THE COURT OF APPEAL

Appeal Nos. 2016/250

Birmingham J.
Irvine J.
Hogan J.

BETWEEN/

OMOTAOY BAKARE AND OMOTAOY OLALEKAN KAZEEM BAKARE (AN INFANT SUING BY HIS FATHER AND NEXT FRIEND OMOTAOY BAKARE)

APPLICANTS/APPELLANTS

- AND –

THE MINISTER FOR JUSTICE AND EQUALITY

RESPONDENT

JUDGMENT of Mr. Justice Gerard Hogan delivered on the 19th day of October 2016

1. This is an appeal brought by the first named appellant, Mr. Bakare, against the decision of the High Court (MacEochaidh J.) made *ex parte* on the 14th March 2016 as refused to grant him to leave to apply for judicial review to quash a decision of the Minister for Justice and Equality made on the 16th January 2016. By that decision the Minister had refused to grant the applicant residency in the State. The matter first came before this Court on 29th July 2016 when the appellant, Mr. Bakare, sought to appeal the decision of the High Court. The Court considered that the *ex parte* appeal presented issues of fact and law which might benefit from an *inter partes* hearing and to this end the Court requested that the appeal should stand adjourned until 3rd October 2016.

2. At the resumed hearing the respondent Minister was put on notice of the application for the first time. The Minister was represented by solicitor and counsel and she duly filed an affidavit setting out the State's position with regard to Mr. Bakare's proceedings. The sole issue which arises in this appeal is whether European Union law precludes this State refusing residency to Mr. Bakare in the circumstances of this case by reason of the fact that he is the father of an Irish citizen child. No issue has been raised regarding the potential application of Article 41 of the Constitution and it is, accordingly, unnecessary to express any view in respect of any such constitutional question.

3. Before considering the issue of EU law, it is, however, first necessary to set out the background facts.

The background facts

4. Mr. Bakare is a Nigerian citizen who arrived in the State in February 2002 when he applied for asylum on grounds of his ethnicity and his political views. That application was refused on 29th August 2002. Mr. Bakare then appealed that refusal to the Refugee Appeals Tribunal which upheld the decision on 26th May 2003. In its decision the Tribunal concluded that the application was unmeritorious and that the applicant's account lacked credibility. A deportation order was subsequently made by the Minister in respect of Mr. Bakare on 17th September 2003.

5. Mr. Bakare then married his wife, Ms. Titiloa Bakare, in September 2003. They had a child (who is the second appellant), Omomtayo, who was born on 13th March 2004 and that child is an Irish citizen. Ms. Bakare is now a naturalised Irish citizen.

6. Ms. Bakare works as a chef's assistant in Kilkenny. While it is clear that she suffers from a psychiatric condition, this is being medically managed in what appears to be a relatively successful fashion. There is nothing to suggest that her condition has changed adversely since this matter was put before the Minister in October 2009 at a time when the couple made submissions objecting to the proposed deportation of Mr. Bakare.

7. Following the making of the deportation order in 2003 Mr. Bakare did not, however, present to the immigration authorities and he was then classified as an evader. On 8th March 2005 Mr. Bakare then made an application for residency based on the parentage of his Irish citizen child, but this was refused by the Minister on 23rd October 2006 on the ground that he was not of good character. Mr. Bakarae had been convicted of possession of drugs for sale or supply in May 2006 and he received a six months prison sentence.

8. Another child was born to the couple in September 2006, but that child is not an Irish citizen. The mother has two children from a previous relationship, but both children were taken into care by social services (one in this State and the other in the United Kingdom).

9. Having been classified as an evader, Mr. Bakare was arrested and ultimately deported to Nigeria in December 2009. It seems that Mr. Bakare lived there, but endeavoured to return to Ireland. He then obtained a Schengen visa which enabled him to travel to the Netherlands. His wife then travelled there to meet him and he subsequently obtained a three month via to reside in the UK. From there he travelled to Ireland by ferry in March 2014. It is accepted that this re-entry into the State was illegal.

10. The Minister learnt of Mr. Bakare's presence in the State in June 2015 when he again applied for residency based on his parentage of an Irish citizen child and the decision of the Court of Justice in Case C-34/09 *Ruiz Zambrano* [2011] E.C.R. I-1177. The Minister requested full details of the extent to which the second appellant, Omotayo Jnr., was emotionally and legally dependent on his father. The father responded with a short hand written letter dated 29th July 2015 in which he claimed that he played a "major role" in the lives of his two children by taking them to the school and to the doctor as well as to hurling training. He also claimed that he had remained in regular contact with his family after his deportation. His wife wrote a similar letter in which she maintained that he regularly helped them with their school homework and that he had been a good father to the children.

The Minister's decision

11. In his decision of 16th January 2016 refusing the application for residency the Minister concluded that the Zambrano principle could not avail this applicant, precisely because there was no evidence that his Irish citizen child would be forced to leave the State

or the territory of the European Union. As the file note supporting the decision explained:

> "The applicant asserts that he was driven to return to the State by his worries for his family – he contends that his wife has mental health issues and that she finds it difficult to look after their children. He also asserts that he has maintained contact with his family while outside the State and has played a role in their lives. Moreover, he has submitted a hand-written letter, allegedly from his partner, stating that he has been playing a role in his children's lives and has been acting as good father. It is noted, moreover, that several undated family photographs have been submitted. Other than this information and documentation, however, there is nothing on file to suggest that the applicant's children are dependent upon him in the State…..
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> The circumstances of this family have not changed since the applicant was deported from the State in December 2009. Nor has any substantially new information been presented since Mr. Bakare submitted applications under s. 3(11) of the Immigration Act 1999 (as amended) in January 2009 and May 2011. That is, the Minister has been aware that the applicant is the partner of Titilola Bakare and the father of their two sons, Omotayo Olalekan Kazeem Bakare and Olawale Bakare. There is little current information on file in respect of these children, although it is assumed that they are living in the State with their mother, Titilola Bakare, who is a naturalized Irish citizen and has the right to move and reside freely within the territory of the Member States. It is considered, therefore that these children are not going to be forced to leave this jurisdiction and are not going to be deprived of the genuine enjoyment of the substance of their rights as European Union citizens if the Minister does not provide the applicant with permission to remain in the State."

12. It is this decision which is the subject of the present judicial review proceedings.

The rationale for the decision in *Ruiz Zambrano*

13. There is no doubt but that the decision of the Court of Justice in *Ruiz Zambrano* upon which Mr. Bakare relies was a ground-breaking one. As is well known, in that case the Court of Justice held that one essential attribute of citizenship of the European Union conferred by Article 20 TFEU was that nationals of the constituent Member State had, in principle, the right to live in the territory of the Union. The Court then reasoned that this right might be jeopardised if the non-national parents of young dependent children who were themselves citizens of a Member State of the Union were to be refused a right of residence. As the Court explained (at paras. 42-44 of the judgment):

> "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….
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> 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.
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> 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."

14. There was, however, one feature of the facts of *Zambrano* which, to some degree, possibly obscured the true rationale of that decision. While the decision in *Zambrano* only concerned the position of the father, it is clear from the Court's factual narrative that the Belgian authorities had taken a similar position attitude towards Mr. Zambrano's spouse. It is implicit in para. 44 of that judgment that these particular parents should be treated in effect as one unit for this purpose. The Court accordingly assumed that refusal of a residence permit to the husband would effectively have compelled both parents to leave Belgium (along with the children), as without that right to reside the father would have been denied access to Belgium's social security system and jobs market. In those circumstances the entire family would have faced economic hardship – even destitution – and the Court evidently considered that upon the particular facts of that case the entire family would have been obliged to leave Belgium and, for that matter, the entire territory of the Member States of the European Union.

15. It is, however, clear from the subsequent case-law that this assumption regarding the likely impact of residency or other similar immigration decisions might not always hold true where the underlying facts were somewhat different, particularly where the children were being raised in the EU state in question by a parent who was a citizen of the Member State in question or who otherwise had a lawful status in the State in question.

16. This is illustrated by the next decision of the Court of Justice dealing with this issue, Case C-256/11 *Derechi* [2011] E.C.R. I-11315. That case concerned the legality of administrative decisions taken by the Austrian authorities to deport third country nationals who were married to Austrian nationals with Austrian citizen children. Critically, however, in these circumstances – and in contrast to the facts of *Zambrano* - the Austrian courts had found that there was no risk to the subsistence of the children or that the children would be themselves forced to leave Austria.

17. The Court of Justice accordingly found that the reasoning in *Zambrano* simply did not apply:

> "65. Indeed, in the case leading to that judgment [in *Zambrano*], the question arose as to whether 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 a refusal to grant such a person a work permit have such an effect. The Court considered in particular that such a refusal would lead to a situation where those children, who are citizens of the Union, would have to leave the territory of the Union in order to accompany their parents. In those circumstances, those citizens of the Union would, in fact, be unable to exercise the substance of the rights conferred on them by virtue of their status as citizens of the Union (see *Ruiz Zambrano*, paragraphs 43 and 44).
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> 66. It follows that the criterion relating to the denial of the genuine enjoyment of the substance of the rights conferred by virtue of European Union citizen status refers to situations in which the Union citizen has, in fact, to leave not only the territory of the Member State of which he is a national but also the territory of the Union as a whole.
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> 67. That criterion is specific in character inasmuch as it relates to situations in which, although subordinate legislation on the right of residence of third country nationals is not applicable, a right of residence may not, exceptionally, be refused

> to a third country national, who is a family member of a Member State national, as the effectiveness of Union citizenship enjoyed by that national would otherwise be undermined.
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> 68. Consequently, *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."* (emphasis supplied)

18. In my judgment, this last paragraph – which I have taken the liberty of highlighting – shows the true rationale of *Zambrano*: is it likely that the administrative decision taken by the Member State will in practice oblige the parents to take the EU citizen children with them so that the latter are obliged to leave the territory of the Union? I propose presently to return to this point, but it is next necessary to consider two other subsequent decisions of the Court of Justice: Joined Cases C-356/11 and Case C-357/11 *O and S* [2012] E.C.R. I-000 and Case C-156/13 *Alfredo Rendón Marin* [2016] E.C.R. I-000.

19. In *O and S* the applicants were respectively Ghanian and Algerian nationals who had been married to Finnish citizens and the applicants had given birth to children who were themselves Finnish nationals. Both Ms. O and Ms. S were divorced from their Finnish husbands and had re-married third country nationals in Finland. Following a reference from the Finnish courts as to whether *Zambrano* governed the fathers' respective applications for residency in Finland, the Court of Justice seemed to indicate that this was not so:

> "66. It follows that the criterion [in *Zambrano*] relating to the denial of the genuine enjoyment of the substance of the rights conferred by virtue of European Union citizen status refers to situations in which the Union citizen has, in fact, to leave not only the territory of the Member State of which he is a national but also the territory of the Union as a whole.
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> 67. That criterion is specific in character inasmuch as it relates to situations in which, although subordinate legislation on the right of residence of third country nationals is not applicable, a right of residence may not, exceptionally, be refused to a third country national, who is a family member of a Member State national, as the effectiveness of Union citizenship enjoyed by that national would otherwise be undermined.
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20. This last paragraph again is of relevance to the present case, since the Court of Justice again stressed that the ultimate issue was whether an adverse immigration decision was likely to trigger a set of circumstances leading to the situation where the young children who were Union citizens were effectively compelled to leave the Union territory.

21. In *Alfredo Rendón Marin* the facts were different again. In this case the Spanish authorities had refused a residence permit to a Colombian national who was the father of two young children who had respectively Polish and Spanish citizenship. Although the present whereabouts of the Polish mother of the children were unknown, the Spanish authorities had refused a permit to the father because he had been convicted of an (unspecified) crime which had attracted a nine months prison sentence which had been subsequently suspended.

22. The Court of Justice held that in these circumstances the *Zambrano* principle was engaged, precisely because of the real risk that the children would in practice be compelled to leave the territory of the Union. As the Court explained (at para. 78):

> "…if…the refusal to grant residence to Mr. Rendón Marín, a third-country national, to whose sole care those children have been entrusted, were to mean that he had to leave the territory of the European Union, that could result in a restriction of that right, in particular the right of residence, as the children could be compelled to go with him, and therefore to leave the territory of the European Union as a whole. Any obligation on their father to leave the territory of the European Union would thus deprive them of the genuine enjoyment of the substance of the rights which the status of Union citizen nevertheless confers upon them…"

23. The Court went on to hold that the mere fact that Mr. Marín had been convicted of an offence was not in itself sufficient to deny him the benefit of the derivative *Zambrano* rights: it would instead have been necessary for the authorities to demonstrate the existence of a "genuine, present and sufficiently serious threat to public policy or of public security."

Application of the Zambrano case-law to the present case

24. It is accordingly clear from a consideration of post-*Zambrano* case-law that the critical consideration is whether the denial of residency or similar rights to one or both third country nationals who the parents of EU citizen children is likely to bring about a situation where those children are in practice compelled to leave the territory of the Union.

25. There is no doubt that, viewed from the perspective of the family and, indeed, the best interests of the children, it would be desirable that Mr. Bakare would continue to reside with his wife and children. His continued presence in the State would doubtless contribute to family stability and would provide welcome assistance to Ms. Bakare by sharing parental responsibility in respect of the rearing of the two children. No one can doubt but that, in principle at least, it is in the best interests of the children that they be raised by both parents.

26. Here it is impossible not to have considerable sympathy for Ms. Bakare, since she is being effectively compelled by force of circumstances to choose between having a normal married relationship with her husband on the one hand (if she were to return to Nigeria to follow him were he obliged to leave the State) and ensuring that in his absence the children are raised in an advanced Western economy such as Ireland on the other. As, however, the Court of Justice made clear in both *Derechi* (para. 68) and *O and S* (para. 68), these considerations in themselves are not decisive: these cases makes it clear that it is necessary to go further in order to demonstrate that the practical effect of the denial of residency would be that the children would be obliged to leave the territory of the Union.

27. Can it be said that this is a real risk in the present case? The available evidence suggests that there is in fact no such risk of any appreciable kind. Ms. Bakare did not in fact move from Ireland to Nigeria following her husband's deportation in 2009. Ms. Bakare is now a naturalised Irish citizen with (it would appear) secure employment and her children are even more integrated into the Irish school system than was the case in 2009. She has, moreover, access to high quality health care in this State which facilitates the

on-going management of her mental health issues. Despite the challenges which these mental health issues doubtless present, no evidence has been adduced to suggest that she would be medically or otherwise physically unable to look after the children without her husband's presence in the State. In all these circumstances the prospect of Ms. Bakare leaving Ireland for Nigeria with the children (including the Irish citizen child, Omotaoy Bakare jnr.) must be considered to be a remote one.

28. In these circumstances I find myself obliged to conclude that the present case is no difference in principle from other cases with broadly similar facts such as *Derechi* and *O and S*. Given that on these facts there is no appreciable risk that the children would be obliged to leave the territory of the State by reason of the decision of the Minister to refuse to grant residency to Mr. Bakare, I do not see that the present case properly comes within the scope of *Zambrano*. The net effect of this conclusion is that as the denial of such status will not in practice affect the entitlement of the second appellant child of the substance of his right to reside within the territory of the Union, his rights qua citizen of the Union remain unaffected for the purposes of Article 20 TFEU.

The Charter of Fundamental Rights
29. It is true that Article 7 of the Charter requires that account be taken of the right to respect for family life. As the decision in Marín makes clear, Article 7 of the Charter must be read (where applicable) in conjunction with the obligation to take into account the child's best interests, as recognised by Article 24(2).

30. All of this presupposes that the Charter applies in a case of this kind. The key provision of the Charter is, of course, Article 51(1) which provides that it applies only to Member States when they are "implementing" Union law. Classically, of course, a Member State is "implementing" Article 51(1) when it exercises a discretionary power pursuant to a Directive or a Regulation or when it takes a decision which is within the scope of EU law: see, *e.g.,* Case C-617/10 *Åkerberg Fransson* [2013] E.C.R. I-000.

31. In my view, however, the State was not implementing Union law within the meaning of Article 51(1) of the Charter when it refused Mr. Bakare a residency permission. That decision was, however, taken in accordance the State's sovereign authority to control and regulate the status of third country nationals. It was, accordingly, taken by the Minister in the exercise of the executive power of the State in accordance with Article 28.2 of the Constitution. Just as this Court held in *NHV v. Minister for Justice* [2016] IECA 86 that legislation enacted by the Oireachtas regulating the rights of asylum seekers in relation to employment and the labour market fell outside the scope of EU law (so that in that instance the State was not thereby implementing Union law for the purposes of Article 51 of the Charter), it can accordingly be said by the same token that the refusal of a residency permit to a third country national represents the exercise of an autochthonous sovereign power on the part of the State.

32. It follows, therefore, that as the State was not implementing Union law within the meaning of Article 51, the provisions of the Charter accordingly have no application to the present case.

Conclusions
33. Summing up, therefore, I would conclude as follows:

34. First, as the appellant has not demonstrated on the particular facts of the present case that there is any appreciable risk that the second appellant would be forced to leave the State or the territory of the European Union if he were refused residency in the State, I do not consider that the *Zambrano* principle is thereby engaged so far his case is concerned.

35. Second, the decision of the Minister to refuse to grant Mr. Bakare a residency permit represented the exercise by the executive branch of the sovereign power of the State to control and regulate the rights of third country nationals. It follows that the State was not thereby "implementing" Union law for the purposes of Article 51 of the Charter, so that the Charter has accordingly no application to the present case.

36. Third, it is true that, strictly speaking, this is simply an appeal taken by Mr. Bakare against the refusal of leave to apply for judicial review, so that the test governing the possible grant of leave remains that of arguability. It is clear, however, following a very full *inter partes* argument in this Court that at least so far as the facts and circumstances of the present case are concerned, the present application for judicial review is doomed to fail.

37. I would accordingly dismiss the appeal and I would equally refuse to grant Mr. Bakare leave to apply for judicial review.