Neutral Citation: [2015] IEHC 7

THE HIGH COURT

JUDICIAL REVIEW

[No. 2012/839/J.R.]

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 B HIS FATHER AND NEXT FRIEND M. Y.) AND F. Y. (A MINOR SUING BY HIS FATHER AND NEXT FRIEND M. Y.) (NO. 2)

APPLICANTS

-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 Mac Eochaidh delivered on the 15th day of January 2015

1. This is the second judgment of the court in respect of an application for judicial review in which the applicants seek, *inter alia*, declarations that the first and second named applicants' have resided lawfully in the State since 5th May 2002 and that their residency is reckonable within the meaning of the Irish Nationality and Citizenship Acts 1956 to 2004. Such reliefs are sought in order for the third and fourth named applicants to automatically qualify for Irish citizenship. A preliminary issue was identified when the matter first came on for hearing and the court delivered its judgment in that matter on 20th March 2013. The court found for the respondents on that occasion, holding that the Minister was correct in discounting the first and second named applicants' residency during the period of 13th February 2004 (the date the Immigration Act 2004 Act came into effect) to 30th June 2005 (the date of birth of the twin children) as not constituting reckonable residence under the Irish Nationality and Citizenship Act 1956 (as amended). (In retrospect, the issue thus decided is not properly to be regarded as a preliminary issue in that its resolution did not dispose of the action.)

2. In the view of the parties, the remaining issue to be decided in this matter relates to Ground 5(ii) of the Amended Statement Grounding the Application for Judicial Review dated 27th November 2012, namely that:

> "The rights of the third named Applicant under Article 20 TFEU and Article 7 of the Charter, in combination with each of the Applicants' family rights pursuant to the Constitution 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 the first and/or second named Applicants' right of residency and which include the right for the fourth and fifth named Applicants to be citizens of Ireland."

Background:

3. It is recalled that the first and second named applicants in this case are a married couple from Pakistan who are lawfully residing in the State with their three children. The first named applicant father arrived in the State on 27th August 2001 on a student visa which was valid from 26th June – 25th September 2001 and later extended to 1st July 2002. His wife arrived in the State without a visa in April 2002. Their first child, the third named applicant, was born in the State as an Irish citizen on 5th May 2002 (under birth citizenship rules which applied at the time). This is the key date for the applicants as they say that their rights of residence crystallised on the birth of this EU citizen.

4. The parents applied to the respondent for residency on 12th June 2002 following the birth of this child. This application was not based on EU rights. It appears that no action was taken by the respondent on foot of this application and it is stated on affidavit that the respondent ceased to consider applications for residency made by parents of Irish citizen children with effect from 19th February 2003. No steps were taken in response to the inaction of the respondent. In any event, the parents were granted permission to remain in the State on 19th July 2005 pursuant to the 'IBC/05 scheme' (a scheme for third country national parents of Irish citizen children) to last until 19th July 2007. The fourth and fifth named applicant twins were born on the 30th June 2005. The parents' visas with permission to remain were both renewed and extended on a number of occasions.

5. This case arises from an application on behalf of the twins for Irish passports which was rejected by the Minister for Foreign Affairs and Trade because the parents lacked the required period of lawful residence prior to birth being three out of the previous four years (or 1095 days).

Applicants' Submissions:

6. The applicants note that the Immigration Act 2004 explicitly provides that nothing in that Act shall derogate from any of the obligations of the State under the Treaties governing the European Communities. As such, it is submitted that once the first and second named applicant parents can show that they would be entitled to a "*Zambrano*-type" permission, such entitlement is

calculable from the birth of their citizen child and this period constitutes 'reckonable residence' within the meaning of section 6B of the Irish Nationality and Citizenship Act 1956. As the third named applicant is an Irish citizen born on 5th May 2002, it is stated that the first and second named applicants' residence is derived from that citizenship status. It is contended that even if their residence permission was not in fact derived from that citizenship status, such right would exist independently owing to the operation of Article 20 of the Treaty on the Functioning of the European Union ('TFEU'). Further, it is submitted that the derived rights of the first named applicant in respect of a right to residency from the date of birth of his EU citizen child must be retrospectively acknowledged by the Minister, as this retrospective recognition was precisely what the Court of Justice of the E.U. required in Case C-34/09 *Ruíz Zambrano*.

7. Counsel submits that in the *Zambrano* case, the applicant asserted, *inter alia*, that he enjoyed a derived right of residence, being the ascendant of a minor child who is a national of a Member State and that, therefore, he was exempt from the obligation to hold a work permit in Belgium. It is noted that this application required recognition of his status retrospectively rather than prospectively, so that he could avail of social welfare payments based on the lawfulness of his working and residing in Belgium prior to his unemployment. In that case it is recalled that the Grand Chamber of the Court of Justice held:

> "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.
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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."

8. The applicants argue that the judgment thus had retrospective consequences to the effect that the Belgian authorities were obliged not to consider periods of residence or employment dating back to October 2005 to be unlawful for the purposes of calculating Mr. Zambrano's social welfare entitlements during his later period of unemployment. In particular, counsel submits that an identical consequence should logically flow in the present case, and the respondent must be obliged to consider the periods of residency from the birth of the third applicant on 5th May 2002 to be 'reckonable residence' within the meaning of the Irish Nationality and Citizenship Act 1956. The success or failure of the applicants' case hinges on this argument.

9. It was argued that the Immigration Act 2004 specifically excludes applicants in their position as section 2(2) states that: "(2) 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". Further, it is contended that it is not the case that EU law would be dictating the law on the acquisition of citizenship but rather only determines the residence status of the first named applicant upon the birth of his Irish citizen child in the State on 5th May 2002. It is submitted that as the *Zambrano* decision demonstrated, the determination of the residence status of family members of E.U. citizens is clearly within the competence of the European Union and is an obligation of Member States when they are making decisions on the legal status of historical periods of residency.

10. Counsel refutes the respondent's contention that the judgment in *Zambrano* did not entitle the applicants to disregard the necessity of obtaining a permission to reside in the State. Rather, it is submitted that the decision taken in *Zambrano* was that Belgium's view of the historical position with regard to Mr. Zambrano's permission to work in light of their domestic law was inconsistent with EU law, and as such, their interpretation of the historical position had to yield to the historic EU law entitlement.

11. It is submitted that it is precisely the same position in this case. Mr. Zambrano's application for social welfare was rejected on the basis that, although he had made the necessary social security contributions, he had not been permitted to work in Belgium. It is stated that he asserted that he enjoyed a derived right of residence, being the ascendant of a minor child who is a national of a Member State and that, therefore, he was exempt from the obligation to hold a work permit. It is asserted that this application required his status to be recognised retrospectively rather than prospectively, so that he could avail of social welfare payments based on the lawfulness of his working and residing in Belgium prior to his unemployment. The applicants note that this is what he achieved and is what they are seeking in this case.

12. The respondents' view that the failure of the applicants to assert a right under EU Law in their initial application or compel the grant of permission now means that they cannot "complain that [they] were not granted permission to remain in the State at an earlier time or that the First Named Respondent breached any duty under European Union law…" is entirely at odds with the judgment in *Zambrano*, it is submitted. Further, counsel contends that this view also fails to recognise that the judgment in that case has the effect of declaring past residence lawful as a matter of EU law, which was not recognised by the relevant Member State at the time.

13. In this regard, counsel refers the court to the decision of the U.K. Court of Appeal in *Pryce v. Southwark London Borough Council* [2012] EWCA Civ 1572. In that case the issue was whether the applicant was precluded from receiving housing assistance on the basis that she was "subject to immigration control" within the meaning of the particular legislation. The applicant claimed that she was not subject to immigration control because she would be entitled to *Zambrano* rights (although the Secretary of State had not given her same). The Court accepted that certain concessions of fact and law made in the case were appropriate and set them out as follows:

> "1. Article 20 of the [TFEU] contains treaty rights which are directly applicable in the UK national legal order by virtue of section 2(1) of the European Communities Act 1972 without the need for transposition into national law.
>
> 2. A person in respect of whom a refusal of a right of residence would be inconsistent with article 20 of TFEU in

accordance with the principles established by the EU in *Ruiz Zambrano v Office national de l'emploi* (Case C-34/09) [2012] QB 265 is not a person subject to immigration control for the purposes of s. 185 of the Housing Act 1996 or s. 7 of the Immigration Act 1988.

3. For the purposes of the Appellant's application for housing assistance, the Respondent (whose responsibility it is to make such a determination) has determined that the Appellant meets the requirements of the *Zambrano* principles.

4. The Appellant is such a person who derives a right of residence from the EU law and there being no issue as to habitual residence is eligible for assistance as homeless under s. 185(3) of the 1996 Act and the Homelessness Regulations 2006, regulation 6, as in force at all material times on 15 June 2011 onwards when she applied for assistance as homeless, including 30 September 2011 being the date of the review decision under appeal in these proceedings.

5. In the circumstances, the appeal ought to be allowed; the Order of HHJ Faber of 2 May 2012 ought to be set aside; and [the council's] review decision of 30 September 2011 ought to be varied pursuant to s. 204(3) of the 1996 Act to a decision that the Appellant is eligible for assistance under section 185 of the 1996 Act."

14. In light of this judgment, it is submitted that it is clear that the question of fact as to whether the *Zambrano* criteria would be met is decisive and would overrule domestic provisions, even where no permission to reside was actually acknowledged or given by the relevant immigration authority. Counsel submits that the existence of such rights were clearly put to the respondent in correspondence and what should have been considered was whether or not the applicants met the criteria, rather than whether they had in fact been given permission on that basis.

15. Counsel notes that the respondent is of the view that some administrative process is required for such residence to accrue. The applicants submit that an insurmountable problem with this proposition is that it cannot be suggested that recognition of residence can only be prospective, rather it is clear that such recognition can, does, and should occur in relation to applications which require an assessment of historical residency.

16. In any event, the applicants are of the view that any such process which would apply to the present case, would involve the Minister enquiring (in the context of investigating reckonable residence for citizenship) whether a derivative right of residence under EU law existed since the birth of the applicants' eldest child. It is submitted that no such investigation has been completed and that the Minister cannot say it is not required. In this regard, counsel notes that such investigation was required in the *Zambrano* case, it was required in the *Pryce* case and it is submitted that it is required in this case. The applicants state that it is not open to the Minister to say that an administrative decision is required to establish the issue factually and then steadfastly refuse to carry out any such assessment.

17. Counsel for the applicants also refers to the decision of *The Queen on the Application of Olubunmi Yekini v. The London Borough of Southwark* [2014] EWHC 2096 (Admin). In that case, the applicant had been considered by the Local Housing Authority to meet the *Zambrano* criteria and applied for housing prior to a change in the law brought into the U.K. after the *Pryce* judgment. Thus, it is submitted that while the case was governed by the principles established in the *Pryce* decision, although that decision is not explicitly referred to, the court reached a decision which is identical to the substance of *Pryce* on the retrospective nature of the *Zambrano* decision, albeit for independent reasons. The Court states at paragraph 25:

"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: see, for example, sections 184(1)(a), 185(2) and 193(1) and the 2006 Regulations prior to the exclusion for the future of Zambrano carers.

18. It is submitted that this consideration of the English High Court is one that is correct in law, one which was not subject to a concession as to the correct legal position on the part of the Home Secretary and thus cannot be subject to the criticism of the nature of the finding in *Pryce* contended for by the respondents.

19. The applicants do not accept that the criticism of the status of the *Pryce* decision is appropriate in circumstances in which the Home Secretary is acting on behalf of the U.K. in its capacity as a Member State in relation to the correct interpretation of EU law. Rather, it is contended that it is for each Member State to apply EU law and it is stated that the U.K. has interpreted EU law in a manner which is identical in substance and effect to that advocated for by the applicants in this case. Counsel also notes that the U.K. has passed legislation which has the effect of accepting the law adopted in the *Pryce* case and which changes domestic law to reflect that fact.

20. The applicants submit that the obligation of the Minister to acknowledge lawful residence retrospectively is also a feature of domestic law, identified in *Sulaimon v. Minister for Justice* [2012] IESC 63. They note that in that case it was clear that a permission granted on 23rd July 2007 was retrospective in nature because it was deemed to become effective for the purposes of establishing 'reckonable residence' two weeks prior to that on 7th July 2007. Counsel also notes that in *Robertson v. Governor of the Dochas Centre* [2011] IEHC 24, Hogan J. exercised what could be referred to as the reverse power of that exercised in *Sulaimon* by deeming an apparent period of documented legal residence as being without permission owing to fundamental deceit.

Respondents' Submissions:

21. Counsel for the respondents submits that that the right identified by the Court of Justice in *Zambrano* is a qualified one. In the respondents' view this is clear from the judgment itself and from subsequent judgments such as *Case C-256/11, Dereci v. Bundesministerium für Inneres* and others in that line of jurisprudence. In this regard it is submitted that the right only arises where the Union citizen child is dependent on the third country national parent and where the child would be deprived of the genuine enjoyment of the substance of the rights attaching to the status of an EU citizen if the third country parent is not granted a right of residence and a work permit. In this light it is contended that the right of the Union citizen child does not arise automatically on birth but is dependent on the circumstances of the family and on an assessment of whether the child would have to leave the territory of the Union if the parent is not permitted to remain and work in the Member State.

22. Counsel refers to the joined cases C-356/11 and C-357/11, *O, S. v. Maahanmuuttovirasto*, (6th December 2012) where the Court of Justice summarised the position as follows:

"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).

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.

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).

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."

23. Further, counsel notes that in Case C-87/12, *Ymeraga v. Ministre du Travail, de l'Emploi et de l'Immigration* (8th May 2013), the Court of Justice stated:

"36. In this respect, the Court has already held that there are very specific situations in which, despite the fact that the secondary law on the right of residence of third-country nationals does not apply and the Union citizen concerned has not made use of his freedom of movement, a right of residence cannot, exceptionally, without undermining the effectiveness of the Union citizenship that citizen enjoys, be refused to a third-country national who is a family member of his if, as a consequence of refusal, that citizen would be obliged in practice to leave the territory of the European Union altogether, thus denying him the genuine enjoyment of the substance of the rights conferred by virtue of his status (see Dereci and Others , paragraphs 64, 66 and 67, and Iida , paragraph 71).

37. The common element in the above situations is that, although they are governed by legislation which falls a priori within the competence of the Member States, namely legislation on the right of entry and stay of third-country nationals outside the scope of provisions of secondary legislation which, under certain conditions, provide for the attribution of such a right, they none the less have an intrinsic connection with the freedom of movement of a Union citizen, which prevents the right of entry and residence being refused to those nationals in the Member State of residence of that citizen, in order not to interfere with that freedom (see, to that effect, Iida , paragraph 72).

38. The Court has also found, in this respect, that 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 (Dereci and Others , paragraph 68)."

24. In light of these cases, the respondents submit that the Court of Justice envisaged that a Member State would have to *grant* a right of residence and that an administrative act was required so as to confer such right of residence on the non-EU parent. Further, counsel notes that while Mr. Zambrano argued that he was *exempted* from the need to obtain a work permit because of the Treaty provisions on Union citizenship, the Court of Justice held that because of the effects of Article 20 TFEU, a non-national parent could be entitled to the grant of a right of residence and a work permit if the refusal to do so would result in the Union citizen child being deprived of the genuine enjoyment of the substance of their rights as a Union citizen. It is submitted that the Court envisaged that the authorities of the Member State would have to make an assessment on a case by case basis and then take the step of granting a right of residence and a work permit in appropriate cases. As such it is stated that there is no exemption from the need for an assessment by the national authorities and an appropriate administrative step.

25. The respondents submit that the judgment in *Zambrano* did not entitle the first and second named applicants to disregard the necessity of obtaining a permission to remain in the State, rather, the judgment, when read with subsequent cases of the Court of Justice, sets out the circumstances in which third country national parents of Union citizens may be entitled to be granted permission. It is submitted that this position is indicated, *inter alia*, by paragraph 37 of the judgment in *Ymeraga* (quoted above), where the Court referred to "legislation on the right of entry and stay of third-country nationals" which "falls a priori within the competence of the Member States," but where "the right of entry and residence [could not be] refused to those nationals in the Member State of residence of that citizen, in order not to interfere [with the citizen's right of freedom of movement]."

26. The respondents submit that s. 2(2) of the Immigration Act 2004, in providing that nothing in the Act derogates from the State's obligations under the European Treaties, merely has the effect of clarifying that the Act does not detract from or conflict with the rules relating to free movement of persons under the treaties. Counsel contends that no such right as that identified in *Zambrano* was known in European law at the date of enactment of the Immigration Act 2004 and that s. 2(2) cannot be read as excluding the application of the Act to non-national parents of Irish citizen children.

27. Further, the respondents affirm that Article 20 TFEU, as interpreted by the Court of Justice, does not instruct that family members of dependent Union citizens may not be required to have a permission to reside and work in the State, rather it merely requires that, in circumstances where the Union citizen would otherwise lose the benefits of Union citizenship, such a permission must be granted to the non-Union family member on whom the Union citizen is dependent. It is submitted that the State can fully respect its obligations under the European Treaties by granting permission to remain under the Immigration Act 2004 to third country national parents of dependent Union citizens in circumstances where the Union citizen would otherwise have to leave the territory of the Union.

28. Counsel for the respondent denies that the requirement that a person who is a beneficiary of the right identified in *Zambrano* must obtain a permission is inconsistent with that judgment or with the requirements of the Treaties. On the contrary, the respondents note that the Court of Justice stated in *Zambrano* that, in the exceptional circumstances outlined by it, a refusal to grant a right of residence and a work permit would have an effect precluded by Article 20 TFEU but that the Court did not adopt Mr.

Zambrano's assertion that he had an (effectively self-executing) right of residence and was exempted from the need to obtain a work permit. It is submitted that given that the assessment of the entitlement of the parent of a Union citizen to *Zambrano* rights necessitates an examination of the circumstances of the citizen and parent, it is consistent with the procedural autonomy of the Member States that the procedure by which this is assessed is a matter for each Member State. It is said that the necessity for an examination of the circumstances said to give rise to an entitlement to the rights identified in *Zambrano* and the issuing of a permission to a successful applicant does not impede or render impermissibly difficult the enjoyment of those rights.

29. The respondents also refer to the judgment in *Pryce v. Southwark London Borough Council* [2012] EWCA Civ 1572 and note that the appeal in that case was allowed by consent. It is stated that while the Council initially opposed the appeal and the Home Secretary was permitted to intervene in light of the implications for her Department, the Council then changed its position and indicated that it would not oppose the appeal. In that regard, the respondent notes that the applicant and Council requested that a consent order allowing the appeal should be made and supplied a "statement of reasons and draft order." It is stated that the Home Secretary sought a hearing apparently because she did not agree with certain aspects of the "agreed position of claimant and council specified in the statement of reasons". Pill L.J. in the judgment noted:

> "13. I bear in mind that in this appeal nobody has appeared to oppose the joint submissions of the parties on the central issue, on which they and the Secretary of State are at one."

30. The central issue being that, "…none of the parties before the court seeks to dispute that the claimant is not subject to immigration control for the purposes of section 185(2) of the Housing Act 1996 in respect of the application to which these proceedings relate. The Secretary of State's position is that where a claimant does have a valid *Zambrano* claim the person is not subject to immigration control. The council adopts a position agreeing with that of the claimant."

31. Counsel for the respondents submit that therefore the Court of Appeal did not determine any disputed issue of law in the case, but merely adopted a statement of reasons that had been prepared by the parties and as such the judgment does not have any weight as an authority as the Court did not make its own determination of any issue, but rather recorded the consensus of the parties.

32. Without prejudice to the foregoing submissions, it is contended that even if the applicants are correct in their contention that the *Zambrano* judgment had the effect of retrospectively entitling the first and second named applicants to reside in the State from the 5th May 2002, it does not alter the fact that they did not have a permission to be in the State between the 13th February 2004 and the 30th June 2005. Furthermore, it is submitted that by virtue of section 6B(4) of the Irish Nationality and Citizenship Act 1956, that period was not reckonable because it was a period of residence that was in contravention of section 5(1) of the Immigration Act 2004 at the time.

33. It is submitted that the first named applicant did not have a permission to be in the State after the 1st July 2002 until the 19th July 2005, while the second named applicant did not have a permission to be in the State until the 19th July 2005. Counsel notes that while the applicants' solicitor had applied for permission to remain in the State on their behalf on the 12th June 2002, those applications were not processed as a result of the decision of the Supreme Court in *L and O. v. Minister for Justice, Equality and Law Reform* [2003] 1 I.R. 1 (on the 23rd January 2003), which clarified the law in respect of a citizen child's entitlement to the company of its parents in the State. As such, it is contended that the applicants cannot complain about the State's decision not to process those applications or its failure to grant them permission until the 19th July 2005 as they could have instituted proceedings to compel the making of a decision on the application of the 12th June 2002 or they could have asserted an entitlement to remain in the State (whether derived from Irish or European law), but did not do so.

34. The respondents submit that European Union law cannot operate, whether directly or indirectly, so as to confer an entitlement to citizenship on the fourth and fifth named applicants. In this regard it is submitted that the applicants are not entitled to invoke Article 20 TFEU so as to confer an entitlement to Irish citizenship or nationality on them. Counsel refers to the decision of the Court of Justice in C-135/08 *Rottmann v. Freeistat Bayern* [2010] ECR I 28 to support the contention that European Union law does not dictate the circumstances in which a person is entitled to nationality of a Member State, this being a matter for the national law of each Member State.

35. In this regard, it is submitted that there is no valid basis on which to interpret the judgment in *Zambrano* as having the effect of retrospectively altering the actual immigration status of the first and second named applicants in this State so as to confer an entitlement to citizenship on the fourth and fifth named applicants. It is the respondents' view that the applicants are simply seeking to call the *Zambrano* judgment in aid to attempt retrospectively to disapply section 5(1) of the Immigration Act 2004 and thereby to render reckonable periods of residence that were not reckonable. The respondents state that neither parent had sufficient reckonable residence when the fourth and fifth named applicants were born owing to a lack of permission to be in the State; that these children were not Irish citizens at birth; and that a subsequent judgment of the European Court declaring a novel source of a right of residence does not alter the historical fact that the applicants did not have a permission to be in the State during the period from the 13th February 2004 to the 30th June 2005.

36. The respondents note that in the decision of the Supreme Court in *Sulaimon v. Minister for Justice* [2012] IESC 63, no ruling was made on the issue of whether or not the permission granted was retrospective, contrary to the view of the applicants. In this regard it is submitted that the Supreme Court did not consider it necessary to determine this issue, rather the court found that a permission granted by the Minister was effective from the date thereof, rather than the later date when the beneficiary registered with an immigration officer and received a passport stamp.

37. Finally, with regard to the judgment of Hogan J. in *Robertson v. Governor of the Dochas Centre* [2011] IEHC 24, counsel for the respondent notes that that case concerned the interpretation of the words "ordinarily resident" in section 3(9)(b) of the Immigration Act 1999 and that Hogan J. found the applicant's residence was not "ordinary" because it was not lawful, regular and bona fide. In this regard, it is submitted that the court did not deem her residence to have been without permission, on the contrary, it noted that it was "ostensibly valid" but nonetheless, Hogan J. emphasised that a person could not be allowed to profit from a statutory entitlement to which she was not justly entitled because of her deception. It is submitted that the judgment did not hold that a permission granted by the Minister could retrospectively be treated as if it had not existed. In any event, the respondents submit that the case has no bearing on the issues in this case and does not support the view that the respondent can retrospectively confer permission on a person who did not have it at the time in question or that she can retrospectively render unlawful a period of residence during the course of which the person had held a permission to be in the State.

Findings:

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.