Neutral Citation [2012] IEHC 113

THE HIGH COURT

JUDICIAL REVIEW

[2012 No. 12 J.R.]

BETWEEN

CHARLES SMITH AND ALIMAT SMITH (MINORS SUING BY THEIR FATHER AND NEXT FRIEND OMOLOLU SMITH), SIKIRAT SMITH, RUFAI SMITH, AJOKE MORIAMO SMITH AND OMOLULU SMITH

APPLICANTS

AND

THE MINISTER FOR JUSTICE AND EQUALITY, ATTORNEY GENERAL AND IRELAND

RESPONDENTS

JUDGMENT of Mr. Justice Cooke delivered the 5th day of March 2012

1. This is the judgment of the Court upon an application made *ex parte* on behalf of the applicants for leave to apply for judicial review of a decision made by the first named respondent on the 14th December, 2011, under s. 3(11) of the Immigration Act 1999, refusing an application for revocation of a deportation order made in respect of the sixth named applicant on the 9th March, 2010. The background to the case can be summarised as follows.

2. The sixth named applicant ("Mr. Smith") is a Nigerian national. The fifth named applicant is his Nigerian born wife and the remaining applicants are their children. Mr. Smith and his wife arrived in the State in January, 2002 and were unsuccessful in an application for asylum. The first named applicant was born in the State on the 16th January, 2002, and is an Irish citizen. The second, third and fourth named applicants were born respectively on the 22nd June, 2006, 28th March, 1999 and the 8th June, 1993.

3. Mr. Smith claims that when he and his wife left Nigeria in 2002, they were unable to bring the third and fourth named applicants with them. He says that in the hope of arranging to have them brought over from Nigeria, he went to the United Kingdom in mid 2002. He was there arrested for carrying illegal drugs and was subsequently charged and sentenced to seven years imprisonment. He served part of the sentence and was deported to Nigeria in July 2005.

4. His wife was granted residency in the State in March 2005, under the IBC 05 scheme. The third named applicant came to the State in March 2005 and was subsequently granted permission to remain.

5. In September 2006, Mr. Smith entered the State unlawfully with the fourth named applicant. On the 9th March, 2010, deportation orders were made against each of them. Having been served with the deportation order, Mr. Smith fled the State and unlawfully entered the United Kingdom. By letter of the 2nd June, 2011, following, it is said, the delivery of the judgment by the Court of Justice of the European Union in *Ruiz Zambrano* [2011] EUECJ C-34/09 (08 March 2011), an application was made by solicitors on behalf of Mr. Smith and the fourth named applicant for permission to reside in the State on foot of that judgment, although nothing was said in the letter as to the whereabouts of Mr. Smith or the fact that he had been in the United Kingdom since September 2010.

6. By letter dated the 21st October, 2011, the fourth named applicant was informed of the decision of the first named respondent to grant him temporary permission to remain in the State for three years until the 21st October 2014.

7. By letter of the same date, Mr. Smith was informed by the first named respondent that the decision (the "first refusal") to make the deportation order in respect of him remained unchanged. He was instructed to present himself at the Garda National Immigration Bureau on the 17th November, 20, to make arrangements for his removal from the State. The reasons for the refusal to revoke the deportation order were set out in a memorandum entitled "Examination of file under s. 3(11) of the Immigration Act 1999" which was enclosed with the letter.

8. In that memorandum, consideration was given to the representation made in the application to the effect that Mr. Smith wished to have his case reconsidered in the light of the *Zambrano* judgment. The essential ruling in that judgment was quoted and the issue before the decision maker was then identified as "whether a decision to affirm the deportation order in respect of Mr. Smith would force hi s son to leave the European Union with him and thus depriving him of the genuine enjoyment of the substance of his right as a European Union citizen". (This is a reference to the first named applicant, the member of the family who i s an Irish citizen and therefore a citizen of the European Union).

9. The memorandum sets out the circumstances of the family in the State and the history of Mr. Smith's movements since 2002. The conclusion is then given:-

> "Based on the information on file, it is submitted that should the deportation order made in respect of Mr. Smith be affirmed, the most likely outcome is that Ms. Ajoke Smith will remain in the State with her Irish citizen son, thus ensuring that Master Charles Smith will continue to enjoy the substance of his rights attaching to the status of a European Union citizen. Mr. Smith has not demonstrated that his son, Charles, is dependent upon him. Therefore it is submitted that the ruling in the *Zambrano* case does not apply in this instance."

10. By letter of the 24th November, 2011, solicitors on behalf of Mr. Smith made a new application for revocation of the deportation order under s. 3(11) of the Act of 1999. This application made the following ad mission:-

> "As you will note from your file, by letter dated the 22nd September, 2011, your office inquired as to when Mr. Smith had left the country, when he had returned and what documents he had used to travel. By letter dated the 30th September, 2011, our client replied that he had not left the country. Mr. Smith has recently instructed that he was not truthful with

> the Minister regarding this matter and confirms that he left Ireland for the UK in or around September 2010, and returned in June 2011." (The question as to the documents used was not answered.)

11. The remainder of the letter, apart from containing an apology for the previous deception, bases the application upon the fact that the fourth named applicant had now been granted temporary permission to remain in the State and otherwise seeks to assert that the Minister had erred in law in the preceding refusal decision in holding that the first named applicant was not dependent upon Mr. Smith and that for that reason the *Zambrano* judgment did not apply. It was submitted:-

> "Considering the totality of the circumstances of this case, we submit that Charles Smith is clearly a dependent of Omololu Smith. In the circumstances the *Zambrano* judgment is fully applicable in this case. The fact that Charles mother was Charles' primary carer after 2006, and then from July 2010, until May 2011, does not mean that Charles is not dependent on his father. The Minister's current position ignores the strong emotional bond between this child and his father, which is the most significant element of the concept of dependency, and indeed Charles' rights to respect for his private life and family life.'"

In support of the argument reliance is placed upon Articles 7, 21 and 33 of the Charter of Fundamental Rights of the European Union.

12. By letter of the 14th December, 2011, the decision now sought to be contested was given to Mr. Smith refusing the second application for revocation and was, as in the previous refusal, accompanied by a memorandum setting out the response to the new application. The submissions upon which the application summarised above was based are set out in the memorandum and the reliance upon the *Zambrano* judgment is again rejected with particular reference to the more recent judgment of the Court of Justice of the 15th November, 2011, in *Derec*i [2011] EUECJ C-256/11 . The decision maker cites a particular passage in that judgment as follows:-

> "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 hi s 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."

13. The non-application of the *Zambrano* principle is thus reaffirmed upon the basis that if the deportation order is not revoked "the most likely outcome is that Master Smith will remain in the State in the care of his mother, thus ensuring that (he) will continue to enjoy the substance of his rights attaching to the status of a European Union citizen, as (the fifth named applicant) currently has temporary permission to remain in the State until the 11/03/2013 at which time she can apply to renew her temporary permission".

14. It is well settled that the Minister is not obliged to entertain an application for revocation under s. 3(11) unless it is based upon some new fact or information or some change of circumstance which has come about since the deportation order was made and which, it established, would render the implementation of the deportation order unlawful. (See *C.R.A. v Minister for Justice* [2007] 3 IR 603 at [78] to [87] and *Irfan v Minister for Justice* [2010] IEHC 422 at paras 7 and 8 and the cases there cited).

15. As between the decision rejecting the first application for revocation on the 21st October, 2011, and the making of the new application on the 24th November, 2011 , the only new fact or event relied upon is that of the grant of temporary permission to remain to the fourth named applicant. In the judgment of the Court, that cannot be a new fact or event which, of itself, is capable of rendering the existing deportation order unlawful if implemented. The second application for revocation was not based upon the position of the fourth named applicant but upon the proposition that the first named applicant as an Irish and Union citizen is dependent upon Mr. Smith and, by virtue of the principle in the *Zamabrano* judgment, is entitled to require the State to allow Mr. Smith to reside in the State.

16. In the judgment of the Court, this argument is unfounded in the context in which it is sought to be advanced. It is merely a reiteration of the argument which was advanced as the basis for the first application to revoke and was fully considered and rejected in the decision of the 21st October, 2011. That decision was not sought to be challenged by judicial review at the time. An individual in respect of whom there is subsisting a valid deportation order cannot avail of s. 3(11) to postpone its implementation by repeated applications to revoke, based upon the same submission or ground in the absence of any material change of circumstances or any new intervening event as described above.

17. In moving the application, counsel for the applicants sough t to advance a further argument based upon consideration given to the *Zambrano* and *Dereci* judgments, mentioned above, by the Immigration Appeals Tribunal in the United Kingdom in the judgment of the 7th July, 2011, in *Sanade and Others v. Secretary of State for the Home Department* [2012] U.K.U.T. 00048 (IAC). In that case the Tribunal was considering deportation orders made against a number of fathers of children who had permission to reside in the UK. Mr. Sanade, the first named appellant for example was a national of India who had been employed as a nurse in the National Health Service, where he met his wife, also a national of India. They married in 2005 and were granted indefinite leave to remain in 2009. They had two children, one of whom was a British citizen by birth and the other, with Mrs. Sanade became citizens by registration. Mr. Sanade was sentenced to twelve months' imprisonment on pleading guilty to an offence of indecent assault of a patient. Analogous circumstances were also being considered by the Tribunal in the cases of the two other appellants. In all cases the mothers concerned were themselves British citizens as were the children involved. As such, they could not be removed from the United Kingdom. The Tribunal accepted that on the basis of the *Zambrano* principle, the deportation of the father would not require the spouse or children to follow upon the ground that they would have no ability to exercise their Treaty rights independently of the father if deported. The Tribunal said: "what is being impaired is not the right to reside in the EU but the right to enjoy family life whilst so residing ...

Cases where the remaining parent not facing removal is either a British citizen or a third country national will be governed by Article 8 [of the ECHR]."

18. In the course of the case the Tribunal had posed a number of questions to the Secretary of State for assistance including the following:-

> "Does the respondent agree that in the case where a non national parent is being removed and claims it is a violation of that person's human rights to be separated from a child with whom he presently enjoys family life as an engaged parent, that a consequence of the CJEU's judgment is that it is not open to the respondent to submit that an interference can be avoided because it is reasonable to expect the child (and presumably any other parent/carer who is not facing deportation/removal) to join the appellant in the country of origin?"

19. This question received the following reply: "We do accept, however, that in a case where a third country national is unable to claim a right to reside on the basis set out above it will not logically be possible, when assessing the compatibility of their removal or deportation with the ECHR to argue that any interference with Article 8 rights could be avoided by the family unit moving to a country which is outside of the EU".

20. Counsel for the applicants in the present case sought to rely upon this answer in order to submit that in the memorandum giving the reason for the second refusal decision, the Minister had failed to carry out an appropriate analysis of the interference with the Article 8 right to family life.

21. In the judgment of the Court, this argument is unfounded. In the first place, the issues considered by the United Kingdom tribunal were considered in the context of appeals against the making of orders for the removal of the appellants in question.

It was in that context that arguments were advanced as to the infringement of the Article 8 rights of the families in question.

22. The application which the Minister was considering was in respect of the revocation of a deportation order made in 2010. The making of the deportation order sent to Mr. Smith under cover of the letter of the 15th March, 2010, was accompanied by a lengthy (36 page) memorandum, which contained, *inter alia,* a detailed analysis and assessment of the impact of a deportation order upon the rights of the Smith family under Article 8 of the Convention and particularly the right of respect for family life. It also contained a detailed analysis and assessment of the impact of the deportation order upon the constitutional rights of the Irish citizen child. In both considerations an explanation was given as to how the conclusion to make the deportation order was reached in balancing the rights in question against the interest of the State. Accordingly, a full analysis and appreciation of the Article 8 rights was carried out and communicated to the applicants in 2010. The decision to make the deportation order has not been challenged and is now beyond challenge. On that basis it cannot now be reopened as an argument sought to be advanced as part of a second attempt to reargue the submissions made on foot of the *Zambrano* judgment in the first application for revocation. In the judgment of the Court a person against whom a deportation order has been made and not challenged cannot, by illegally evading the implementation of that order, create a situation in which the Minister can be compelled to embark upon a fresh reconsideration of the assessment of Article 8 rights in reliance upon factors which have arisen in the interim unless, at least, it is demonstrated that there has been knowing acquiescence on the part of the State in the creation of that situation.

23. Furthermore, even if it is supposed that the Minister had any obligation to entertain the second application for revocation in the absence of any material change of circumstance or new fact, the Minister's obligation was to consider the submissions put to him in the application. The application made in the letter of the 24th November, 2011, was not based upon Article 8 of the Convention, apart from a passing reference in its closing paragraph by way of request "that the Constitution, ECHR and EU Charter Rights of each member of the family be vindicated".

24. It is true of course that Article 7 of the Charter corresponds to Article 8 of the Convention in that it affirms that "everyone has the right to respect for his or her private and family life, home and communication". However, as Article 51 of the Charter makes clear, its provisions are addressed to the institutions of the European Union and its agencies; and to the Member States "only when they are implementing Union law". The revocation of a deportation order made under s. 3 of the Immigration Act 1999, does not involve, as such, any implementation of Union law. It is the exercise by the State of its sovereign entitlement to decide who shall remain within the territory of the State. The removal of a third country national from the State does, of course, also remove the individual from the territory of the European Union. In circumstances such as those in the present case, however, it is only where the principle of the *Zambrano* judgment is applicable that the Member State comes under any obligation derived from Union law not to effect the removal. As the Minster has, correctly and lawfully in the judgment of the Court, decided in the first refusal that this was not a case in which the *Zambrano* principle was applicable because the deportation of Mr. Smith would clearly not result in any other member of the family leaving the European Union, that consideration cannot be said to arise in this case.

25. For these reasons, the Court is satisfied that no stateable case has been made out for the grant of leave. Even it is a case in which some tenable argument could be said to have been raised, it is also a case in which there are compelling reasons why the Court should exercise its discretion to refuse to entertain the application. This is a case in which there has been repeated abuse by Mr. Smith of the immigration laws of the State and the laws of another Member State. He left the State illegally while present as an asylum seeker. lie illegally entered the United Kingdom and was engaged in criminal activity for which he was convicted. Having been deported from the United Kingdom and the territory of European Union, he re-entered that territory and the State illegally. Following the making of the deportation order he evaded it and again re-entered the United Kingdom illegally. When applying for permission to remain on foot of the *Zambrano* judgment, he lied about his whereabouts and movements. This history of disregard for the law would, in the judgment of the Court, be ample ground for refusing the application in any event.