THE HIGH COURT

JUDICIAL REVIEW

Record No: 2009 / 1175 J.R.

Between:

NETOCHUKWU PRECIOUS KEN AMOBI (AN INFANT ACTING BY HIS FATHER AND NEXT FRIEND KENETH AMOBI); SOBECHUKWU PRAISE KEN AMOBI (AN INFANT ACTING BY HER FATHER AND NEXT FRIEND KENETH AMOBI); KENETH AMOBI and OBIAGELI-KEN AMOBI

APPLICANTS

-AND-

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

RESPONDENTS

-AND-

HUMAN RIGHTS COMMISSION

NOTICE PARTY

JUDGMENT OF MS JUSTICE M. CLARK, delivered on the 8th day of February 2013.

1. The applicants are a Nigerian family whose personal circumstances mirror those of the two test cases of *Alli v. The Minister* [2010] 4 I.R. 45 and *Asibor v. The Minister* [2009] IEHC 594 on the deportation of foreign national fathers of Irish citizen children who joined their wives and citizen children outside the terms of the IBC05 scheme. As occurred with many fathers in that situation, the father in this case was served with a deportation order on 28th October 2009. He issued judicial review proceedings challenging the decision to deport on 17th November 2009. After the application for leave was heard but before a decision on that application had issued, a change in EU law was effected by the decision of the Court of Justice of the EU in *Ruis Zambrano v Office National de l'emploi* [C-34/09, 8th March 2011]. The parties were invited by Birmingham J. who was the trial judge to address him on the implication of that decision on the legality of the deportation order under challenge.

2. The pre-leave application in this case and many other cases travelling with *Alli and Asibor*, which became known as the *Zambrano list*, was adjourned on a number of occasions while the Minister considered whether, and how many and which, non-EU national fathers of Irish citizen children would benefit from the *Zambrano* ruling. To this effect the Minister issued a statement on 21st March 2011 that he was conducting a review of all cases involving non-EU national parents of Irish citizen children. It is instructive to repeat the operative part of Minister Shatter's statement:-

> *"Ireland's Approach to Implementing the Judgement*
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> *First it is important to state that this judgement applies only where the child is a citizen. It has no implications whatever for Irish Citizenship law. The granting of citizenship remains a matter entirely for the Oireachtas under the Constitution […].*
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> *Given the importance of the ruling in the Zambrano case, I have decided, with the support of my Government colleagues, to make a brief public statement outlining the consideration being given to cases involving Irish minor dependant citizen children who have a non-national third country parent or parents.*
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> *One possible approach in these matters is to wait for pending cases to be determined by the Irish Courts and for the Courts to interpret and apply the Court of Justice ruling. That is an entirely justifiable approach from a legal standpoint. However in this case the Government has agreed that there needs to be a more proactive approach and that it should make a clear statement of its intention to take early action in these cases, insofar as it is unnecessary to await rulings of the Courts. We should not tie up the courts unnecessarily or ask eligible families to wait longer than necessary.*
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> *Accordingly I have asked my officials to carry out an urgent examination of all cases before the courts (approximately 120 at present) involving Irish citizen children to which the Zambrano judgment may be relevant.*
>
> *The Government has agreed with my proposal that early decisions in appropriate cases to which the Zambrano judgement applies be made without waiting for further rulings of the Courts.*
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> *I have also asked my officials to examine the cases in the Department in which the possibility of deportation is being considered in order to ascertain the number of cases in which there is an Irish citizen child and to which the Zambrano judgment is relevant. In addition, consideration will be given to those cases of Irish Citizen children who have left the state whose parents were refused permission to remain.*
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> *This initiative is being taken in the best interests of the welfare of eligible minor Irish citizen children* ***and to ensure that the taxpayer is not exposed to any unnecessary additional legal costs****." (The Court's emphasis)*

3. In the meanwhile, the Minister's agents conducted investigations into each case and leave to remain was granted in what were considered to be appropriate cases. Mr. Amobi's case was not reconsidered in the short period between the Minister's statement and mid-May 2011. The applicants then insisted that their leave application would be determined and on 31st May 2011, Birmingham J. granted leave to apply for judicial review on the sole ground that the Minister's refusal to allow Mr. Amobi to remain in Ireland constituted an enforced separation contrary to the ECHR, the TFEU and the constitutional rights of the applicants.

4. A month later, on 29th June 2011 the deportation order made against Mr. Amobi was revoked and he was given leave to remain. He received a letter in the following terms:

> *"You will be aware that on the 30th May, 2011 the Minister indicated to the High Court that he had undertaken a review of cases involving Irish citizen children and would be writing to the applicants concerned. I am directed by the Minister for Justice and Equality to inform you that, on foot of that review, as an exceptional measure the Minister has decided to revoke the deportation order and grant you temporary permission to remain in the State for 3 years until 06/07/2014."*

5. The respondent Minister invited parties affected by the *Zambrano* decision to engage in negotiations / discussions on their individual cases and on costs issues. The applicants in this case did not engage in such discussions. Since then, most cases in the *Zambrano* list have been determined and struck out as settled.

6. Considering that the applicants had achieved what they set out to seek – the revocation of the deportation order against the father – their actions thereafter are to say the least odd. They objected to any characterisation of their case as moot and insisted that the matter proceed in the ordinary way with a statement of opposition and a date for hearing. It is difficult to know what in fact remained for determination.

7. The respondents argue that since the date of the notification of leave to remain, the action become moot and they have never departed from that position. In 2012 alone, they objected to the case proceeding further on nine separate occasions in the Monday lists where post-leave judicial review actions are case managed. The applicants persisted in maintaining their position that a substantive hearing was necessary and they insisted on the delivery of a statement of opposition.

8. The respondents' statement of opposition raises the mootness of the proceedings as a preliminary issue. The same issue was raised at the list to fix dates when a date was allocated to the hearing of the substantive application for judicial review. On each occasion, the applicants persisted in arguing that there were issues to be determined and the case was going on while the respondents warned that costs were being unnecessarily incurred.

9. The case was allocated 7th November 2012 for the substantive hearing. As is the normal practice in the asylum / immigration list, all cases listed for hearing are called over two weeks before the allocated date to determine if they are actually going on and whether written submissions have been filed. At the call-over on 22nd October 2012, counsel for the applicants announced that the proceedings were moot and that the only issue for determination would be the costs of the action. It is the respondents' contention that this was the first occasion on which the applicants formally accepted that the case was moot. When the case came on for hearing before this Court on 7th November 2012, it was agreed that the only issue was costs.

10. Originally, it was stated that the applicants were seeking costs of the substantive hearing but they moved quickly away from this position and argued that they were entitled to the costs of the leave application as the proceedings became moot arising from the unilateral act of the Minister in revoking the deportation order. It was necessary to press the respondents to file a statement of opposition in order to ascertain the reason behind the revocation.

11. The respondents submit that when leave was disputed originally, it was on the basis of existing law which had been tested in the *Alli* and *Asibor* cases. When leave to remain was refused to the father in this case, the Minister was applying a long line of authority from domestic and Strasbourg jurisprudence. The decision in *Zambrano* was the reason the Minister revisited the issue of the deportation of non-EU fathers who were illegally in the State but who were the parents of Irish citizen children. The *Zambrano* decision caused the Minister to review his previous decisions in the light of the children's rights as EU citizens who were said to be dependent on the fathers and who might otherwise have to leave the EU and would be deprived of the enjoyment of their rights as EU citizens. The respondents submit that the *Zambrano* ruling was an unanticipated external intervening event. They submit that no order for costs should be made but if the Court were considering an order for the applicants' costs up to the leave stage, then it would be appropriate that such order should be balanced with an order for the respondents' costs incurred after the date when the case became moot.

COSTS PRINCIPLES WHERE PROCEEDINGS HAVE BECOME MOOT

12. Both parties in this case rely on the judgment of the Supreme Court in *Cecily Cunningham v. President of the Circuit Court and the Director of Public Prosecutions* [2012] IESC 39, where Clarke J. set out the correct approach to be taken in relation to costs in cases which become moot. Ms Cunningham had brought proceedings seeking to prohibit her criminal prosecution on grounds of delay. The application did not succeed although McKechnie J. found that there was delay on the part of the prosecution. He departed from the normal rule and made no order as to costs to reflect his finding on delay. Ms Cunningham appealed the refusal to prohibit the trial to the Supreme Court but before her appeal was heard, she was notified that a material witness for the prosecution had died some years earlier and that following a review, the DPP entered a *nolle prosequi*. The appeal therefore became moot and the only remaining issue was costs.

13. Clarke J., giving the judgment of the Supreme Court, set out the principles applicable to costs at paragraphs 4.1 to 4.11 of the judgment. He noted the normal rule that costs follow the event, which stems from Order 99, rule 4 RSC. He also noted exceptions to that general rule, for example in cases involving points of law of exceptional public importance or test cases, or in difficult cases where the question of who has won the "event" may not be clear cut. He noted that in cases which have become moot, the problem is that there will be no "event" which the costs have to follow as the issue was never determined. Clarke J. adopted the principles which he had established in *Telefonica 02 Ireland Ltd v. Commission for Communications Regulation* [2011] IEHC 380, which he summarised thus:-

> *"4.7 […] a court, without being overly prescriptive as to the application of the rule, should, in the absence of significant countervailing factors, ordinarily lean in favour of making no order as to costs in cases which have become moot as a result of a factor or occurrence outside the control of the parties but should lean in favour of awarding costs against a party through whose unilateral action the proceedings have become moot. […]*
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> *4.8 It must, of course, be acknowledged that some cases which have become moot may not fit neatly into the category of proceedings which have become moot due to entirely external events, on the one hand, or due to the unilateral action of one of the parties, on the other hand. In particular there will be cases where the immediate reason why proceedings have become moot is because a statutory officer or body has decided not to go ahead with a threatened course of action (such as the criminal prosecution in this case). However, the reason why it may have been necessary or appropriate for that statutory officer or body to adopt a changed position may, to a greater or lesser extent, be due to wholly external factors. To take a simple example, one might envisage a criminal prosecution which was, on any view,*

wholly dependent on the evidence of an individual who unfortunately had died before the case could commence. If there had been a challenge, on judicial review grounds, to that prosecution which was not finalised, and if, as here, the D.P.P. were to enter a nolle prosequi because of the death of the only real witness, then it might superficially be said that the judicial review challenge had become moot by reason of the unilateral action of the D.P.P. but in truth the real reason why the judicial review challenge had become moot would have been because of the death of the witness which made it necessary for the D.P.P. to bring the criminal process to an end.

4.9 In that context it is, of course, important to note that statutory officers and bodies have an obligation to exercise their powers in a proper manner. If circumstances change then it is, of course, not only reasonable but necessary for such officers and bodies to reflect the new circumstances by adopting a position (even if different) which takes into account the circumstances as they have come to be. The mere fact, therefore, that a statutory officer or body adopts a changed position which renders judicial review proceedings moot does not, of itself, necessarily mean that it is appropriate to characterise the proceedings as having become moot by reason of a unilateral act of one party.

4.10 If there were no change in underlying circumstances and if the statutory officer or body had simply changed his or its mind or adopted a new and different view, then such a characterisation might be appropriate. Where, however, there is an underlying change of circumstance, it is necessary to consider the extent to which it can properly be said that the proceedings have become moot by reason of the unilateral act of one party, on the one hand or, in reality have become moot by reason of a change in underlying circumstances outside the control of either party, on the other hand. The result of any such analysis should play an important role in the court's consideration of the justice of where the costs of proceedings rendered moot should lie.

4.11 It does, however, seem to me that, where the immediate or proximate cause of proceedings becoming moot is the action of such a statutory officer or body but where it is sought to argue that the true underlying reason is an external factor outside the control of that officer or body, it is incumbent on the officer or body concerned to place before the court sufficient evidence to allow the court to assess whether, and if so to what extent, it can fairly be said that there was a sufficient underlying change in circumstances sufficient to justify, in whole or in part, it being appropriate to characterise the proceedings as having become moot by reason of a change in external circumstances. Against those general observations it is necessary to turn to the circumstances in which these proceedings became moot.

Decision

14. It is clear that the revocation decision in this and other similar cases where the non-EU national fathers of minor Irish citizen children had previously been refused leave to remain was heavily, if not exclusively, influenced by the *Zambrano* ruling. It is also fair to say that ruling took many interested Member States who had participated in the application before the CJEU off guard as, somewhat unusually, the Court of Justice did not follow the opinion given by Advocate General Sharpston which was published six months earlier. The *Zambrano* ruling represented a significant change to the law as it was understood and applied in this State and motivated the Minister's decision to review all similar cases pending before the courts. Thus the change of attitude to Mr. Amobi's leave to remain application did not derive from a change of heart on the facts of his particular case but rather, from the *Zambrano* ruling which (until the narrow scope of its application was clarified in subsequent judgments)[1] caused the Minister to review his previous decisions. As the Minister stated in his public notification, "*Given the importance of the ruling in the Zambrano case, I have decided, with the support of my Government colleagues, to make a brief public statement outlining the consideration being given to cases involving Irish minor dependant citizen children who have a non-national third country parent or parents*."

15. It is also clear that the Minister did not revoke the deportation order made against Mr. Amobi as a result of the decision of Birmingham J. granting leave to apply for judicial review of the deportation order. There was every indication at that time that the post-leave application would be as fully opposed as the pre-leave application. However, post *Zambrano*, the respondents stayed their hand while seeking an adjournment to allow the Minister time to consider the cases which might potentially be affected by the ruling. In the view of the Court this action could not be fairly described a unilateral action of the Minister but rather one which was caused by the external factor which was the *Zambrano* ruling. The letter of notification confirms this view as it states that Mr. Amobi was granted temporary permission to remain "*on foot of that review, as an exceptional measure*". Nothing altered for the applicants between the date of the notification that he was granted permission to remain in the State and the date of this application. The proceedings became moot upon the notification of that decision. There was nothing further that the applicant could obtain by continuing the proceedings. The deportation order which was the subject of the proceedings had been quashed and consequently an order quashing that deportation order was utterly unnecessary and it was futile to pursue such an order.

16. The *Zambrano* ruling was interpreted very expansively in the year following its delivery and later decisions of the CJEU are much narrower in their application. While it is not necessary to determine the issue in this case, it is certainly arguable that the protection afforded by Articles 20 and 21 of the TFEU would not now automatically extend to a parent in the position of Mr. Amobi, whose wife has permission to remain in the State and whose deportation would not therefore automatically require their Union citizen children to leave the territory of the EU.

17. In the particular circumstances of this case, where leave was granted on grounds which to some extent resembled the reasoning in *Zambrano* and as leave was granted before these proceedings became moot, the justice of the case is best served by making an order for the applicants' costs up to and including the date on which leave was granted, including all reserved costs. However, their actions in persisting in pursuing a case which was moot from the date on which the applicants received written notification of the revocation of the deportation order has caused the respondents to incur additional and unnecessary costs. The case first appeared in the post-leave list on 7th July 2011. It must have been apparent by then that the proceedings were moot and that the only unresolved issue was costs. The applicants refused to accept this situation and refused to negotiate costs with the respondents as occurred with the other cases in the *Zambrano* list. The respondents made it clear, on each of the numerous occasions on which the case appeared thereafter in the post-leave list, that it was their position that the case was moot. In those circumstances, it is inescapable that all costs incurred from the 7th July 2011 were occasioned by the acts of the applicants. The Court finds the suggestion that it was necessary to press for a statement of opposition in order to see what arguments might be made in relation to costs to be unstateable. Nothing in the respondents' statement of opposition could have advanced the applicants' claim for their costs. Further, it is not disputed that Cooke J. specifically advised counsel for the applicants in this case that he was on risk of costs if he pursued a date for hearing in a case that was moot. Despite this warning, the applicants pressed on and took a full hearing date.

18. It is well known to all those who practice regularly in this area that in the asylum and immigration judicial review list there are waiting lists for leave applications which sometimes extend beyond five years. Hearing dates are highly valued by those who are seeking regularisation of their status. There are many hundreds of asylum seekers who are living in hardship in direct provision

accommodation for years without permission to work and with little personal autonomy, while they await a date for a judicial review of negative decisions. Against that background the applicants in this case insisted on a hearing date thus displacing another case. A full day was taken up to argue the issue of costs. They denied in their oral submissions that Cooke J. had warned about the incurring of costs if they persisted in seeking a trial date and they denied that the first time it was admitted that the only outstanding issue was costs was before this Court on the call over of the 22nd October 2012. This approach was unacceptable, unnecessary and avoidable. The respondents are entitled to an order for the costs incurred by them from the date of notification of the revocation order. There will be a set off of the costs incurred by the respondents against the costs awarded to the applicants.

1. See e.g *McCarthy v. Secretary of State for the Home Department* (C-434/09, 5th May 2011); *Dereci & Others v. Bundesminiterium fur Inneres* (C-256/11, 15th November 2011); *Iida v. Stadt Ulm* (C-40/11, 8th November 2012); *O & S and L v. Maahanmuutovirasto* (C-356/11 and 357/11, 6th December 2012).