Minister is correct then it is clear that Z and F are not entitled to Irish passports under s. 12(1)(a) of the Passports Act, 2008 which provides that the Minister shall refuse to issue a passport to a person if the Minister is not satisfied that the person is an Irish citizen.

8. In their amended statement of grounds filed in the High Court the appellants claimed the following declarations by way of judicial review:

> (i) A declaration that [Y]'s residency from the 13th February 2004 to 30th June 2005 is reckonable within the meaning of section 6A of the Irish Citizenship and Nationality Act 1956 [sic], as amended by the Act of 2004.
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> (ii) A declaration that [Y] have resided lawfully in the State since 5 May 2002.
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> (iii) A declaration that [Z] and [F] are entitled to Irish citizenship on the basis of their parents' lawful residence in the State as provided for by section 6A of the Citizenship and Nationality Act 1956 [sic] as amended by the Act of 2004.

9. By order of the High Court (Clarke J.) dated 26th November 2012 leave was granted to seek those reliefs on the following grounds:

> "(i) The respondent has erred in law in finding that [Y] did not accrue reckonable residence for the purpose of section 6A(1) of the Irish Nationality and Citizenship Act 1956, as amended, between the 13th February 2004 and the 30th June 2005.
>
> (ii) The rights of [N] under Article 20 TFEU and Article 7 of the Charter, in combination with each of the applicants' family rights pursuant to the Convention and the ECHR, have been breached by the respondent by reason of his refusal to recognise a period of his father's residency which was lawful by reference to EU law, and which has deprived the family unit herein of rights which are ancillary to [Y]'s right of residency and which include the right of [Z] and [F] to be citizens of Ireland."
>
> (iii) The respondent has in all the circumstances breached the constitutional rights of [Z] and [F] to have the State by its laws, defend and vindicate their personal rights as citizens pursuant to Article 40 of the Constitution.

10. When the matter first came on for hearing in the High Court before Mr Justice MacEochaidh, it was agreed by all parties that a preliminary issue should be determined in the first instance as, depending on the outcome, it might dispose of the action. That issue was agreed in the following terms:

> "Was the Minister correct in discounting the period from 13th February 2004 (the date the Immigration Act 2004 came into effect) to the 30th June 2005 (the date of birth of the twin children [Z and F] in his computation of reckonable residence under the Irish Nationality and Citizenship Act 1956 (as amended)."

11. The trial judge determined that preliminary issue in the affirmative for the reasons appearing in his first judgment delivered on the 20th March 2014 ([2014] IEHC 143). In other words he decided that the Minister was correct to deduct the period in question from his computation of reckonable residence under the Act of 1956. If that issue had been determined the other way, it would not have been necessary for him to go on to hear and determine the remaining grounds contained in the statement of grounds. In the circumstances therefore, the trial judge went on to determine the issues raised in grounds (ii) and (iii) above, and again determined them against the appellants for the reasons contained in his second judgment delivered on the 15th January 2015 ([2015] IEHC 7), essentially determining that Y did not automatically enjoy rights of residence in the State following, and on the basis of, the birth of N in the State on the 5th May 2002 by virtue of N's rights derived from Article 20 TFEU, and/or on the basis of principles of EU law later identified by the CJEU as deriving from Article 20 TFEU in its judgment in Case C-34/09 *Ruiz Zambrano v. Office national de l'emploi (ONEm*).

The trial judge's conclusions

12. The trial judge set out his conclusions conveniently at paras. 38-44 of his judgment as follows:

> "38. My view is that the applicants have read too much into the Zambrano decision of the ECJ. They interpret the decision as confirmation that EU law grants rights of residence in Ireland to non EU parents of Irish/EU citizens. They assert that such rights are enjoyed from the date of birth of an EU citizen child and parents unlawfully present in the State overcome that illegality and automatically enjoy a right to reside and work in a Member State. In addition they assert that unlawful presence when viewed historically must be refuted. This is incorrect.

39. It is important not to lose sight of the facts of the Zambrano case. Mr. Zambrano, a Colombian national, was the father of two Belgian/EU citizen children born in Belgium and who became Belgian citizens by operation of law. He had worked illegally in Belgium for some years but paid his social security contributions. He lost his job and when he claimed unemployment assistance he was refused because his contributions were paid during a period when he had no work permit. He challenged this refusal saying that he was exempt from work permit requirements as the father of dependent EU citizens. The Belgian court asked the ECJ whether EU law conferred a right of residence and exemption from work permit on the father of an EU citizen. The ECJ did not give a direct answer to the questions but instead said that EU law precluded Member States from refusing residency and work permits to persons such as Mr. Zambrano if such refusals would require him to leave the EU and thereby oblige the EU citizen dependent child to leave also.

40. Any suggestion that EU law confers automatic rights of residence (whether retrospectively or prospectively) on the parents of EU citizen children is misconceived. The ECJ was asked whether Mr. Zambrano was exempt from work permit rules. I interpret the answer given as meaning that no such exemption is automatically created by EU law but there are circumstances where such effect may be found. It was left to the national court to decide whether the denial of unemployment assistance to Mr. Zambrano would have the effect of depriving his EU citizen children of the right to remain in the EU.

41. Similarly, there may be circumstances in which Ireland might be obliged to acknowledge retrospectively lawful residence of parents, commencing on the date of birth of an EU citizen child. If some negative consequence, directly related to the child's EU citizenship, arose from the absence of acknowledgement of lawful residence then it might be necessary to retrospectively confer permission to be in the State on parents who were present without permission. No facts or argument to this effect were advanced in this case and it is difficult to imagine how the child's EU citizenship is or was impaired by the historic unlawful presence of the parents in the period from the birth of the citizen child until the date they were granted permission to be in Ireland in July 2005.

42. 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.

43. EU law does not automatically confer a right of residence or a right to work or a right to social welfare or any other right on the third country national parents of EU citizen children. Such rights may not be denied to those parents if the consequence would deprive the child of EU citizenship rights

44. In view of these remarks the argument that the parents in this case were lawfully in the State from the date of birth of their Irish/EU citizen child must fail. I dismiss the application."

13. The notice of appeal filed on the 29th February 2016 contains a single ground of appeal in the following terms:

"1. The trial judge erred in law in holding that the fourth and fifth named applicants [Z and F] are not entitled to citizenship by birth in the State.

The trial judge erred by misconstruing the rights accruing to [N] pursuant to Article 20 TFEU by reason of his Irish citizenship, as not being capable of retrospective recognition. Had they been recognised as having retrospective recognition, as a consequence his parents [Y] would be regarded as having been lawfully in the State from the time of his birth by reason of the application of EU law, with a further consequence that his siblings [Z and F] would be entitled to recognition as Irish citizens by birth owing to their parents' lawful residence at the time of their births."

14. Since this is the sole ground of appeal raised in the notice of appeal, it is clear that the appellants have not appealed against the findings on the preliminary issue contained in the first judgment delivered by the trial judge on the 20th March 2014 ([2014] IEHC 143), namely that the Minister was correct to discount the period in question in his computation of the reckonable period in s. 6A of the Act of 1956.

15. In their respondents' notice, the respondents oppose the appeal substantively on the following grounds, as relevant:

(i) The learned High Court judge did not err by misconstruing the rights accruing to [N] under Article 20 TFEU as not being capable of retrospective application. The learned High Court judge found that there may be circumstances in which Ireland might be obliged to acknowledge retrospectively lawful residence of parents, commencing on the date of birth of an EU citizen child (paragraph 41 of the judgment of the 15th January 2015).

However, the learned High Court judge correctly found that no negative consequence directly related to the child's EU citizenship arose from the absence of acknowledgement of lawful residence during the period from the birth of [N] (5th May 2002) to the date when [Y] were granted permission (19th July 2005).

(ii) The learned High Court judge further correctly found that EU law did not confer an automatic right of residence on the parents of an EU citizen child, but that such a right could not be refused if the consequence of a refusal would be to deprive the child of the genuine enjoyment of the substance of rights conferred by the status of EU citizen.

(iii) The learned High Court judge further correctly found that EU law did not exempt third country nationals from complying with the laws of Member States as to residence and employment. This State's statutory regime requiring non-EU persons to have permission to be in the State was not affected by EU law save that such permission could not be withheld if the applicants for permission where parents/carers of dependent EU citizens who would be obliged to leave the territory of the Union if such permission was refused.

16. It is worth noting at this point also that in addition to the grounds of appeal just referred to, the respondents plead some additional grounds on which they say the decision of the High Court should be affirmed by this Court. Firstly, they refer to the fact that certificates of naturalisation were granted to Z and F on 12th February 2015 pursuant to applications made on their behalf by Y, and they submit that in these circumstances no further benefit or advantage can be gained by them by the continued pursuit of the present appeal, and therefore that the appeal is moot. Secondly they urge that EU law and, in particular reliance upon Article 20 TFEU, cannot operate directly or indirectly so as to confer an entitlement to citizenship upon Z and F, and that same stands to be determined as a matter of domestic law. Thirdly, it is submitted that the judgment of the CJEU in Zambrano did not have the effect of

retrospectively altering the immigration status of Y so as to confer an entitlement to citizenship for Z and F under domestic law. Fourthly, it is submitted that Y did not, as a matter of pure fact, have a permission to be in the State during the period from 13th February 2004 until 30th June 2005, and that since such period of residence is in contravention of s.5 (1) of the 2004 Act it is not reckonable under s.6B (4) (a) of the Act of 1956 (as inserted).

Appellants' legal submissions on this appeal

17. The judgment of the CJEU in *Zambrano* postdates the birth of N in the State by some nine years or so. Nevertheless, the appellants submit that N had from the date of his birth in May 2002 the rights which are now sometimes referred to as *Zambrano* rights and which derive from Article 20 TFEU, and that they as parents of N had as a result an entitlement under EU law to reside in the State in order to provide joint primary care to their dependent Irish-born child [N] from the date of his birth in May 2002. It follows in their submission that they were lawfully in the State after N's birth even though they had no written permission to remain (albeit that in June 2002 they had made application for permission to remain, which application was never considered by the Minister for reasons which the Minister has explained). They describe the right as a declaratory right, one which simply exists, and does not require something in writing to create it. They point to the fact that the Minister has accepted that their presence in the State up to the 1st February 2004 was lawful. Accordingly, it is submitted, the Minister may not contend that their presence in the State suddenly became unlawful on the 13th February 2004 following the enactment of s. 5 of the Immigration Act, 2004. They submit that a proper interpretation of s. 5(1) must exclude from its ambit those persons such as the appellants who were entitled to reside in the State by virtue of their dependent Irish-born child's *Zambrano* rights, and are not therefore residing "other than in accordance with the terms of a permission given to [them] before the passing of the Act", and therefore are not in contravention of s. 5(1) of the Act.

18. The appellants submit that if such an interpretation is correct it must follow that Z and F are entitled to Irish citizenship from the time they were born since their parents meet the "reckonable residence" requirement provided for in s. 6A and 6B of the Act of 1956 at the date of their birth, and are therefore entitled to an Irish passport.

19. The appellants have relied also on s. 2(2)(a) of the Act of 2004 which provides:

> "(2)(a) Nothing in this Act shall derogate from (a) any of the obligations of the State under the treaties governing the European communities within the meaning of the European Communities Acts 1972 to 2003.

20. It is submitted that in so far as s. 5(1) is to be interpreted as requiring the actual granting of a permission to reside after the 13th February 2004, s. 2(2)(a) provides for a derogation from such a requirement for persons such as the appellants who, it is submitted, have an entitlement under principles of EU law to reside in the State.

21. The appellants do not ask the Court to apply what they contend is an EU law in order to disapply a national law provision (*i.e.* s. 5). Rather, they submit that s. 5 does not apply to their situation as "*Zambrano* carers" (a phrase used by Arden L.J. in *Sanneh* – see below), since they were lawfully resident here prior to the enactment of the 2004 Act. They accept that between 13th February 2004 and 19th July 2005 they did not hold a written permission of any kind. But because they were permitted to reside here, and therefore lawfully resident here prior to the 13th February 2004, they cannot be considered to be in contravention of s. 5(1), and therefore were not "unlawfully present in the State" as provided by s. 5 (2) of the Act. They again refer to the fact that after the birth of N in May 2002 they made an application for permission to remain in June 2002 which was never considered by the Minister, and they ought not to be disadvantaged by the Minister's default in that regard. It is accepted that they could have sought an order of *mandamus* to force the Minister to make a decision on their application, but they submit that the fact that they did not take that step should not now be held against them by a finding that their presence in the State after 13th February 2004 was unlawful in the absence of a written permission.

22. The appellants have placed much reliance on cases such as *Pryce v. Southwark London Borough Council* [2012] EWCW Civ. 1572*, Yekini v. The London Borough of Southwark* [2014] EWHC 2096 (Admin), *Sanneh & ors v. Secretary for Work and Pensions* [2015] EWCA Civ. 49, as well as a preliminary reference ruling by the CJEU in Case C-325/09 - *Secretary of State for Work and Pensions v. Maria Dias* [2011] EUECJ for their submission that the trial judge was in error in concluding that no automatic right of residence arises from the birth of N under *Zambrano* principles (applied retrospectively in this case).

23. These cases, in the appellants' submission, support the contention that the principles in *Zambrano* preclude the Minister from considering Y to have been here unlawfully between 13th February 2004 and 19th July 2005, and therefore to have been in contravention of s. 5(1) of the 2004 Act during that period, since a residence permission is simply declaratory of an underlying objective fact i.e. that a person is lawfully resident.

24. In their written submissions the appellants have referred to a passage in Yekini as follows:

> "25. The Court of Justice of the European Union in Dias (European citizenship) [2011] EUECJ C- 325/09 described, at paragraph 49, residence permits as declaratory not constitutive. Under the statutory scheme with which this case is concerned, the question whether the claimant is a Zambrano carer is not a question of status recognised by the immigration *authorities but rather a question of underlying objective fact and eligibility* which it is for the defendant authority to assess within its competence …".[my emphasis]

25. The appellants have also referred the Court to passages in para. 48 and para. 54 of the judgment of the CJEU in *Dias* as follows:

> "48. As the Court has held on numerous occasions, the right of the nationals of a Member State to enter the territory of another Member State, and to reside there for the purposes intended by the EC Treaty, is a right conferred directly by the Treaty, or, as the case may be, by the provisions adopted for its implementation. The grant of a residence permit to a national of a Member State is to be regarded, not as a measure giving rise to rights, but as a measure by a Member State serving to prove the individual position of a national of another Member State with regard to provisions of European Union law …
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> 54. … The declaratory character of residence permits means that those permits merely certify that a right already exists. Consequently, just as such a declaratory character means that a citizen's residence may not be regarded as illegal, within the meaning of European Union law, solely on the ground that he does not hold a residence permit, it precludes a Union citizen's residence from being regarded as legal, within the meaning of European Union law, solely on the ground that such permit was validly issued to him."

26. The judgment in *Pryce* held that there is a substantive right to reside derived from the citizen-child's citizenship right under Article 20 TFEU, where a non-national parent comes within the *Zambrano* criteria, and not simply a procedural right. To that extent it

supports the general submission made by the appellants that the right to reside is a substantive declaratory right which is not dependent upon a grant of permission - in other words the appellants' submission that their residence here was lawful without the need for an actual permission under domestic law, and therefore that s. 5(1) must be considered to be not applicable to their particular situation. However, it has to be borne in mind that *Pryce* was decided in the context of the statutory regime as it exists in the United Kingdom, and where there does not appear to be any provision equivalent to s. 5 of the Act of 2004. It must be borne in mind also that the question at issue in *Pryce* was simply whether the applicant, a homeless person, met the necessary habitual residence requirement in order to be eligible for housing benefit. It was not addressing an issue such as that in the present proceedings where the issue of reckonable residence is relevant to whether or not other persons (Z and F) are or are not Irish citizens from birth. I do not think that *Pryce* is of assistance to the appellants' argument. It is distinguishable on its facts, and does not go beyond deciding that the right to reside does not depend on the existence of an actual permission to reside.

27. The judgment upon which significant reliance is placed by the appellants is that in Sanneh which was delivered in the UK Court of Appeal a few weeks after judgment in the present case was delivered by the trial judge on the 15th January 2015. There are very clear factual differences between *Sanneh* and the present case, and it is unnecessary to set out those facts other than to say that following cases such as *Pryce* amending legislation was introduced in the UK which added *Zambrano* carers to a list of persons who were not to be treated as being 'habitually resident' (a requirement for eligibility for social assistance) even though they were otherwise so resident. New regulations were then introduced by which this category of person was disqualified from receiving benefits of various kinds. In her judgment, Arden L.J. held that the *Zambrano* carer's right to reside in the UK commenced at the date of birth of the UK/EU citizen child. However, she went on to describe the right to reside (and other rights such as the right to work and to certain social welfare benefits) as derivative rights being derived from the child's citizenship right under Article 20 TFEU, and reflecting the effective citizenship principle under EU law – in other words that the rights were necessary in order to give meaningful effect to the citizenship right under Article 20 TFEU enjoyed by the child. It is clear that the Zambrano carer's right does not arise directly under Article 20 TFEU, but rather indirectly through the citizen child's right. As stated by Arden L.J. at para. 26 of her judgment:

> "In my judgment … the status of Zambrano carers is only derivative: their rights are derived from the EU citizen child and their status is not founded on any personal right of residence, or right to be paid social assistance, conferred on them by any EU treaty provision or legislative measure."

28. I do not believe that Sanneh is of particular assistance to the appellants beyond the assistance derived from previous cases such as *Pryce*. In fact the concession by the Minister that Y were lawfully here from the date of birth of N in May 2002 reflects the Minister's acceptance of the position stated in those cases. I do not think those cases, and in particular *Sanneh*, assist the appellants' argument that their residence right as *Zambrano* carers takes them outside s. 5 of the 2004 Act so that their entire period of residence becomes reckonable for the purposes of Z and F determining that Z and F are Irish citizens from birth.

The respondents' submissions on this appeal

29. The respondents submit that the appellants misunderstand the effect of the judgment in Zambrano in so far as they submit by reference to the decision in the UK in Sanneh that a Zambrano carer's right to reside accrues for all purposes automatically upon the birth of their EU citizen child. The respondents submit that Zambrano does not have the effect of disapplying national immigration and citizenship laws, either prospectively or retrospectively.

30. The respondents submit that the appellants' incorrectly consider *Zambrano* from the perspective of the parents' rights to reside, and instead of looking upon *Zambrano* as giving certain rights to the EU citizen child – one of which is that the dependent child is entitled to enjoy the care and support of his/her parents, and that the taking of a measure by the State which required the non-EU parents to leave the State would not be lawful if a consequence would be either to require the child to lave with his/her parents, or to deprive him/her of the enjoyment of the right. The respondents point to the fact that Y were never being asked to leave, and were never refused residency in the State. Rather, once s. 5 of the 2004 Act came into force on 13th February 2004 they were required to apply for a permission to reside here, and until this was given to them by letter dated 19th July 2005 they were here in contravention of s. 5 – hence the hiatus period was not reckonable in order to give Z and F citizenship upon their birth.

31. The respondents submit that *Sanneh* is not an authority of relevance to the law in this State where s. 5 has been enacted. In so far as *Sanneh* found that a *Zambrano* carer right to reside arose automatically and commenced upon the birth of a child, the respondents submits firstly that this is incorrect as a matter of EU law, and that subsequent judgments of the CJEU have so clarified; but secondly that in any event matters related to immigration are matters to be regulated by national laws, and that the effect of *Zambrano* is simply that in so far as Y are required to make an application for permission to reside here under s. 5 of the 2004 Act, the fact that they are the *Zambrano* carers of N means that the Minister would have to consider that fact, and in order to protect the genuine enjoyment of the citizenship rights of N, may be required not to refuse Y's application. It is submitted that this is very different from saying that Y were lawfully here without having a permission, or that they had some automatic right to reside here that excluded them from the ambit of s. 5 of the 2004 Act. In this regard the respondents have referred to the judgment of the CJEU in *Ymeraga v. Ministre du Travail, de l'Emploi et de l'Immigration*, Case C-87/12 (8th May 2013).

Conclusions

32. The present case does not concern the rights of N, the Irish born child who was an Irish citizen from the date of his birth by virtue of the law as it then existed. Neither does it concern the right of Y to reside here as the Zambrano carers of N. They have never been requested or required to leave following the birth of N. The Minister has acknowledged that upon the birth of N their residence here in that capacity was not unlawful. However, the legal landscape changed on the 13th February 2004 when the Oireachtas passed into law the 2004 Act. Thereafter, all non-EU nationals were required to either already have a permission to reside, or if not, to apply for a permission to reside here, failing which, as provided for in s. 5(2) of the Act they were "*for all purposes* unlawfully present in the State" [Emphasis provided]. The phrase "for all purposes" is all embracing. It is unambiguous. Nevertheless, the appellants are contending that it does not apply to them as the Zambrano carers of Z and F, and do so on the basis that their right to reside in this State following the birth of N is a right that exists regardless of any written permission, and is derived from Article 20 TFEU, and that despite the clear words of s. 5 of the 2004 Act they ought not to be considered to have been residing here in contravention of s. 5 after the 13th February 2004 until they received a permission to reside by letter dated 19th July 2005.

33. I agree with the respondents' submissions that the argument made by the appellants depends upon a misunderstanding of the *Zambrano j*udgment. *Zambrano* neither confers rights upon, nor declares rights in favour of Y as such. The focus of the decision is upon the citizen child N, and his ability to enjoy to the fullest extent possible his genuine rights of citizenship deriving from Article 20 TFEU. It is his rights that are declared. Paragraphs 41 – 45 of the judgment of the CJEU in Zambrano are clear in this regard:

> "41. As the Court has stated several times, citizenship of the Union is intended to be the fundamental status of nationals of the Member States (see, *inter alia*, Case C-184/99 *Grzelczyk* [2001] ECR I-6193, paragraph 31; Case C-413/99 *Baumbast and R* [2002] ECR I-7091, paragraph 82; Garcia Avello, paragraph 22; Zhu and

> 42. In those circumstances, 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 (see, to that effect, Rottmann, paragraph 42).
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> 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.
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> 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, in fact, be unable to exercise the substance of the rights conferred on them by virtue of their status as citizens of the Union.
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> 45. Accordingly, the answer to the questions referred is that Article 20 TFEU is to be interpreted as meaning that it precludes a Member State from refusing a third country national upon 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."

34. The CJEU has subsequently confirmed the meaning and effect of Zambrano in several cases, one being in Cases C-356/11 and C-357/11, *O.S. v. Maahanmuutovirasto* (6th December 2012). In that case the Court stated at paras. 46 – 49 of its judgment:

> "46. With respect, finally, to the right of residence of a person who is a third country national in the Member State of residence of his minor children, nationals of that Member State, who are dependant on him and of whom he and his spouse have joint custody, the Court has held that *the refusal to grant a right of residence* would have the consequence that those children, who are citizens of the Union, would have to leave the territory of the Union in order to accompany their parents, and that those citizens of the Union would, in fact, be unable to exercise the substance of the rights conferred by their status (Ruiz Zambrano, paragraphs 43 and 44). [Emphasis provided]
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> 47. The criterion of the denial of the genuine enjoyment of the substance of the rights conferred by the status of citizen of the Union referred, in the Ruiz Zambrano and Dereci and Others cases, to situations characterised by the circumstance that the Union citizen had, in fact, to leave not only the territory of the Member State of which he was a national but also that of the European Union as a whole.
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> 48. That criterion is therefore specific in character inasmuch as it relates to situations in which a right of residence, exceptionally, may not be refused to a third country national who is a family member of a national of a Member State, as the effectiveness of the Union citizenship enjoyed by that national would otherwise be undermined (Dereci and Others, paragraph 67).
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> 49. In the present case, it is for the referring court to establish whether the refusal of the applications for residence permits submitted on the basis of family reunification in circumstances such as those at issue in the main proceedings entails, for the Union citizens concerned, a denial of the genuine enjoyment of the substance of the rights conferred by their status."

35. There is nothing in that judgment which suggests even that a member state may not enact a provision whereby a Zambrano carer must make an application for a residence permission. In fact, as highlighted, it specifically envisages that such may be the position. The effect of *Zambrano* is therefore clear. The member state in which the EU citizen child resides may not refuse such an application for permission if by doing so it deprived the citizen child of the opportunity to exercise and enjoy the substance of his/her citizenship rights deriving from Article 20 TFEU. But that is very different to saying that Y are not required to comply with national legislation such as s. 5, or are in some unspecified way exempted or excluded from ambit of the section. In fact it is clear also that the onus of factually proving that the *Zambrano* principles apply is upon the applicant. There is no automatic right of the parent(s) to reside deriving from the EU citizenship rights of the child. The national authority must be satisfied that a refusal of the application would deprive the dependent citizen child of the enjoyment of the substance of his/her citizenship rights. As it is put by Hogan J. in his judgment in *Bakare v. Minister for Justice and Equality* [2016] IECA 292 at para. 24:

> "It is accordingly clear from a consideration of post-Zambrano case-law that the critical consideration is whether the denial of residency or similar rights to one or both third country nationals who are parents of EU citizen children is likely to bring about a situation where those children are in practice compelled to leave the territory of the Union."

36. The appellants have placed heavy reliance on the judgment of Arden L.J. in *Sanneh*. I believe that reliance to be misplaced in so far as that case was decided against a different legislative background. It was not decided in the context of a statutory provision such as s. 5 of the 2004 Act. That is a critical distinction. The manner in which immigration is controlled and regulated, including any requirement that a third country national must make an application of a residency permission, is a matter for the member state. The criteria by which any such application is granted or refused will of course be guided by a proper recognition of and respect for rights derived from EU law, such as Zambrano-type rights to which an EU citizen child has an entitlement under Article 20 TFEU. But the granting or refusal of permission to reside is still a matter for the decision of the relevant national body under whatever legislation exists.

37. I am satisfied that Y are not outside the ambit, or otherwise exempted from the application of s. 5 of the 2004 Act by reason of their status as Zambrano carers. They had no permission to reside here granted prior to that Act's commencement, and without a permission granted under that Act after 13th February 2004 their presence in the State was in contravention of s. 5 (1) of the Act. It follows that their period of residence in the State between 13th February 2004 and 30th June 2005 (date of birth of Z and F) is not a reckonable period of residence for the purpose of s. 6B(4) of the Act of 1956 in relation to the applications for citizenship of Z and F.

38. In these circumstances I am satisfied that the appellants are not entitled to the declarations which they seek in their statement of grounds, and that the trial judge was correct to refuse them. I would therefore dismiss this appeal.