Neutral Citation Number [2012] IEHC 193

THE HIGH COURT

JUDICIAL REVIEW

[2012 No. 402 J.R.]

BETWEEN

NABEEL GILANI AND ZOYA GILANI (A MINOR SUING BY HER FATHER AND NEXT FRIEND NABEEL GILIANI)

APPLICANTS

AND

THE MINISTER FOR JUSTICE AND EQUALITY

RESPONDENT

JUDGMENT of Mr. Justice Cooke dated the 14th day of May 2012

1. On the 14th May, 2012, application was made *ex parte* to the Court on behalf of the above named applicants for leave to apply for judicial review seeking primarily an order of *mandamus* requiring the respondent to determine within a reasonable period of time the first named applicant's application for permission to reside in the State "pursuant to EU law on the basis if his parentage of an Irish citizen child". The application was refused by the Court. This is the Court's written statement of its reasons for refusing leave as requested by counsel for the applicants.

2. The first named applicant is a national of Pakistan who came to the State in October 2003, on a visitor's visa. He subsequently overstayed the period for which the visa was valid and remained illegally in the State. He found employment and has since been working in the State.

3. According to the applicant he had been "in a relationship" with an Estonian national who had been residing in the State since 1999. The second named applicant is their daughter. She was born on the 2nd October, 2007, and is an Irish citizen and therefore an EU citizen by virtue of her mother's residence in the State since 1999.

4. According to the first named applicant, the relationship with the child's mother ended and the child has since remained with her mother. The first named applicant claims, however, to take an active role in his daughter's life with access twice or three times a week and to have contributed financial support.

5. In 2008, the first named applicant began a relationship with another woman, an Irish citizen, and they were married in June 2009. An application was then made to the respondent for permission to reside in the State on the basis of the marriage to the Irish citizen. By a letter of the 11th January, 2010, the respondent gave the first named applicant permission to reside in the State on that basis and he was issued with a Stamp 4 endorsement, which was subsequently renewed to the 11th January, 2012.

6. In March 2011 unhappy differences are said to have arisen in the marriage and the couple are no longer living together, although not divorced.

7. On the 28th June, 2011, following the delivery by the Court of Justice of the European Union of its judgment of the 8th March, 2011, in case C34/09 *Ruiz Zambrano*, the applicant's solicitor wrote to the Irish Naturalisation and Immigration Service of the respondent's Department submitting, "an application for residency in the State on behalf of our client in terms of his parentage of his Irish citizen child, Zoya Gilani". Having described the personal circumstances, the letter outlined the basis upon which the application was made:-

> "The Irish citizen child is dependent on her father. We assert her father's rights to reside and be employed in the State pursuant to our client's rights under the Treaty on the Functioning of the European Union and in particular Article 20 thereof and Article 24 of the Charter of Fundamental Rights of the European Union. We further assert that pursuant to the provisions of the Constitution of Ireland and in particular Articles 40 and 41 that in the circumstances of this case, where the Irish Citizen child was born in the State in 2007 and is now three years old, due regard to her welfare requires that her father be entitled to live and work in the State."

8. Further correspondence was then exchanged in which the respondent sought further information and documents were furnished including what appears to be an unsigned letter from the child's mother confirming that the father sees the child two/three times a week and that he is providing unspecified financial support towards the child's clothing and playschool.

9. By letter of the 27th July, 2011, the Repatriation Unit of the Department responded to the application setting out the Department's interpretation of the *Ruiz Zambrano* case and indicating that it did not consider it to apply here:-

> "The position is that in the recent judgment in the *Zambrano* case, the European Court stated that Article 20 of the Treaty ... 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, insofar as such decisions deprive those children of the genuine enjoyment of the substance of the rights attaching to the status of European Union citizen. In the context of your client, our records show that your client, Mr. Nabeel Gilani, already holds a right of residence in Ireland of a nature as has allowed him to seek to enter employment or to set up any legitimate business or profession without seeking the permission of the Minster. Accordingly the State's obligation under the *Zambrano* principles has been met in your client's case, and, as such, the *Zambrano* judgment offers him nothing extra from an immigration standpoint at this time."

10. On the 14th December, 2011, the solicitors took issue with this response and pointed out that the first named applicant's permission based on his marriage to the Irish wife would expire on the 11th January, 2012. Although the letter of the 27th July, 2011, was clearly a refusal of the application, the solicitors ended their letter saying: "Please note our client's permission to remain in the State expires on the 11th January, 2012 and we would therefore request that a decision be made on his application by this date".

11. Following the expiry of that permission, the solicitors again wrote on the 16th January, 2012 and on the 16th February, 2012, requesting a decision. On the 22nd February, 2012, a further letter seeking a decision was written stating that the first named applicant "is anxious that a decision be made on his application as he is fearful that he may lose his employment in the State should his "Stamp 4" not be renewed without any further delay". The letter was acknowledged on the 28th February, 2012.

12. A first reason for refusing the application for leave to apply for judicial review is that the proceeding as it is presented is unfounded and unsustainable. The order of *mandamus* issues from the High Court to compel a public authority or officer to perform a public duty. It can only issue where a respondent is shown to be under an obligation to perform a particular duty and to have either wrongfully refused to do so or to have delayed so egregiously that the delay is tantamount to a refusal. (See for example Point Exhibition Co. Ltd v Revenue Commissioners [1993]2 I.R.551.) In the present case, it is clear that in the letter of the 27th July, 2011, the respondent gave the decision that had been demanded upon the application made in the letters of the 28th June, and 18th July, 2011. The application was refused. The reason given for the refusal was that at the time the first named applicant already had permission to reside in Ireland and to take up employment, entitlements which he was in fact currently exercising at the time. If the applicants' solicitors considered that this was a wrong or inadequate reason for refusing the application, the proper course was to challenge it; if necessary by applying to seek to have it quashed by order to *certiorari*. That was not done and the failure to make such an application within the time limit then applicable cannot be repaired by ignoring the refusal and reiterating the original request in order to seek an order of *mandamus* upon the basis that the respondent has wrongfully failed to give a decision. In as much as the Minister had, following the delivery of the above judgment undertaken to consider cases of third-country parents of Union citizen children resident in the State, any public duty to do so in this instance was clearly discharged by the letter of 27th July 2011.

13. The further and possibly more important reason for refusing leave is that, in the judgment of the Court, the basic assertion on which the application in the letter of 28th June 2011 on behalf of the first named applicant was founded rests on a misconception and on a misreading of the *Ruiz Zambrano* judgment.

14. The case is presented on the basis that the first named applicant is "asserting my entitlement to reside in the State pursuant to the decision in *Zambrano*" and that there has been a "delay in determining my *Zambrano* application". As the solicitors put it in the letter of application, they were "asserting the rights of the father" to reside and work in the State on the basis of Article 20 TFEU. In the view of the Court, the principle or interpretation expounded by the Court of Justice in the *Ruiz Zambrano* case confers no right or entitlement upon the father as a non EU citizen. The essential point made by the Court in interpreting Article 20 of the Treaty is that the rights and protection conferred by that Article are enure to the citizen of the Union and to no-one else. Article 20 confers upon a Union citizen the right to reside, live and work in the territory of the Union. In the case of minor children dependent for care and support upon the presence of one or more parents, the Union citizen's entitlement to enjoy the substantive benefit of the right is interfered with if the probable consequence of the parent's expulsion from the territory of the Union would be that the child will be obliged to accompany the parent and thereby be deprived of the entitlement to live and grow up within the Union. This is clear, in particular, from paragraphs. 41-45 of the judgment of the Court of Justice, including the following:-

> "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 ...
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> 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."

15. Accordingly, it is only where the removal of the third country national or the refusal to grant a third country national parent a work permit will necessarily lead to the departure of the Union citizen child from the territory of the Union because he or she cannot continue to reside within the Union without the presence, care and support of that parent, that Article 20 TFEU can be invoked by the EU citizen to require the relevant Member State to permit the parent to remain and to be employed.

16. That this is the extent of the effect of Article 20 in these situations is made clear by the later judgment of the Court of Justice of the 15th November, 2011, in case C256/11 *Dereci and Others.* There the Court was asked to consider the position of a number of third country nationals who wished to live with family members who were resident in Austria as nationals of that Member State and thereefore citizens of the Union. Those Union citizens had lived in Austria; had never exercised their right to free movement and were not maintained by the non national applicants. The Court noted that some of the applicants such as the first named, Mr Dereci, had entered Austria illegally and had married Austrian nationals with whom there were three children who were also Austrian nationals and still minors.

17. Referring to the case which Jed to the *Ruiz Zambrano* judgment, the Court reiterated the essential position that a refusal to grant a right of residence and a work permit to a third country national with dependent minor children in a Member State of which the children are nationals and resident "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".

18. The Court added however:-

> "66. It follows that the criteria 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.

67. That criterion is specific in character in as much 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 with a third country national who is a family member of a Member State national as the effectiveness of the Union citizenship enjoyed by that national would otherwise be undermined.

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 would be forced to leave Union territory if such a right is not granted.

69. That finding is, admittedly without prejudice to the question whether, on the basis of other criteria, *inter alia*, by virtue of the right to the protection of family life, a right of residence cannot be refused. However, that question must be tackled in the framework of the provisions on the protection of fundamental rights which are applicable in each case."

19. Thus the circumstance in which a Union citizen can require his or her Member State of nationality to permit a third country family member to reside and work in the Member State is explicitly exceptional and conditional on the fact that the citizen is dependent on the presence of the family member for care and support such that if it is removed, the citizen must leave the territory of the Union with the family member. It is clear, accordingly, that the entitlement of a minor Union citizen child to assert an entitlement to compel the grant of a right of residence and a work permit to a non national parent is fundamentally dependent upon it being shown that it is necessary to do so in order to avoid the Union citizen child having to depart the territory of the Union upon the removal of the parent.

20. No evidence has been presented on this application which brings this case within that criterion. The second named applicant is an Irish citizen who resides with and is cared for by her Union citizen mother. No suggestion whatsoever is made that the child is at any risk of having to leave the country. It is suggested that the daughter is "dependent" upon her father but that is only in the sense that she sees him twice or three times a week and that he contributes some unquantified sum for clothes and her playschool. This does not constitute evidence of the type or level of dependence envisaged in the above cases namely, one which compels the EU citizen to leave the territory of the Union if the parent is removed.

21. Furthermore, and in any event, the first named applicant had not been refused residence or permission to continue in employment and although the existing permission is said to have expired in January of this year, there is no evidence before the Court that it will not be renewed so long as the first named applicant is married to an Irish citizen nor that there has been any proposal to deport the first named applicant. The Court has been given no information as to whether an application has been made to renew the existing permission. In the event that the permission to reside were not renewed and a proposal to deport the first named applicant was made, his entitlement to avoid such deportation will not depend on the principles of the *Ruiz Zambrano* case but, as the Court of Justice pointed out in the *Dereci* judgment, upon the application of provisions of law protecting family life. That situation has not arisen in this case.

22. Finally, even if it could be argued (quod non) that the letter of 14th December 2011 fell to be treated as a new application based upon the anticipated expiry of the then current permission and on an intention not to apply for its renewal thus abandoning the Irish citizen marriage as the basis for residence, there would still be no purpose to be served by the grant of leave to seek an order compelling the Minister to reply to the application because, for the reasons given above, the premise upon which the "application" was based has no tenable foundation in law.

23. For all of these reasons the Court was satisfied that no arguable case had been made for the grant of leave to apply for an order of *mandamus* upon the basis proposed.