THE HIGH COURT

[2011 No. 972 J.R.]

BETWEEN/

AO

APPLICANT

AND

MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM, IRELAND AND THE ATTORNEY GENERAL (No.2)

RESPONDENTS

JUDGMENT of Mr. Justice Hogan delivered on 17th January, 2012

1. This is an application brought by the applicant whereby he seeks to apply afresh for a stay on the implementation of his deportation order pending the determination of his application for leave to apply for judicial review in respect of the validity of that order. In a judgment delivered in these proceedings on 6th January, 2012, I vacated an earlier interim injunction which had been granted by me on the ground of material non-disclosure by the applicant: see *AO v. Minister for Justice and Law Reform*, High Court, 6th January 2012.

2. While the earlier judgment contains a fuller account of the background to this application, one may recapitulate by noting that the applicant is a Nigerian national who arrived here on a flight from Bratislava in March, 2009. The applicant was in possession of a Nigerian passport and an Austrian identity card. The passport was in the name of a Mr. X. and it contained a valid Irish entry visa.

3. Upon his arrival, the applicant originally presented himself to immigration officials as Mr. X. He later claimed asylum in Ireland under his true name. Subsequent Garda investigations established that Mr. X.'s passport had been stolen from him at a bank in Vienna. The applicant was subsequently charged with the offence of handling stolen property (*i.e.*, the stolen passport) and he pleaded guilty to this offence before the Cloverhill District Court in May, 2009 whereupon he received a six months sentence.

4. The applicant claimed asylum on the ground that he said that he had fled Nigeria as a result of threats from third parties following his engagement to a Muslim woman whilst he was Christian. He contended that his fiancee had been murdered. The asylum process came to an end following the determination of the Refugee Appeal Tribunal on 25th November, 2009, that the applicant's account was not credible.

5. On 12th January, 2010, the Minister informed the applicant of an intention to deport him. The applicant then applied for subsidiary protection, but he was informed on 9th August, 2011, that this application had been rejected. The applicant was also informed that the Minister had made a decision to deport him. At the end of August, 2011 the applicant then made an application under s. 3(11) of the Immigration Act 1999, to revoke the deportation order on the basis that he had two Irish citizen children. Although this application was rejected by letter communicated to the applicant on 14th September, 2011, it is nevertheless appropriate to describe the circumstances pertaining to the Irish citizen children.

6. According to Mr. O.'s own account, the first child, Ms. A, was born in Belfast in August, 2004 and now resides with the applicant's former partner, Ms. B., in Dagenham, London. The applicant avers that Ms. A. has visited him here and, further, that he provides some financial assistance to Ms. B. to assist her with child rearing. It would seem probable, however, that Ms. A. will live permanently in the United Kingdom under the care of Ms. B. The applicant is, however, presently excluded from the United Kingdom following a conviction there for dishonesty. Accordingly, the position of that child can be disregarded so far as this injunction application is concerned.

7. At some stage, however, following his application for asylum, Mr. O. became romantically involved with a Ms. Y. She is an Irish national who resided in the border region and in Dublin. Ms. Y. is professionally qualified and she is currently in the process of moving to practice her profession in the United Kingdom. It has also been suggested that Ms. Y. has already moved to the United Kingdom.

8. Ms. Y. maintains that she was cruelly deceived by Mr. O. During this period he had somehow managed to lead an affluent lifestyle and she contends that he led her to believe that he was previously a male model who was now working for a UK property firm. At no stage did Mr. O. disclose that he had a criminal record or that he was currently in the asylum process. She found herself unexpectedly pregnant in April, 2010 and the relationship foundered shortly thereafter after she discovered what she claims were compromising messages from another female on his mobile telephone. In fairness to Mr. O., it should be stated that this general account is emphatically denied by him, not least the contention that the pregnancy was unplanned.

9. Ms. Y. gave birth to a baby daughter (whom I shall describe as Baby C) towards the end of December 2010, but she says that Mr. O.'s request for access in respect of the child first came some three months later. Mr. O. then issued proceedings under the Guardianship of Infants Act 1964, in late March, 2011. Ms. Y. avers that she believes that this was simply a tactical and opportunistic ploy on his part so that his paternity of the child could be used to his advantage for immigration purposes, prompted by the publicity which surrounded the decision of the Court of Justice of the European Union in Case C-34/08 *Ruiz Zambrano* [2011] ECR I-0000. This judgment had been delivered on 8th March, 2011.

10. The applicant's application for guardianship in respect of the child currently remain outstanding and is now scheduled to be heard by the District Court on 22nd February 2012. As things stand, there seems very little prospect that Ms. Y and Mr. O. can be reconciled, not least since Ms. Y. feels betrayed by the fundamental manner in which she says she has been deceived by Mr. O.It could not be suggested that the prospects of Ms. Y. moving to Nigeria are in any way realistic or, indeed, that she would have any inclination whatever to do so. One must accordingly assume, therefore, that if Mr. O. is deported that Baby C will have no contact whatever with her father and may well never meet him, whether during her childhood or otherwise.

11. This is accordingly the background to the present application for an interlocutory injunction.

The application for an interlocutory injunction under O. 84, r. 20(8)
12. The applicant now seeks an injunction pursuant to the provisions of the new O. 84, r. 20(8) RSC. This provision came into force on 1st January, 2012, and it is in the following terms:-

"Where leave to apply for judicial review is granted then the Court, should it consider it just and convenient to do so, may, on such terms as it thinks fit-

> (a) grant such interim relief as could be granted in an action begun by plenary summons,
>
> (b) where the relief sought is an order of prohibition or certiorari, make an order staying the proceedings, order or decision to which the application relates until the determination of the application for judicial review or until the Court otherwise orders."

13. It is clear from the terms of O. 84, r. 20(8)(a) in particular that the new rules apply standard *Campus Oil* principles (*Campus Oil Ltd. v. Minister for Industry and Commerce(No.2)* [1983] I.R. 88) to all applications for interlocutory relief in judicial review proceedings, including those cases where certiorari is the primary relief which is being sought in the substantive proceedings: see, e.g., the reasons set out in more detail in my own judgment in *PI v. Minister for Justice and Law Reform*, High Court, 11th January, 2012. It is, accordingly, necessary for the applicant first to establish that he has an arguable case so that there is a fair question to be determined.

Can the applicant establish a fair question to be tried?
14. As matters stand, the only grounds advanced for the injunctive relief relate to arguments based on the applicant's entitlement to apply to the District Court for either guardianship or access in respect of his daughter, Baby C. There is, however, presently a motion before the court whereby the applicant seeks to expand these grounds so as, *inter alia*, to include *Zambrano*-type issues and, indeed, to include his daughter as a party to these proceedings. I will assume in his favour for the purposes of this present application that this application for leave to amend the pleadings will be granted.

15. It is against this background that we may now turn to consider- if only provisionally - these expanded grounds.

Can the applicant rely on *Zambrano* principles?
16. In *Ruiz-Zambrano* the applicants were a Columbian couple residing in Belgium, the second and third of whose children were Belgian. Their asylum application in Belgium had been unsuccessful, although the Belgian authorities could not return them to Colombia by reason of the on-going civil conflict in that country. Although the father of the children had previously been working and had paid social security contributions in Belgium, he was refused unemployment benefit by reason of his illegal status. Critical to the issues in the case was that the second and third children had Belgian citizenship and, accordingly, were European citizens for the purposes of Article 20 TFEU. The applicants argued that if the father could not obtain the benefit of social security contributions, the children would be obliged to leave Belgium and, indeed, the territory of the Union itself, thus setting at naught one of the essential elements of European citizenship, namely, the right to live in the territory of the Union.

17. Following a reference from the Belgian courts, the Court of Justice held as follows:-

> "41. As the Court has stated several times, citizenship of the Union is intended to be the fundamental status of nationals of the Member States... .
>
> 42. In those circumstances, 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.
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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.

18. It will accordingly be seen that *Ruiz-Zambrano* turns on factors such as dependency, residence in the territory of the Member State in question and the right of European citizens to enjoy one of the real benefits of that citizenship, namely, the right to reside within the territory of the Union. In the context of Zambrano, the rights in question are those of the citizen child and insofar as a third country national parent of such a child has any rights in this regard, they are entirely derivative from that of the child.

19. In the present case Mr. O. cannot show that the child is in any way dependent on him. Indeed, so far as is known, Baby C has not even seen him and nor has he paid any contributions to her upkeep. In any event, there is no realistic prospect whatever that the child will be obliged by *State action* to leave the territory of the *Union*, since the mother is an Irish national with a right of residence in Ireland and, furthermore, subject to minor qualifications, she has a free movement right derived from Union law to move to any of the other twenty six member states of the Union. In other words, even if Mr. O. were to be deported to Nigeria, there is no prospect at all that Baby C would be thereby obliged to leave the territory of the Union, since it seems clear that she would reside with her mother in either Ireland or the United Kingdom.

20. In these circumstances the applicant cannot lay claim to any *Zambrano* rights. This accords with the views taken by Herbert J. in the course of Mr. O.'s earlier interlocutory injunction application last September when he said that the facts of the present case were too remote from that of *Zambrano*. (I might in passing observe that it was the failure of the applicant to disclose the fact that such

an application had been made (unsuccessfully) to Herbert J. that led me to vacate the interim stay originally granted by me in October, 2011.)

21. That view was confirmed by the subsequent decision of the Court of Justice in Case C-256/11, *Dereci* [2011] E.C.R. I-000. Here the issues referred arose from decisions of the Austrian authorities to refuse residence permits to third country nationals who had married Austrian citizens. In some of the cases, the couples had children who were Austrian nationals. On the general *Zambrano* issue the Court of Justice stated:-

> "European Union law and, in particular, its provisions on citizenship of the Union, must be interpreted as meaning that it does not preclude a Member State from refusing to allow a third country national to reside on its territory, where that third country national wishes to reside with a member of his family who is a citizen of the Union residing in the Member State of which he has nationality, who has never exercised his right to freedom of movement, provided that such refusal does not lead, for the Union citizen concerned, to the denial of the genuine enjoyment of the substance of the rights conferred by virtue of his status as a citizen of the Union, which is a matter for the referring court to verify."

22. So far as the present case is concerned, the situation is entirely internal to this State inasmuch as Ms. Y. is an Irish citizen. Her right to reside here stems from Article 9 of the Constitution (and, indeed, from a generally accepted principle of international law, namely, that a citizen of a state cannot be denied entry to the territory of that state) and it does not derive at all from European Union law. Nor, for the reasons already mentioned, is there any prospect that the child will be obliged to leave the territory of the Union, even if Mr. O. were to be deported to Nigeria.

23. It follows, therefore, that the applicant cannot raise a fair question so far as the *Ruiz-Zambrano* arguments are concerned.

The effective remedy argument

24. The second argument is that Mr. O. has been denied an effective remedy to challenge the refusal of the subsidiary protection decision insofar as there is no full right of appeal against an adverse decision is, in my view, unsustainable for all the reasons set out in my judgment in *Efe v. Minister for Justice, Equality and Law Reform* [2011] IEHC 214, [2011] 2 I.L.R.M. 411 and the authorities cited therein.

25. It follows, therefore, that the applicant cannot establish a fair question in respect of this issue either.

Access to the courts, guardianship and the rights of the child

26. If one looked, therefore, at this application for an injunction from the perspective of the applicant, it would be clear that it would be doomed to fail *in limine*. After all, it must be recalled that Mr. O. arrived in the State by means of a fundamentally dishonest, mean and devious act, namely, the theft of a passport and identity document, misconduct which was justly found to merit a six month prison sentence. His subsequent claims to international protection were adjudged not to be credible and it is not without significance that the asylum decision has not been challenged in these proceedings.

27. But I cannot- and do not- look at this matter from the standpoint of the applicant, but rather entirely from the perspective of his daughter, Baby C: see, *e.g.*, my own judgment in *Oboh v. Minister for Justice, Equality and law Reform* [2011] IEHC 102 where I held that the fact that asylum seeking parents were complicit in swearing false affidavits could not affect the granting of any relief designed to protect the interests of their innocent dependent children.

28. Article 42.1 of the Constitution envisages that it is the "right and duty" of the parents of a child to provide for its education, welfare and upbringing. Insofar as the Constitution speaks of it being the "duty" of parents, it is because that the child enjoys - presumptively, at least- the right to have both of its parents engaged in that vital and responsible task. This is because, as O'Donnell J. put it in *Nottinghamshire C. C. v. B*. [2011] IESC 48:-

> "...the Articles [41 and 42] at least in general terms, state propositions that are by no means eccentric, uniquely Irish or necessarily outdated: there is a working assumption that a family with married parents is believed to have been shown by experience to be a desirable location for the upbringing of children; that as such the family created by marriage is an essential unit in society; that accordingly, marriage and family based upon it is to be supported by the State. Consequently the State's position is one which does not seek to pre-empt the family, but rather seeks to supplement its position so that the State will only interfere when a family is not functioning and providing the benefits to its members (and thus the benefits to society) which the Constitution contemplates. In that case, the State may be entitled to intervene in discharge of its own duty under the Constitution and to protect the rights of the individuals involved."

29. I would merely add that the active involvement of both parents in child-rearing is also inherently desirable from the child's perspective, even if the parents are not married, assuming always that this is feasible and practicable.

30. Insofar as Constitution refers to the "right" of parents in this regard, it is because that in a free society parents must have the right to educate and rear their children according to their own philosophical, religious or political ideals, even if in some cases those ideals are seen by society at large as unconventional, unorthodox or even eccentric. If it were otherwise, it might have meant that the children of those who challenged the prevailing orthodoxies- orthodoxies which, as our history teaches us, can and do change, sometimes quickly and often profoundly - might have found that their children were taken into care or that they otherwise would have come to the attention of the State authorities.

31. There are, of course, definite limits to this parental freedom. It cannot be exercised in a manner which would threaten the general welfare of the child: sec, *e.g., North Western Health Board v. HW* [2001] 3 I.R. 622, *In re Baby AB: Children's University Hospital Temple St. v. CD* [2011] 21.L.R.M. 262. The State is the ultimate guardian of the common good. As such, it has a vital interest in ensuring that, as I put it in *Baby AB* ([2011] 2 I.L.R.M. 262 at 270-271) the welfare of the child is safeguarded:-

> "There is thus no doubt at all but that parents have the constitutional right to raise their children by reference to their own religious and philosophical views. But, as Article 42.5 makes clear, that right is not absolute. The State has a vital interest in ensuring that children are protected, so that a new cohort of well-rounded, healthy and educated citizens can come to maturity and are thus given every opportunity to develop in life. This interest can prevail even in the face of express and fundamental constitutional rights. No one would suggest, for example, that the right of the State to protect children against possible exploitation and abuse would not, for example, enable the Oireachtas to enact legislation prohibiting the involvement of children in street preaching and the distribution of religious literature on the street at night, even if such activities were thought by some to be scripturally mandated or that the children were being directed in such religious activities for religious reasons by their parents: see*, e.g.,* the judgment of Ruttledge J. for the US Supreme Court

> on this very point in another noted decision concerning the [Jehovah] Witnesses, *Prince v. Massachusetts* 321 US 158 (1944)."

32. Of course, Article 42.1 applies only to married couples and their children: see, e.g., *The State (Nicolaou) v. An Bord Uchtala* [1966] I.R. 567. But even in the very early days of the Constitution Gavan Duffy P. stated in *Re M. an infant* (1946] I.R. 334, 344 that:-

> "It is now universally recognised that the paramount consideration on such an application as this must be the welfare of the child, the word 'welfare' being taken in its widest sense. Under Irish law, while I do not think that the constitutional guarantee for the family (Art. 41 of the Constitution) avails the mother of an illegitimate child, I regard the innocent little girl as having the same 'natural and imprescriptible rights' (under Art. 42) as a child born in wedlock to religious and moral, intellectual, physical and social education, and her care and upbringing must be the decisive consideration in our judgment,"

33. The important statement of principle has been expressly endorsed by the Supreme Court: see *G. v. An Bard Uchtála* [1980] I.R. 32 at 67 (per Walsh J.) and 87 (per Henchy J.). As Henchy J. put it:-

> "….all children, whether legitimate or illegitimate, share the common characteristic that they enter life without any responsibility for their status and with equal claim to what the Constitution expressly or impliedly postulates as the fundamental rights of children."

34. It follows, therefore, that all children- irrespective of the marital status of their parents - have the same equal rights to that which the Constitution postulates as representing the fundamental rights of children in a family setting. Any other conclusion would be flagrantly inconsistent with the Constitution's command of equality before the law in Article 40.1 in light of the modern case-law on this subject: see, e.g., *An Blascaod Mór Teo. v. Commissioners of Public Work (No.2)* [2000] 1 I.R. 6, 19, per Barrington J. It might equally be stated (as Henchy J. did in *G.*) that this constitutional premise means that non-marital children must be deemed to have an unenumerated personal right by virtue of Article 40.3.1 to have the same rights as children whose parents are married.

35. What is not in doubt is that one of those rights is the presumptive right of the child to the care and company of his or her parents. While it is difficult to view the present application on the part of Mr. O. for guardianship and access in respect of Baby C. without some degree of scepticism - perhaps even cynicism - this is a matter for the exclusive judgment and assessment of the District Court, which judgment and assessment in respect of guardianship and access I would not wish to pre-empt in any way. I would merely observe that the present proceedings have made the speedy resolution of these guardianship proceedings all the more necessary.

Conclusions

36. Summing up, therefore, I am of the view that since it may be held by the District Court that it is in the interests of Baby C that her father enjoy either rights of access or even guardianship rights in respect of her, I propose to stay the enforcement of the deportation order against Mr. O. pending the outcome of that application for what I trust will be a short period, to be measured at most in weeks.

37. The stay is prompted exclusively by concerns for the ultimate welfare of Baby C and by a desire to protect her (presumptive) constitutional right to the care and company of both parents, conscious as I am that she probably will have no contact whatever with her father in Nigeria were he to be deported back to his country of origin. A further consideration is that Mr. O. would find it difficult to advance his case in the guardianship proceedings were he not physically present before the District Court to give oral evidence if necessary.

38. In the event that the District Court rules adversely to this application, then the injunction will lapse. If, on the contrary, the District Court finds that it would be in the best interests of the child to have some degree of access to her father, then the extent of any injunctive relief can be re-assessed at that juncture. Were this to be the case, then the State's vital interest in an effective asylum and immigration system would have to be balanced against the child's right to have the care and company of her father. Beyond securing effective access to the court in the short term for guardianship purposes, it would be premature at this point to examine what the position might be thereafter in that event.

39. For the moment, however, it is sufficient to continue the stay until 24th January, 2012 when the matter will be mentioned to me again. At that juncture I will discuss with counsel the precise form of the relief to be granted pending the determination of the guardianship application in the District Court.

APPROVED