THE HIGH COURT

JUDICIAL REVIEW

[2019 No. 267 J.R.]

BETWEEN

B.S. (INDIA), A.A.D. AND Z.S.S. (A MINOR SUING BY HIS MOTHER AND NEXT FRIEND A.A.D)

APPLICANTS

AND

THE MINISTER FOR JUSTICE AND EQUALITY

RESPONDENT

JUDGMENT of Mr. Justice Richard Humphreys delivered on the 10th day of May, 2019

1. The applicants are an Indian father, a Romanian mother, and their minor child born in the State. The first-named applicant was born in 1981. He lived in Dubai for an approximately three-month period in 1999 to 2000 and then returned to India. He then resided unlawfully in the UK from 2004 to 2014 and came to the State in the latter year by boat from Scotland. He resided in Ireland illegally thereafter.

2. The second applicant was born in Romania in 1987 and arrived in Ireland in June, 2015. She opened a food outlet or takeaway with substantial financial assistance from the first-named applicant's family. The respondent has not as yet had an opportunity to investigate her account of her economic activity. The applicants claim to have met on 1st April, 2017 and to have been in a relationship since 15th April, 2017. They lived together, it would appear, from about six months later. The first and second applicants are recorded as living at the same address on the third-named applicant's birth certificate.

3. The first-named applicant was arrested in 2015, whereupon he applied for asylum on 22nd July, 2015. He did not pursue that application, which was deemed withdrawn on 29th April, 2016. In June, 2016, a proposal to deport the first-named applicant was made. No response was provided to that. A deportation order was then issued under s. 3 of the Immigration Act 1999 on 30th September, 2016, and notified to the first-named applicant under cover of a letter dated 24th October, 2016.

4. The third-named applicant was born on 18th January, 2019 and as noted above, the first-named applicant was named as the father on the birth certificate. In a case such as the present one, the qualification for Irish citizenship is that the EU parent is legally present for three out of the previous four years before the birth. If the mother's account is accepted and if it is assumed that she was exercising EU treaty rights, that condition would appear to have been satisfied and thus it is very possible that the child is an Irish citizen by birth.

5. On 28th April, 2019, the first-named applicant was arrested on foot of the deportation order and at time of writing is detained in Cloverhill Prison. The detention order has been exhibited in the proceedings. The basis of arrest as set out in that order was failure to leave the State within the time specified in the deportation order. On 3rd May, 2019, application was made on his behalf to revoke the deportation order, the relevant statutory provision being s. 3(11) of the 1999 Act, although that is not in fact specified in the letter seeking revocation, nor indeed are the specific family rights by reference to art. 8 of the ECHR as applied by the European Convention on Human Rights Act 2003 or corresponding family rights under Articles 40 or 41 of the Constitution.

6. The present proceedings were filed on 7th May, 2019, the primary reliefs sought being an injunction restraining deportation until a decision has been made on "*an application currently pending*" before the Minister, declaratory relief and interim or interlocutory injunctive relief. An interim injunction was granted on 7th May, 2019. On 9th May, 2019, the first-named applicant signed the relevant form to apply for EU treaty rights, although at time of writing that has not actually been submitted.

7. On Friday 10th May, 2019, leave was granted in the 11 a.m. list (the *ex parte* list having been scheduled on the Friday of that week), and following strenuous and indeed persuasive submissions on behalf of the respondent to the effect that to apply normal time-scaling to the proceedings would in fact determine the event in favour of the applicant, the matter was listed for substantive hearing at 2 p.m. on that day by consent.

8. The first-named applicant says he intends to apply for EU treaty rights, although that appears to have been held up because the second-named applicant's passport was lodged with the Department of Foreign Affairs and Trade in order to apply for an Irish passport for the third-named applicant. It is accepted now by counsel for the respondent that the lack of an available passport for the second-named applicant is not a disqualifying problem that would prevent the making of an EU treaty rights application. For the purposes of the present judgment I have received helpful submissions from Mr. Paul O'Shea B.L. for the applicants and from Mr. John P. Gallagher B.L. for the respondent.

Respondent's preliminary objections

9. The respondent offered essentially two overarching objections to the applicants' proceedings. Firstly, that the applicants' claims in relation to EU treaty rights are not justiciable in these proceedings, and secondly, that the applicants' have delayed and have failed to make the appropriate applications.

10. As regards the first objection, Mr. Gallagher submits that the applicants' averments have not been investigated and that the appropriate way to investigate them is the EU treaty rights procedure, as set out in the European Union (Free Movement of Persons) Regulations 2015, not judicial review proceedings in the High Court. He submits that the applicants' averments cannot be taken at face value in the meantime pending such an investigation. He also submitted that the relief sought by the applicants would make the High Court the finder of fact for the purposes of the subsequent EU treaty rights application.

11. But that is not necessarily so. Any evaluation of the weight of, or likely strength of, a case made by the first-named applicant is only an evaluation on the evidence before the court. That does not prevent the Minister from coming to a contrary conclusion when operating the statutory procedure. The difficulty with Mr. Gallagher's submission under this heading is the conceptual confusion of the roles of the Minister and the court, which are in essence answering different questions. The Minister will be answering the question as to whether the first-named applicant should be given a right to remain in the State by virtue of EU treaty rights. The court however

has been called upon to answer a different although related question, which is whether deportation in particular circumstances is a breach of rights of the applicants. In fairness to the respondents, an evaluation of whether the applicants' rights are breached and what remedy if any is appropriate may need to have due regard to whether the statutory procedures have been allowed to operate correctly.

12. Mr. Gallagher submits that a procedure as invoked by the applicants would *"give the court a free-roaming jurisdiction to correct disproportionality"*. Again that is not so. What is at issue here is the enforcement of rights. If an applicant, either in this context or in any context, has a right, such an applicant must also have an effective remedy in relation to a breach of such a right (see art. 13 of the ECHR, *Walsh v. Walsh (No. 2)* [2017] IEHC 177, paras. 15-18).

13. Mr. Gallagher then fell back on a complaint that it had not been established that rights of the applicants have been breached, but in that regard the applicants have identified family rights and rights under the judgment of the CJEU in Case C-34/09 *Ruiz Zambrano*, to which I will return later.

14. As regards Mr. Gallagher's second objection, there is certainly some merit in the argument that the applicants have not acted in a very timely way in asserting the alleged rights and indeed that there is a conceptual difficulty in asserting rights premised on applications that have yet to be formally submitted, which is a valid objection up to a certain point. However, given the course the proceedings have taken, this turns out to be a less fatal objection for reasons that will be seen, given that the applicants will have an opportunity to address this aspect.

Grounds 1 and 5 - Argument based on *Okunade*
15. Ground 1 of the statement of grounds contends *"the applications pending before the respondent disclose a fair question to be tried concerning the positon of the first-named applicant in the State and raised the real possibility that [the] first-named applicant may be granted residence in the State. The applicants have presented an arguable case for the revocation of the deportation order (either by way of discretion or by operation of law) and for the first-named applicant's deportation to be revoked and/or the execution thereof to be postponed pending the consideration of that application and an intended application for residency for the first applicant."*

16. In a similar vein, ground 5 alleges that *"the balance of convenience rests with the grant of an injunction"*. The applicants rely in pursuance of these grounds on the Supreme Court decision in *Okunade v. Minister for Justice and Equality* [2012] IESC 49 [2012] 3 I.R. 152; but that decision does not apply. That case sets out the test for interlocutory or interim injunctive relief. It does not provide for an entitlement to an injunction as substantive relief. To obtain such substantive relief an applicant has to demonstrate an entitlement to that relief, not simply that grant of such relief is arguable or convenient or preserves the *status quo*. One cannot in other words generate a free-standing entitlement to substantive relief based purely on the balance of convenience – some more substantive entitlement based on what is just must be demonstrated.

Ground 2 - Alleged entitlement to a decision prior to removal
17. Ground 2 of the statement of grounds alleges that *"the applicants are entitled to a decision upon the said applications in advance of the removal of the first-named applicant from the State".*

18. The Court of Appeal in *C.A. v. Governor of Cloverhill* [2017] IECA 46 (Unreported, Court of Appeal, Hogan J., 27th February, 2017) decided that the making of an EU treaty rights application does not *"in and of itself"* (para. 28 *per* Hogan J.) create of right to remain in the State. Thus an EU treaty rights application is not in itself suspensive and it has also been clearly established in caselaw that a s. 3(11) application under the 1999 Act is not suspensive in and of itself either (see e.g., *Akujobi v. Minister for Justice, Equality and Law Reform* [2007] IEHC 19 (MacMenamin J.)). As a general proposition, therefore, there is no entitlement not to be removed pending decisions on applications of this nature, one of which has not actually been made yet. *C.A.* however does not mean that there could never in principle be exceptional circumstances in which deportation of an applicant for revocation or for EU treaty rights could potentially be disproportionate.

Disproportionality of removal where likelihood of success of a proposed EU treaty rights application may arise
19. Grounds 3 and 4 of the statement of grounds essentially rely on a combination of two factors as a reason why deportation of the first-named applicant now would be unlawful. One is the strength of the application, and the second one is the level of disruption to the applicants that will be caused. These problems are alleged to give rise to both disproportionality and breach of the doctrine enunciated in *Zambrano*. Those two consequences can be dealt with separately.

20. Ground 3 contends that *"while there is a public interest in the implementation of deportation orders there is also public interest in the protection of family life and the non-separation of families. There are no issues of national security, public safety or the prevention of disorder and crime in the instant case. In the circumstances, the deportation of the first-named applicant prior to a decision on the said applications is disproportionate".* Ground 4 contends that *"the implementation of the deportation order at this juncture would lead to the sundering of the family unit and a serious disruption of the family and business activities of the EU national. Deportation, even on a temporary basis, would cause more than the ordinary disruption in being removed from a country in which the first applicant wishes to live. Deportation would visit irremediable damage on the family and in particular the second applicant will be required to stop working in order to care for the third applicant. Further there is an arguable case that deportation, even on a temporary basis, will interfere with the substance of the third applicant's rights as a citizen of the European Union."*

21. What arguably brings about a potential disproportionality in the present case is not the mere fact that the first-named applicant is in the process of making an EU treaty rights application (which does not render deportation unlawful in itself as found in *C.A.*), but the argument that:

(i). the first-named applicant has demonstrated a likelihood of success given:

(a). that the case relates to dependency on a partner in a nuclear family situation rather than a more remote relationship;

(b). that there is a child of the relationship;

(c). that the evidence before the court at the present time points to a genuine dependency situation;

combined with a second element which is:

(ii). there will be huge disruption involved given:

(a). that the mother will have to give up work to care for the child;

(b). that the business will thereby remain closed; and

(c). that there is a prospect of the mother and child having to move to India, a matter which can be further considered under the *Zambrano* heading.

22. It can be argued that these elements of the present case may on their face be genuinely exceptional and thus may bring the present case potentially into an exceptional category in which it could be disproportionate, whether in EU, ECHR or Irish administrative law terms, to deport someone in circumstances where such a person was highly likely to succeed in an application to be brought back very shortly thereafter, and where severe disruption would be occasioned as a result.

23. A similar approach was taken by the House of Lords in *Chikwamba v. Secretary of State for the Home Department* [2008] UKHL 40 where Lord Brown said at para. 46: "*This appellant came to the UK to seek asylum, met an old friend from Zimbabwe, married him and had a child. He is now settled here as a refugee and cannot return. No one apparently doubts that, in the longer term, this family will have to be allowed to live together here. Is it really to be said that effective immigration control requires that the appellant and her child must first travel back (perhaps at the taxpayer's expense) to Zimbabwe, a country to which the enforced return of failed asylum-seekers remained suspended for more than two years after the appellant's marriage and where conditions are "harsh and unpalatable", and remain there for some months obtaining entry clearance, before finally she can return (at her own expense) to the UK to resume her family life which meantime will have been gravely disrupted? Surely one has only to ask the question to recognise the right answer.*"

24. A consideration of whether the exceptional circumstances of the present case do in fact cross the line into disproportionality permitting, or indeed requiring, the court to grant substantive injunctive relief as a necessary measure to vindicate the applicants' right to an effective remedy may raise questions of EU or ECHR law or Irish constitutional law which need to be considered in more detail, and I will return to that question later.

Claim to an injunction based on *Zambrano* decision

25. Mr. Gallagher says that the third-named applicant should be accepted as a citizen of Romania. That in a way is a generous concession in this context, seeing as *prima facie* the child appears to quite possibly qualify for Irish citizenship (although presumably the "concession" is just a necessary consequence of the Minister's refusal thus far to accept the mother's asserted legal basis for her presence in the State). However, the respondent submits that the *Zambrano* decision does not apply because it only applies to "*the member state of residence and nationality of those children*" as put in the curial paragraph of the CJEU judgment, that is Romania not Ireland.

26. The fallacy of that submission is that requiring a person to leave the EU also means requiring them to leave any and all of its members. The point made is essentially a semantic one rather than one of substance. The Court of Appeal in *Bakare v. Minister for Justice and Equality* [2016] IECA 292 (Unreported, Court of Appeal, 19th October, 2016) at para. 24 appeared to treat the requirement of *Zambrano* as being one of whether the EU national was going to be required to leave the territory of the EU as a whole.

27. Mr. Gallagher also submitted that there was inadequate evidence that the child would be compelled to leave the State, but it appears on the evidence before the court at the present time that the case is markedly different from *Bakare v. Minister for Justice and Equality* and *E.A. v. Minister for Justice and Equality* [2012] IEHC 371 (Unreported, High Court, Hogan J., 7th September, 2012) where there was no appreciable risk of being compelled to leave the State. Here such a risk is averred to and it appears that it should therefore be accepted for present purposes.

28. As noted above, the respondent also makes the point that there is a non-statutory procedure for applying for *Zambrano* rights which has not been invoked. That possibly could have been a fatal obstacle to relief although given the nature of the order I am going to make, the applicants will have an opportunity to address that.

Order

29. For the reasons set out above, the primary order will be that:

(i). I will dismiss the proceedings insofar as they are based on grounds 1, 2 and 5 of the Statement of Grounds; and

(ii). as far as the claim under the headings of grounds 3 and 4 is concerned, given that the questions arising including questions of EU law to which the answers may not be absolutely clear, I do not consider that I should make a final order at this point without giving the parties an opportunity to make more detailed submissions on those specific questions (including whether art. 267 of the TFEU should be invoked), so I will adjourn that limited aspect of the case for a short period until 20th May, 2019.

30. That adjournment will be on certain terms, namely that:

(i). if the applicants wish to rely on art. 8 of the ECHR and/or Articles 40 or 41 of the Constitution for the purposes of their s. 3(11) application they should make submissions in that regard by close of business on Monday 13th May, 2019;

(ii). likewise if they intend to make an application for EU treaty rights and/or *Zambrano* permission they should make such applications by the same date;

(iii). the respondent should use his best endeavours to determine the s. 3(11) application by close of business on Friday 17th May, 2019, noting that at the present point in time it does not appear necessary to envisage any specific time scale for the hypothetical EU Treaty rights or *Zambrano* applications; and

(iv). assuming that the s. 3(11) application is determined on the timescale just referred to, any application to amend the proceedings to challenge any negative decision in that regard should be made on 20th May, 2019.

31. In the meantime, having regard to submissions of counsel and in all the circumstances, the balance of justice and convenience

and the *Okunade* test which *does* apply in the interlocutory injunction context, favours granting an interlocutory injunction restraining the respondent from deporting the first named applicant until 20th May, 2019. On that date I will consider the question of whether a reference to the CJEU is necessary or appropriate and I am directing the parties to deliver submissions in advance on that question, identifying and formulating any questions of European law that may arise, so that the matter can be finalised insofar as it can be, on that date. There is considerable urgency here in the sense that the eight weeks for detention of the first-named applicant continues to run. However, that period would be stayed if there was a hypothetically negative s. 3(11) decision that became the subject of an amendment to the proceedings. Conversely, if there was a favourable s. 3(11) decision, the proceedings would become moot.