THE HIGH COURT
JUDICIAL REVIEW

[2016 No. 759JR]

BETWEEN

MAXIM MURAVIEV (AN INFANT SUING BY HIS FATHER AND NEXT FRIEND DMITRY MURAVIEV) AND DMITRY MURAVIEV
APPLICANT

AND

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

Judgment of Mr. Justice Keane delivered on the 4th July 2018

Introduction

1. The applicants seek to quash the decision of the Minister for Justice and Equality, contained in a letter dated 16 August 2016, refusing to grant Dmitry Muraviev, the second applicant, who is a citizen of the Russian Federation, temporary permission to reside in the State based upon his parentage of Maxim Muraviev, the second applicant, who is a citizen of Ireland, having been born in the State on 1 October 2003 ('the decision'). For simplicity and convenience, in this judgment I will refer to Dmitry Muraviev as 'the father' and Maxim Muraviev as 'the child'.

2. Ireland and the Attorney General should not have been joined as respondents to these proceedings. No damages are sought against the State. Nor is the constitutionality of any provision of any law in issue. No relief of any kind is sought against those legal persons.

The principal ground of challenge

3. By order made on 6 November 2017, Humphreys J granted leave to the applicants to seek judicial review of the Minister's decision on the grounds set out at paragraph (d) of their statement of grounds, filed on 5 October 2016. As counsel for the applicants acknowledged in argument, those grounds boil down to the assertion of a single proposition of law.

4. The single proposition of law on which the applicants' claim depends is that Article 20 of the Treaty on the Functioning of the European Union ('TFEU') precludes the Minister from refusing a residence permission to the third country national parent of a dependent European Union citizen child, where that refusal would deprive that child of the genuine enjoyment of the substance of any right attached to the status of European Union citizenship, rather than only of the right to remain in the territory of the Union as a necessary condition of the genuine enjoyment of the substance of the rights attaching to that status.

5. The applicants must rely on the broader proposition because, as they concede at paragraph d (1) of their statement of grounds, they cannot bring themselves within the narrower one. This follows from the applicants' acknowledgment that - for reasons it is unnecessary to go into for the purpose of the present judgment - the refusal of a residence permission to the second applicant would not have resulted in the first applicant having to leave the territory of the Union. The narrower proposition is, of course, that articulated by the Court of Justice of the European Union ('CJEU') in Case C-34/09 *Ruiz Zambrano* [2011] ECR I -1177. It is colloquially known as the *Zambrano* principle.

6. The applicants submit that the Minister's decision deprived the child of his Union law rights under the Charter of Fundamental Rights of the European Union ('CFREU') and, in particular, of: the right to have his human dignity respected and protected under Article 1; the right to respect for his private and family life under Article 7; the right to have his best interests as a child addressed as the primary consideration in the Minister's decision on the father's residence permission application under Article 24.2; and the right to maintain on a regular basis a personal relationship and direct contact with the father under Article 24.3.

The law

7. Precisely the proposition for which the applicants now contend has already been considered and rejected by this court in the following passage from the careful and closely reasoned judgment of Faherty J in *Doyle & Anor. v The Minister for Justice & Ors* [2017] IEHC 374 (Unreported, High Court, 24th March, 2017):

> '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:
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> > '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.'
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> 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 minor) v Minister for Justice* [2016] IEHC 531 (Unreported, High Court (Faherty J), 29th January, 2016)] , a somewhat similar argument to that being advanced in this case was rejected by this court. I stated (at paras. 74-78):
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> > "In [Case C-256/11 *Dereci & Ors.* [2011] ECR I-1315] and [Joined Cases C-356/11 and C-357/11 *O. and S.* [2012] ECR I-000] 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.
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> > More specifically, in [*O.and S.*], the Charter was invoked by [CJEU] in the context of the referring court having mentioned the Family Reunification Directive [Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification] without, however, posing a question concerning the Directive. Nevertheless, the [CJEU] noted that in contrast to the circumstances of the cases in *Dereci*, 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 [at para. 82]:

> '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 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 the directive. It is for the referring court to ascertain whether the decisions refusing residence permits at issue were taken in compliance with those requirements.'
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> Thus, in [*O. and S.*], the application of the Charter was firmly rooted in the applicability of the Family Reunification Directive.
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> I am satisfied that 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 [Case C-87/12 *Ymeraga* ECLI:EU:C:2013:291; [2013] 3 CMLR 33]. As is clear from the factual matrix in *Ymeraga,* the [CJEU] clearly found that the Charter was not applicable as the situation in that case did not involve the implementation by the [particular Member State] 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 [CJEU] 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 [CJEU] found neither [Directive 2004/58/EC ('the Citizenship Directive')] 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 [CJEU] 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 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.
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> Applying the approach adopted by the [CJEU] to the present case. Had the minor applicants' circumstances been covered by the Citizenship Directive (2004/58) 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 not 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 [CJEU] in *Zambrano, Dereci & Ors*. and *O. and S*. (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 [CJEU] in *Zambrano* and the subsequent jurisprudence has been met."

37. In [*Bakare v Minister for Justice* [2016] IECA 292], 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 [Case C-165/14 *Marin* ECLI:EU:C:2016:675; [2017] 1 CMLR 29] 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).
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> 30. All of this presupposes that the Charter applies in a case of this kind. The key provision in 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 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] ECLI:EU:C:2013:105; [[2013] 2 CMLR 46].
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> 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 with 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.
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> 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 in the present case."

38. By reason of the aforesaid jurisprudence, it is clear that the protections in the Charter may only by invoked where a Member State is implementing EU law. The decision which is sought to be impugned in this case does not fall within the

realm of EU law and thus the provisions of the Charter cannot benefit the applicants.'

Conclusion

8. The preceding analysis is the one that I must apply to the facts presented in this case. The child here, though an EU citizen, is not exercising any right of free movement under the Citizenship Directive. The applicants concede that the *Zambrano* principle does not apply to their situation, as there is no suggestion that the refusal of a residence permission to the father would result in the child having to leave the territory of the Union. The applicants do not argue that the provisions of the Family Reunification Directive are in any way engaged by their situation. Thus, there is no suggestion that the State was implementing EU law when the Minister refused the father a residence permission. As Article 51 of the CFREU makes plain, the provisions of the CFREU are addressed to the Member States – as opposed to the institutions, bodies, offices and agencies of the Union – 'only when they are implementing Union law.' It follows that the applicants cannot impugn the Minister's decision, which represents an exercise of an autochthonous sovereign power of the State, on the basis of any asserted breach of any provision of the CFEU and that, in consequence, their claim must fail.