THE HIGH COURT
JUDICIAL REVIEW

[2016 No. 527 JR]

BETWEEN

KINGSLEY OKOLIE
AND
ANGEL DANIELLE ISHIOMA OKOLIE
(AN INFANT SUING BY HER FATHER AND NEXT FRIEND KINGSLEY OKOLIE)

APPLICANTS

AND
THE MINISTER FOR JUSTICE AND EQUALITY

RESPONDENT

JUDGMENT of Mr Justice David Keane delivered on the 3rd September 2018

Introduction
1. This is an application for the costs of judicial review proceedings that have become moot.

2. The first applicant, Kingsley Okolie, is a citizen of Nigeria and the father of the second applicant, Angel Danielle Ishioma Okolie, who was born in the State on 8 July 2004 and is a citizen of Ireland.

3. Mr Okolie entered the State unlawfully in October 2013 or 2015 - on the papers before me it is not entirely clear which. On 19 October 2015, through his solicitors, he wrote to the Irish Naturalisation and Immigration Service ('INIS'), seeking permission to reside in the State based on his parentage of an Irish citizen child, in reliance upon the principle identified by Court of Justice of the European Union ('CJEU') in Case C-34/09 *Gerardo Ruiz Zambrano v Office national de l'emploi* EU:C:2011:124 ('the *Zambrano* principle').

4. By order made on 10 October 2016, Mac Eochaidh J granted the applicants leave to seek an order of *mandamus* compelling the respondent, the Minister for Justice and Equality ('the Minister'), to issue a decision on that application.

5. On 20 December 2016, the INIS wrote to Mr Okolie, informing him of the Minister's decision to refuse him permission to reside and work in the State under the *Zambrano* principle, thereby rendering these proceedings moot.

6. Mr Okolie and his daughter now seek their costs of the proceedings against the Minister.

The correct approach to the costs of moot proceedings
7. The principles I distill from the leading cases on the correct approach to the costs of moot proceedings are the following:

> (a) Under O. 99, r. 1(4) of the Rules of the Superior Courts, the general rule on the costs of proceedings is that they follow the event, although there is a discretion to order otherwise; *Grimes v Punchestown Developments Co. Ltd* [2002] 4 IR 515 (at 522).
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> (b) Even where the substantive point has become moot, the first inquiry which a court must make on a follow on costs application is to decide whether or not there exists an "event" to which the general rule can be applied; *Godsil v Ireland* [2015] 4 IR 535 at 555-6. Such an event may exist where, for example, the actions that rendered the proceedings moot were carried out in direct response to the issue of the proceedings; *ibid* (at 557).
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> (c) Where there is no 'event', the basic rule, though not one that should be applied over-prescriptively, is that, in the absence of significant countervailing factors, the court should lean ordinarily in favour of making no order as to costs where a case has become moot due to 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; *Cunningham v. President of the Circuit Court* [2012] IESC 39 , [2012] 3 I.R. 222 (at 230).
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> (d) There are hybrid cases that do not fit neatly into either category; *Cunningham* (at 23). The most obvious instance of such a case is where a statutory officer or body, whose conduct is under challenge, has changed position, to a greater or lesser extent, due to wholly external factors. Statutory authorities have an obligation to exercise their powers in a proper manner. Where circumstances change, it is not only reasonable but necessary for them to take that into account, which may result in a change of position, rendering proceedings moot. When that happens, it may be inappropriate to characterise the proceedings as having become moot by the unilateral action of that authority, whereas it may be appropriate to do so if there has simply been a change of mind or the adoption of a new and different view. Where the immediate or proximate cause of mootness is an act or omission of a statutory body or officer, which that body or officer claims was precipitated by an external factor or factors, that body or officer bears the evidential burden in that regard; *Cunningham* (at 230-2)
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> (e) The court cannot and should not form a view on the merits of the proceedings - *i.e.* whether the substantive application for judicial review would have succeeded or failed; *Cunningham* (at 233).
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> (e) The quite different test for determining the issue of liability for the costs of moot proceedings posited in *S.G. and N.G. v Minister for Justice, Equality and Law Reform & Ors* [2006] IEHC 371, (Unreported, High Court (Herbert J), 16th November, 2006) - i.e. whether in the circumstances it was reasonable for the applicants to have commenced their application for leave to seek judicial review - must now be viewed as one limited in its application to the facts of that case; *Matta v Minister for Justice* [2016] IESC 45 (Unreported, Supreme Court (MacMenamin J; Dunne and O'Malley JJ concurring), 26th July, 2016) (para. 22).

The *Zambrano* principle
8. Article 20(1) of the Treaty on the Functioning of the European Union ('TFEU') establishes the concept of European Union citizenship by providing that every person holding the nationality of a Member State shall be a citizen of the Union. Under Article 20(2) of the

TFEU the rights of the Union citizen are expressed to include the right to move and reside freely within the territory of the Member States.

9. In *Zambrano*, the CJEU ruled:

> '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.'

10. This is the *Zambrano* principle, upon which Mr Okolie, as the third country national ('TCN') parent of an infant Irish - and, hence, Union - citizen daughter, sought to rely.

11. How may the decision to refuse permission to a third country national to work or reside in the Member State of the nationality of his dependent Union citizen child deprive that child of the genuine enjoyment of the substance of the rights attaching to the status of European Union citizenship? In Case C-256/11 *Murat Dereci v Bundesministerium für Inneres* EU:C:2011:734, the CJEU first noted (at para 65) that, in Zambrano, the Court was satisfied that the refusal to grant the right of residence sought would require the Union citizen children concerned to leave the territory of the Union with their TCN parents, before concluding (at para 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.'

12. The judgment of the CJEU continues:

> '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.'

13. In *Bakare v Minister for Justice* [2016] IECA 292, (Unreported, Court of Appeal (Hogan J; Birmingham and Irvine JJ concurring), 19th October, 2016), the Court of Appeal summarised the position on what amounts to a denial of the genuine enjoyment of the substance of the rights of EU citizenship in this context (at para. 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.'

14. At the risk of over-simplification, I conclude that a third country national who wishes to establish an entitlement to reside in the State under the *Zambrano* principle must establish:

> (a) parentage of a European Union citizen child;
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> (b) the dependence of that Union citizen child upon that parent; and
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> (c) as an exceptional situation, a real risk that the Union citizen child will be compelled to leave the territory of the Union if that parent is not permitted to reside in the State.

15. The CJEU has addressed the proper approach to the assessment of whether there is a relationship of dependency sufficient to compel a Union citizen child to leave the territory of the Union in Case C-133/15 *Chavez-Vilchez v Raad van bestuur van de Sociale verzekeringsbank* EU:C:2017:354, ruling:

> '1. Article 20 TFEU must be interpreted as meaning that for the purposes of assessing whether a child who is a citizen of the European Union would be compelled to leave the territory of the European Union as a whole and thereby deprived of the genuine enjoyment of the substance of the rights conferred on him by that article if the child's third-country national parent were refused a right of residence in the Member State concerned, the fact that the other parent, who is a Union citizen, is actually able and willing to assume sole responsibility for the primary day-to-day care of the child is a relevant factor, but it is not in itself a sufficient ground for a conclusion that there is not, between the third-country national parent and the child, such a relationship of dependency that the child would indeed be so compelled were there to be such a refusal of a right of residence. Such an assessment must take into account, in the best interests of the child concerned, all the specific circumstances, including the age of the child, the child's physical and emotional development, the extent of his emotional ties both to the Union citizen parent and to the third-country national parent, and the risks which separation from the latter might entail for the child's equilibrium.
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> 2. Article 20 TFEU must be interpreted as not precluding a Member State from providing that the right of residence in its territory of a third-country national, who is a parent of a minor child that is a national of that Member State and who is responsible for the primary day-to-day care of that child, is subject to the requirement that the third-country national must provide evidence to prove that a refusal of a right of residence to the third-country national parent would deprive the child of the genuine enjoyment of the substance of the rights pertaining to the child's status as a Union citizen, by obliging the child to leave the territory of the European Union, as a whole. It is however for the competent authorities of the Member State concerned to undertake, on the basis of the evidence provided by the third-country national, the necessary enquiries in order to be able to assess, in the light of all the specific circumstances, whether a refusal would have such consequences.'

16. It seems to me that the ruling encapsulates two principles of particular relevance to the present application for costs. The first is

that a wide range of factors are relevant to the determination of whether such a relationship of dependency exists between the third country national parent and the Union citizen child that refusal of the permission sought would compel departure from the territory of the Union, including: whether the other parent of the child is entitled to remain and is able and willing to assume sole responsibility for the primary day-to-day care of the child; and what is in the best interests of the child concerned in all of the circumstances, including the age of the child, the child's physical and emotional development, the extent of his emotional ties both to the other parent entitled to remain and to the third-country national parent, and the risks, if any, which separation from the latter might entail for the child's equilibrium.

17. The second principle is that it is for the third country national concerned to provide the relevant Member State with the evidence to enable it to carry out the necessary enquiries to conduct that assessment.

Why did these proceedings become moot?
18. In order to properly address the question of why these proceedings became moot, it is necessary to consider briefly the chronology of relevant events.

19. Through his solicitors, Mr Okolie wrote to the INIS on 19 October 2015, seeking permission to reside in the State and enclosing a completed application form for permission to remain in the State as the TCN parent of an Irish citizen child. Apart from the birth certificate and passport details necessary to establish the identity and nationality of Mr Okolie and his daughter, and their family relationship; a single utility bill in the name of Mr Okolie's wife, covering the period April/May 2015, ostensibly to establish Mr Okolie's address; and a letter from the child's school, confirming her enrollment there; the only evidence submitted to establish an exceptional situation of the kind covered by the *Zambrano* principle was a handwritten note, ostensibly from his wife, asserting that they were living together at the address provided; that Mr Okolie was a good father; and that he helped in minding the children and dropping them to school.

20. The INIS confirmed receipt of that correspondence by letter dated 23 October 2016 and, on 22 February 2016, provided a substantive reply seeking documentary evidence to confirm the role that Mr Okolie was playing in his daughter's life, to include: family photographs, a letter from her GP confirming that he had accompanied her to medical appointments; a letter from her school concerning his involvement in her school life; an affidavit from her mother confirming his involvement in his daughter's life; a declaration from Mr Okolie concerning any previous criminal convictions or orders made in family law proceedings; and any other information he may wish to provide.

21. Mr Okolie replied through his solicitors by letter dated 11 March 2016. That letter states that family photographs are enclosed, although they are not exhibited. There is a letter from a GP, stating tersely that the child attends that practice and 'is brought by her mother and father.' There is a short letter from the child's school, again confirming her enrollment there, noting that she is an above average student with an excellent record for attendance and punctuality and a supportive home environment, although saying nothing about the involvement of Mr Okolie in that regard. There is an extremely short letter from Mr Okolie's wife, upon which her signature is witnessed by a solicitor but which is not the affidavit requested, stating that Mr Okolie does not have any problem helping to take care of the children, and is a good father and husband. There is another utility bill covering the period November/December 2015 in the joint names of Mr Okolie and his wife; and there is a signed declaration of Mr Okolie to the effect that he has never had any criminal convictions and that there are no criminal charges pending against him at home or abroad, nor have any court orders been made against him in family law proceedings. Although the relevant cover letter is not exhibited on behalf of Mr Okolie, on 14 March 2016, the INIS acknowledged receipt of those documents.

22. I pause here to note that, while it can be argued that Mr Okolie had thus complied, or very nearly complied, with the strict terms of the specific request for further evidence and information made of him by the INIS, he appears to have rejected a proactive approach to the obligation upon him to provide the evidence necessary to establish and exceptional situation of the kind covered by the *Zambrano* principle, adopting instead an entirely passive or reactive approach in providing only most, though not all, of the information or documentation that the INIS specifically requested from him. While it was perfectly open to Mr Okolie and his legal representatives to make the relevant application in that way, it seems to me that Mr Okolie can hardly be heard to complain if, in consequence, the necessary inquiries on the part of the INIS took longer than they otherwise might have done.

23. On 3 May 2016, Mr Okolie's solicitors wrote to the INIS asking when a decision on the application would be made. On 4 July 2016, they wrote again, demanding a decision within 10 days and threatening to take legal action in default without further notice to the Minister. That letter was received by the INIS on 10 July 2016 and, on 12 July 2015, it wrote in reply requesting the provision of further specific documentation, most notably evidencing the circumstances of Mr Okolie's unlawful entry into the State and any financial support he provided for his daughter during the years prior to his unlawful entry into the State in 2013.

24. I regret to say that this sequence of events lends an absurd quality to the averment made by Mr Okolie, in an affidavit that he swore on 13 July 2016, that at that stage the Minister had before her all of the information required to determine his claim to have established that an exceptional situation existed in his case of the kind covered by the *Zambrano* principle, requiring that he be granted permission to reside and work in the State in order to protect the rights of his daughter as a Union citizen.

25. Mr Okolie responded through his solicitors by letter dated 20 July 2016 that, in effect, he had no such documentation to offer. In relation to the financial support he provided for his daughter between her birth in 2004 and his unlawful entry into the State in 2013, he stated that, while he held two bank accounts in Africa he could not produce statements in relation to them, but that this was, in any event, immaterial because he never transferred funds from those accounts directly for the support of his daughter. Rather, he got friends travelling to Ireland to carry money for him and he carried money to Ireland on occasion himself. The letter continued by making the claim that, as far as Mr Okolie can recall, he gave approximately €4,000 over that eight year period to his family. There are many ways of evidencing such a claim. They include, but are not limited to, the production of Mr Okolie's banks statements to evidence the relevant cash withdrawals; the production of Mrs Okolies' bank statements to evidence the equivalent cash lodgments; affidavits from the persons involved in couriering the relevant cash payments, exhibiting supporting travel records, and so on. No such evidence was produced in this case.

26. The letter concluded by stating that the applicant 'desperately needed to to work [in the State] and to provide for his family', although no attempt appears to have been made to apprise the Minister of his income prior to his unlawful entry into the State, or of his own means or the means otherwise available to his family at any material time.

27. Once again, I pause here to note that it must have been apparent to Mr Okolie and his legal advisers that they had done little in terms of the paucity of information and documentation they had provided to truncate the necessary period of inquiry into the nature and degree of any relationship of dependency between Mr Okolie and his Irish citizen daughter for the purpose of considering the potential application of the *Zambrano* principle.

28. Nonetheless, as previously noted, on 10 October 2016, application was made *ex parte* to Mac Eochaidh J for leave to seek an order of *mandamus* compelling the Minister to issue a decision on that application. Peculiarly, that application was grounded on an affidavit sworn by Mr Okolie on 13 July 2016, and a statement of grounds dated 14 July 2016, some three months earlier. Mr Okolie was given leave to issue an originating notice of motion returnable for 28 November 2016, which was duly done.

29. Meanwhile, on 28 October 2016, Mr Okolie wrote to the INIS personally, rather than through his solicitors, seeking an update on his application. That letter was received by the INIS on 2 November 2016 and, on the same day, it replied, acknowledging that request before continuing:

> 'We note that you are seeking to have a decision made in your case. Please be advised that your case is amongst many to be considered by the Minister at present and, as such, at this point in time, it is not possible to provide a specific indication as to when our case will be finalised.
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> While we would have no wish to delay the processing of your application, you will appreciate that yours is one of a sizeable number of such applications we have on hand. Additionally, we endeavour to deal with such applications on a chronological bassis and, as such, there will inevitably be applications ahead of yours in the queue. However, as stated above, we would have no wish to delay the processing of your case so we will seek to deal with it as soon as possible, subject to all the required information and documentation being on file.'

30. On 9 November 2016, the INIS wrote again to the solicitors for Mr Okolie, seeking additional information including the following:

> (a) An explanation of the note on the Minister's file that Mrs Okolie had previously stated that, on 10 February 2001, she had married one Louis Okolie, whose date of birth was 4 June 1966, and documentary evidence of Mr Okolie's marriage to Mrs Okolie, preferably a copy of their marriage certificate; and
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> (b) Documentary evidence of the travel arrangements whereby Mr Okolie unlawfully entered the State through Northern Ireland in October 2015.

31. The INIS sent a letter of reminder on 24 November 2016, seeking the provision of that information and documentation within 7 days to enable Mr Okolie's application to be considered.

32. The solicitors for Mr Okolie wrote a letter in reply, dated 30 November 2016. On the first point, they enclosed a copy of the certificate of his marriage to Mrs Okolie on 10 February 2001, explaining that Mrs Okolie was unaware of ever having stated that she had married one Louis Okolie, date of birth 4 June 1966, on that date. Those solicitors were instructed that Mrs Okolie's father and brother are both named Louis, and that her brother's date of birth is, indeed, 4 June 1966. On the second point, they enclosed a copy of an e-mail confirming that details of Mr Okolie's air-travel between London and Belfast at the material time (although that e-mail was not exhibited in these proceedings).

33. The INIS received that letter on 13 December 2016 and replied acknowledging it the following day.

34. As previously noted, on 20 December 2016, the INIS wrote to Mr Okolie, informing him of the Minister's decision to refuse him permission to reside and work in the State under the *Zambrano* principle, thereby rendering these proceedings moot.

35. Although it is not material to the present application, for completeness I should add that a letter confirming the proposal of the Minister to deport Mr Okolie issued on the same date.

36. On 19 April 2017, Eileen O'Reilly, a higher executive officer in the Immigration and Naturalisation Service of the Department of Justice and Equality, swore an affidavit on behalf of the Minister for the purpose of resisting the present application for costs. In that affidavit, having deposed to the chronology of events that have just endeavoured to summarise, Ms O'Reilly goes on to aver as follows:

> '20. I say that the decision on [Mr Okolie's] application was made at a time when all necessary information and/or documentation had been received and it was dealt with as the next application in the chronological system operated by the Unit. I say and believe that the issuing of the within proceedings did not have any effect on the processing of this application which was processed in the normal course at the time it reached the top of the queue.
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> 21. I say that as appears from the correspondence exhibited by [Mr Okolie] and as outlined above, information was received from [Mr Okolie] in stages and at each point only on request. As further appears, I say that all correspondence was replied to immediately by the [Minister].
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> 22. I say that due to the limited resources available and the large number of applications received there is a backlog in processing such applications. I say further that all applications are dealt with in chronological order and that there was no undue delay in the processing of the application the subject matter of the within proceedings and that the decision issue in the ordinary course when all requisite information was to hand.'

Arguments

37. Counsel for Mr Okolie submits that the correct test to be applied to the issue of costs in proceeding that have become moot is that applied by MacDermott J in *Mansouri v Minister for Justice and Law Reform* [2013] IEHC 274, (Unreported, High Court, 29th January, 2013), following Herbert J in *S.G. and N.G. v Minister for Justice, Equality and Law Reform & Ors* [2006] IEHC 371 (Unreported, High Court, 16th November, 2008), namely whether in the circumstances it was reasonable for the applicants to have commenced their application for leave to seek judicial review.

38. The written submissions filed on behalf of Mr Okolie go on to assert, bluntly and unhelpfully, that the decision of *Matta v Minister for Justice* is 'relied upon and is of relevance.' No citation is provided. No attempt is made to identify the principle or principles for which it is authority. And not attempt is made to identify the issue or issues in the present application to which it is relevant.

39. I am left to infer that this is a reference to the decision of the Supreme Court reported as *Matta v Minister for Justice* [2016] IESC 45 (Unreported, Supreme Court (MacMenamin J; Dunne and O'Malley JJ concurring), 26th July, 2016), rather than to that of the High Court in the same case case, reported as *Matta v Minister for Justice* [2010] IEHC 488 (Unreported, High Court (Clark J), 21st

July, 2010). And yet, it was in that appeal that MacMenamin J (Dunne and O'Malley JJ concurring) concluded that the decision in *S.G. and N.G.* must now be viewed as one limited in its application to its own facts.

40. On the basis of this apparent misconception, Counsel for Mr Okolie has mounted an elaborate argument that it was reasonable for Mr Okolie to apply for an order of mandamus when he did.

41. In his statement of grounds, Mr Okolie contends, in effect, that the Minister's failure by 10 October 2016 to make a decision on the claim to a derived right of residence in the State on the basis of the *Zambrano* principle first intimated – though hardly properly evidenced - to the Minister on his behalf on 19 October 2015 was: (a) a breach of Mr Okolie's administrative law entitlement to a decision within a reasonable time as an aspect of his entitlement to fair procedures; and (b) a breach of both Mr Okolie's EU law right to good administration under Art. 41 of the CFEU and his child's right to free movement within the EU as a Union citizen.

42. I will briefly address each of those two points in turn. *Nearing v Minister for Justice* [2010] 4 IR 211 was an application for the costs of an application for judicial review that had become moot. In April 2009, the third country national applicant in that case had commenced judicial review proceedings for an order of *mandamus* directing the Minister to make a decision on an application he had made in August 2007 for long term residency permission under a non-statutory administrative scheme operated by the Minister. The Minister wrote granting that application in May 2009, rendering the proceedings moot.

43. Having accepted that the applicant was entitled as a matter of law to have a decision made on his application within a reasonable time, Cooke J went on to State (at 217):

> '[21] Thus, the issue in this case is one as to what is "a reasonable time" in these circumstances. It goes without saying, perhaps, that what is reasonable depends on the circumstances of each case, including what is the decision sought, the particularities of the applicant's position, and the impact that any delay may have and also on the conduct of the administrative decision maker in dealing with applications, together with any explanation given for the time taken. *Mandamus* does issue against an administrative decision maker simply because there is a duty to make a decision. *Mandamus* lies to make good an illegal default in the discharge of a public duty. There must have been, either expressly or by implication, a wrongful refusal to make a decision or such an egregious and unjustified delay in dealing with the application as to be tantamount to a refusal in effect.'

44. In that case, Cooke J concluded that, had the application for judicial review come on for hearing in the first week of May 2009, he had no doubt that *mandamus* would not have issued and that, in those circumstances, the applicant was not entitled to his costs of the moot proceedings.

45. If I were required to conduct the same exercise in this case (although, on the authority of *Cunningham* and *Matta*, already discussed, I do not believe I am), I have no doubt that I would have come to the same conclusion. Mr Okolie submits that a claim to a derived right of residence as a TCN parent covered by the *Zambrano* principle is one that can be decided very quickly in all cases and cannot reasonably take longer than six months in any case. I do not accept that proposition for two principal reasons: first, because of the broad range of specific circumstances that need to be taken into account by the competent authorities in conducting the necessary inquiry into this type of claim; and second, because of the extent to which the relevant time scale for such an inquiry must inevitably be affected by how promptly the TCN parent provides the evidence on which he or she relies and by the nature and quality of that evidence.

46. Amongst the particularities of Mr Okolie's position in this case was the evident belief he shared with his legal representatives that it was for the Minister to advise him on the specific evidence he should produce to establish the existence, in the particular circumstances of his case, of an exceptional situation of the kind covered by the *Zambrano* principle, although such a situation, if it existed, would almost certainly have been within the peculiar knowledge of Mr Okolie and his family.

47. Mr Okolie has adduced no evidence of any urgency associated with his application, or prejudice caused by the time it had taken to consider it when he sought *mandamus*, beyond the assertion in correspondence on his behalf that he was anxious to take up employment in order to provide for his family. That assertion is deprived of any meaningful weight or force by Mr Okolie's failure to provide any evidence whatsoever of his family's means generally or the income, if any, otherwise available to it. The decision of the CJEU in *Dereci*, already cited, makes plain (at para. 68) that the fact that the residence of a TCN parent within the territory of the Union is considered desirable for economic reasons by, or on behalf of, the Union citizen child is not sufficient in and of itself to bring that TCN parent within the *Zambrano* principle. Something more is obviously required.

48. As to the conduct of the Minister as the decision-maker concerned, there is the uncontroverted evidence of Ms O'Reilly that it was at all material times the Minister's position, communicated to Mr Okolie through his legal representatives, that there were a significant number of such claims before the Department and that those claims were being dealt with in strict chronological order. Counsel on behalf of Mr Okolie criticises the relevant averments for not providing the sort of detailed statistics on the number of cases being dealt with that were included in an affidavit sworn by the Financial Services Ombudsman in *O'Brien v Financial Services Ombudsman* [2014] IEHC 268. While the provision of that level of detail may be preferable and perhaps even necessary where there is a controversy about the accuracy or *bona fides* of such a claim, there is no such controversy in this case and, hence, no strict requirement for that level of detail.

49. Thus, I conclude that, had Mr Okolie's application for judicial review come on for hearing in the first week of December 2016, *mandamus* would not have issued and that, if that were the appropriate test to apply (although I am satisfied that it is not) Mr Okolie would not have been entitled to his costs of the moot proceedings.

50. The second argument made by Counsel for Mr Okolie is that the time taken to make a decision on his claim to a residence permission under the *Zambrano* principle was a breach of both his EU law right to good administration under Art. 41 of the CFEU and his child's right to free movement within the EU as a Union citizen.

51. Article 41.1 of the CFEU provides: ' Every person has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions and bodies of the Union.' Thus, the first problem with Mr Okolie's argument is that Art. 41.1 is specifically addressed to the institutions and bodies of the Union, rather than the Member States (in contrast to, for example, the general provision of Art. 51, which states that the provision of the CFEU are addressed to 'the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law').

52. The second problem with Mr Okolie's argument is that the Court of Appeal has stated in *Bakare* (*per* Hogan J at para. 31) that the

State is not implementing Union law in deciding whether to grant a residence permission in a case of this kind but is, rather, exercising its sovereign authority to control and regulate the status of third country nationals, as an exercise of the executive power of the State in accordance with Art. 28.2 of the Constitution.

53. The third problem with Mr Okolie's argument is that it necessarily entails the proposition that the entitlement to have one's affairs handled within a reasonable time under Art. 41 of the CFEU (where applicable) is a different and more rigorous requirement than the administrative law entitlement to have a decision made within a reasonable time as an aspect of the right to natural and constitutional justice and fair procedures. Although Art. 6 of the European Convention on Human Rights recognises an entitlement to a fair and public hearing with a reasonable time by an independent and impartial tribunal established by law in the determination of his or her civil rights and obligations and Art. 52.3 of the CFEU provides that where it provides rights that corresponde to rights guaranteed by the ECHR, the meaning and scope of those rights shall be the same as those laid down in that Convention, Mr Okolie could cite nothing in the jurisprudence of either the CJEU or the European Court of Human Rights that would suggest, much less establish, any such proposition.

54. Quite separately, Mr Okolie invokes the EU law principles of equivalence and effectiveness, which apply where, in the absence of Community Rules, it is for the domestic legal system of each Member State to designate the courts and lay down the rules governing actions intended to ensure the protection of rights conferred by Community law: see, for example, the commentary in Tridimas, *The General Principles of EU Law*, 2nd edn. (London, 2006) at pp. 423-7.

55. Mr Okolie argues that, under the principle of equivalence, he was entitled to a procedure in the determination of whether he was entitled to claim a derived right of residence in the State by operation of the *Zambrano* principle that is in every respect no less favourable than that applicable to TCN family members of Union citizens applying for a residence card under the European Communities (Free Movement of Persons) Regulations 2015 ('the 2015 Regulations) that transpose Directive 2004/38/EC ('the Citizens' Rights Directive') into the law of the State.

56. In particular, Mr Okolie argues that, under the principle of equivalence, he was entitled to a decision on his application for a residence permission under the *Zambrano* principle within 6 months of his application for that residence permission in the same way as a family member of a Union citizen is entitled to a decision on his or her application for a residence card within 6 months of the date on which the Minister received that application under Reg. 7(5) of the 2015 Regulations, transposing Art. 10(1) of the Citizens' Rights Directive.

57. In my judgment, that submission is based on a misconception concerning the nature of the principle of equivalence. That principle requires that claims based on Community law must be subject to rules which are no less favourable than those governing similar claims based on national law.

58. The equivalence that Mr Okolie seeks to draw for the purpose of the argument he makes is not one between claims based on Community law and similar claims based on national law, but one between two separate kinds of claim based on Community law: first, the claim of a family member of a Union citizen exercising free movement rights to the derivative free movement and residence rights conferred on such persons under the Citizens' Rights Directive; and second, the claim of a TCN parent of a dependent Union citizen child to the derivative free movement and residence rights that must afforded to that parent to avoid depriving that child of the genuine enjoyment of the substance of the rights attaching to the status of European Union citizen under Art. 20(2) of the TFEU. Since there is no basis for the argument that the principle of equivalence requires persons in the second category to be afforded precisely the same procedural rights as persons in the first category as a matter of EU law, there is no basis for the argument that persons in the second category are entitled to a decision within six months.

Conclusion

59. Applying the principles summarised earlier in this judgment (at paragraph 7) to the circumstances of the present case, I have come to the following conclusions:

> (a) These judicial review proceedings became moot on 20 December 2016, when the INIS wrote to Mr Okolie, informing him of the Minister's decision to refuse him permission to reside and work in the State under the *Zambrano* principle
>
> (b) On the evidence before me, I am satisfied that the Minister's decision was due to what was, from the Minister's perspective, an external factor, namely the arrival of Mr Okolie's application at the top of a queue of such claims that were being dealt with strictly in chronological order.
>
> (c) It follows that, on that evidence, I am satisfied that the Minister's decision was not made in direct response to the issue of the proceedings, hence there was no 'event' in this case, comparable to the one that was at issue in *Godsil*, to which the general rule on costs under O. 99, r. 1(4) of the RSC can be applied.
>
> (d) Insofar as the Minister's decision can be correctly characterised as a change of position on the Minister's part (and I do not think it can), it was a reasonable, indeed appropriate, response to the change of circumstances represented by the fact that Mr Okolie's application had arrived at the top of the queue. It would be inappropriate, therefore, to characterise the proceedings as having become moot by the unilateral action of the Minister.

60. For those reasons, I will make no order on the costs of these proceedings.