Neutral Citation: [2014] IEHC 526

THE HIGH COURT

JUDICIAL REVIEW

[2013 No. 889 J.R.]

BETWEEN

DAVID NICOLAS, EWELINA JOZEWIAK AND JESSICA NICOLAS (A MINOR SUING BY HER MOTHER EWELINA JOZEWIAK)
APPLICANTS

AND

THE MINISTER FOR JUSTICE AND EQUALITY, IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

JUDGMENT of Mr. Justice Colm Mac Eochaidh delivered on the 11th day of November 2014

1. What are the derivative rights of residence of a third country national parent of an EU citizen child residing in a Member State other than that of its citizenship? This is the preliminary issue which is determined in these proceedings.

2. The first named applicant is a national of Nigeria in a non-marital relationship with the second named applicant and they are the parents of the third named applicant. The second and third named applicants are Polish citizens. The minor applicant was born on 13th April 2008, and has lived in Ireland all her life.

3. Mr. Nicolas applied for permission to remain in Ireland based on his relationship with his daughter, citing the decision of the Court of Justice in Case C-34/09 *Zambrano v. Office National de l'Emploi, Case C-200/02 Zhu & Chen v. Secretary of State for the Home Department* and Article 20 of the Treaty on the European Union.

4. The respondent rejected Mr. Nicolas's application for permanent residence based on his relationship to his EU citizen daughter but he was invited to re apply on the basis of his relationship with the second named applicant. On 26th July 2012, Mr. Nicolas repeated his application and the respondent replied pointing out that *Zambrano* rights only applied in circumstances where a Union citizen is resident in the Member State of their citizenship and derived rights can flow from such circumstances only. Here, the Union citizen in question (his daughter) was residing in Ireland, not Poland.

5. In further correspondence on this issue, lawyers for Mr. Nicolas stated:

> "Please further note that Ms. Jessica Nicolas I[the third named applicant] is dependent on Mr. Nicolas. She has resided in the State since birth. She is currently enrolled at Scoil Treasa Naofa Primary School in Dublin and attends on a daily basis. Mr. Nicolas resides with Ms. Ewelina Jozewiak who is his partner and the mother of Jessica. Ms. Josewiak is also a Polish national and an EU citizen. Mr. Nicolas is heavily involved in and plays an extremely active role in Jessica's life. He drops her off and picks her up from school every day."

6. A declaration of joint guardianship signed by the adult applicants was submitted with the application.

7. On 1st March 2013, the respondent granted Mr. Nicolas permission to remain in the State on a Stamp 4 basis, though it was erroneously stated to be under s. 3 of the Immigration Act 1999, rather than under s. 4 of the Immigration Act 2004. The respondents submit that the error caused no prejudice.

8. Further to a complaint as to the absence of reasons and a request for same, the respondent confirmed his decision of 1st March and stated that because Mr. Nicolas's child was Polish, he was ineligible under the *Zambrano* jurisprudence. The respondent stated that Mr. Nicolas is not a qualifying family member of a Union citizen within the meaning of the EC (Free Movement of Persons) Regulations 2006 and 2008, or Directive 2004/38/EC because he cannot claim dependence on the minor child and he was not permitted to apply for permanent residence as he was not a qualifying family member. He was again invited to apply for a Residence Card as a permitted family member on the basis of his relationship to the second named applicant.

9. Ms. McDonagh S.C., for the applicant, accepts that her client does not qualify as a family member within the meaning of Article 2 of the Citizenship Directive (Directive 2004/38/EC) and its domestic implementing measure (the EC (Free Movement of Persons) Regulations 2006) because he is not a dependent family member of a Union citizen in the ascending line. Therefore, the derivative rights of the applicant are advanced on the basis of Treaty provisions only and not on any provision of European secondary legislation.

Preliminary Issue

10. The parties agreed that the pleadings and submissions suggested a preliminary issue, the resolution of which might determine the proceedings. The issue which it was agreed that the Court would try is:

> "Does a third country national parent enjoy rights of residence derivative from his parental relationship with an EU citizen child residing in a Member State other than that of her Union citizenship in which country the third country national desires to reside."

11. It was also agreed, depending on the answer to the foregoing, that the Court would decide whether the applicant was disentitled to the reliefs sought because he had not applied for derivative rights of residence as the spouse or partner of an EU citizen exercising freedom of movement, notwithstanding invitation so to do from the respondent

12. In support of a positive answer to the question posed, Ms. McDonagh S.C., for the applicant, referred to the decision of the Court

of Justice in Case C-86/12 *Alokpa v. Ministre du Travail, de I'Emploi et de L 'Immigration,* (Judgment of the Court of 10th October 2013). Mrs. Alokpa was a citizen of Togo, who, having failed to acquire refugee status, applied for discretionary leave to remain in Luxembourg. She gave birth to twins in Luxembourg. The father of the children was a French national and the children were citizens of France. Mrs. Alokpa and the father of the children were separated. Proceedings to annul a refusal to remain Luxembourg gave risto a reference to the CJEU which enquired whether Article 20 of the TFEU (and other provisions of the Treaty) precluded a Member State from refusing a right of residence to a third country national of an EU citizen child in the host Member State of the residence of the children.

13. The CJEU considered the mother's derived rights in the context of Directive 2004/38, and expressly endorsed the Opinion of the Advocate General who held that Mrs. Alokpa could have the benefit of a derived right to reside in France. This was because it was accepted that Mrs. Alokpa was the sole carer of the children. The Court held, at para. 36, that Member States may refuse to allow a third country national to reside in its territory if the Union citizens do not satisfy Directive 2004/38, and provided that the refusal to reside for the non-EU parent does not deprive the EU citizens of the effective enjoyment of the substance of the rights conferred by virtue of the status of European Union citizenship.

14. My understanding of the *Alokpa* decision is that the Court was suggesting, although leaving in to the national Court to take the final decision on the matter, that a Member State might be obliged to permit a third country parent to reside in a Member State in which EU citizen children are exercising free movement rights, provided that this is necessary to permit the EU citizens to reside within the Union. If the non-EU mother is refused residence in Luxembourg, and therefore has to leave the territory of the Union, the children would be required to leave the territory of the Union where the mother is their sole carer.

15. My view is that this case does not suggest a helpful answer to the preliminary issue from the perspective of the applicant. There is no suggestion that the minor applicant child in this case will be required to leave the territory of the European Union if the father is not permitted to remain in Ireland. It is not suggested that he is the sole carer of the child. The opposite is the case. The child has the love and care of her mother and father in Ireland. The removal of the father from Ireland would not have the effect of requiring her to leave Ireland, in particular, or the territory of the Union generally.

16. Mr. Conlon Smyth S.C., for the respondent, points out that the applicant's case appears to be based on the provisions in the Treaty on the Functioning of the European Union, and in particular, on Articles 20 and 21. Article 20 of the Treaty provides:

> "1. Citizenship of the Union is hereby established, Every person holding the nationality of a Member State shall be citizen of the Union. Citizenship of the Union shall be additional to and not replace national citizenship ...
>
> 2. Citizens of the Union shall enjoy the rights and be subject to the duties provided for in the Treaties. They shall have, *inter alia*:
>
> ... [a] the right to move and reside freely within the territory of the Member States."

17. Article 21 of the Treaty provides:

> "1. Every citizen of the Union shall have the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in the Treaties and while the measures adopted to give them effect."

18. It is difficult to discern what the difference: in terms of rights is between Articles 20 and 21, but that is not a matter which this Court is required to consider to answer the questions posed.

19. The Court was referred by Mr. Conlon Smyth S.C. and Ms. McDonagh S.C. to the decision of the Court of Justice in Case C-34/09 *Zambrano v. Office National de l'Emploi*. Mr. and Mrs. Zambrano were refused asylum in Belgium and were ordered to leave the country in September 2000, subject to refoulement principles, and thereafter, Mr. Zambrano worked illegally in Belgium, without a work permit, for some years. The couple had twin children in September 2003, who, by operation of law, became Belgian citizens. Mr. Zambrano became unemployed and sought unemployment assistance in 2005. The case arose from a challenge to a refusal to reside and to work in Belgium addressed by the Belgians to Mr. and Mrs. Zambrano. The Employment Tribunal in Brussels referred questions to the Court of Justice which asked whether EU law confers a right of residence on a relative in the ascending line who is a third country national, upon whom the minor EU citizen children are dependent, in the Member State of which the citizen children are nationals and in which they reside.

20. A curious point about the *Zambrano* case was that it is not immediately apparent that any question of European Union law arose. The Belgian children were living in the country of their nationality and citizenship and were therefore exercising no EU rights. Their parents were Colombian and neither were they exercising any EU rights.

21. The Court referred to Article 20 TFEU establishing Union citizenship. It said:

> "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 (see, to that effect, *Rottmann*, para. 42).
>
> 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 the territory of the Union. 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."

22. The test which emerges from *Zambrano* as to whether a national decision interferes with Union citizenship is whether the citizen is unable, because of the decision, to exercise the substance of the rights conferred by citizenship of the Union. Though the Court does not indicate what rights are conferred by Union citizenship, an unavoidable conclusion is that one of the rights associated with the status is to be physically present on the territory of the Union. In addition, where the Union citizen is a minor or in a relationship of dependency, some other person may have to be physically present to take care of the Union citizen.

23. In Case C-434/09 *McCarthy v. The Secretary of State for the Home Department* (Judgment of 5th May 2011) the applicant had dual Irish and UK citizenship. In 2002, she married a Jamaican national who had no permission to be in the United Kingdom. After the marriage, she applied, for the first time, for an Irish Passport which was granted.

24. In 2004, the applicant and her husband applied for a residence permit under EU law. She was refused because she was neither a worker, nor a self- employed, self-sufficient person and therefore not a "qualified person", and consequently, her husband was not the spouse of a qualified person. The ECJ focused on whether Article 3(1) of Directive 2004/38 or Article 21 TFEU (Union Citizenship) would be applicable to a Union citizen not exercising free movement rights.

25. The Court found that Directive 2004/38 regulated Union citizens exercising free movement rights and could be of no application to a Union citizen's circumstances in the country of citizenship. The second question asked by the Court is whether Union citizenship under Article 21 TFEU has application when a person is not exercising free movement rights. Before deciding the second question, the Court had set out the principles of public international law which precludes States from refusing its own nationals to enter and to reside on its territory.

26. The Court held at para. 49:

> "49 However, no element of the situation of Mrs McCarthy, as described by the national court, indicates that the national measure at issue in the main proceedings has the effect of depriving her of the genuine enjoyment of the substance of the rights associated with her status as a Union citizen, or of impeding the exercise of her right to move and reside freely within the territory of the Member States, in accordance with Article 21 TFEU.
>
> 50. In that regard, by contrast with the case of *Ruiz Zambrano*, the national measure at issue in the main proceedings in the present case does not have the effect of obliging Mrs McCarthy to leave the territory of the European Union. Indeed, as is clear from paragraph 29 of the present judgment, Mrs McCarthy e!1ioys, under a principle of international law, an unconditional right of residence in the United Kingdom since she is a national of the United Kingdom."

27. Thus, Mrs. McCarthy failed to raise EU law against the refusal to give her (and her husband) an EU Residence Card in the UK. The measure she sought to attack did not have the effect of depriving her of the substance of any of the rights conferred on her as a citizen of the Union.

28. In *Iida v. Stadt Ulm* (Case C-40/11) 8th November 2012, Mr. Iida, a Japanese national, married a German national in the United States. They had a daughter who enjoyed US/German/Japanese nationality. The family moved to Germany where Mr. Iida had a right to work.

29. In 2007, his spouse left Germany to work in Austria. They separated in 2008, although they did not divorce and maintained joint parental responsibility. The mother and daughter lived in Vienna. Mr. Iida, because of his marital situation, did not enjoy the marital derivative right to reside in Germany, but he did have a residence permit in connection with his employment.

30. In 2008, he sought a 'Residence Card of a family member' of a Union citizen in the city of Ulm in Germany, but his application was rejected. The challenge to this rejection gave rise to a preliminary reference to the CJEU. The Court ruled that a third country national related to a Union citizen could only rely on his derivative rights in the host Member State in which the Union citizen resides. Mr. Iida could not obtain derivative family rights in Germany, notwithstanding that Germany is the State of nationality of his spouse. He could only obtain such derivative rights in the host State where his spouse resided- Austria.

31. The Court also ruled on the applicability of Union citizenship arising under the Treaty. The Court noted that third country national rights are not autonomous, but derive from the exercise of free movement rights by the Union citizen.

32. At para. 68, the Court noted that:

> "... the purpose and justification of those derived rights are based on the fact that a refusal to allow them would be such as to interfere with the Union citizen's freedom of movement by discouraging him from exercising his rights of entry into and residence in the host Member State."

33. In my view, those statements are part of the *ratio decidendi* in *Iida*. The principles thus expressed require a third country national asserting derivative EU rights to explain how the grant of the derivative right is *necessary* to facilitate a Union citizen's right, whether it be a right of free movement or a right to be physically present in the territory of the Union. A third country national applicant must demonstrate how a refusal of the application will prevent the exercise of a Treaty right by a Union citizen or will interfere with the exercise of that right for, by example, discouraging the Union citizen from exercising free movement rights.

34. Noting that the applicant had a right of residence independently of EU derivative rights in Germany, the Court held that the refusal to give Mr. Iida derivative Union rights of residence did not deny his EU citizen wife or EU citizen daughter the right to move and reside freely within the territory of the Union.

35. The final case to which I will refer is Case C-256111 *Dereci v. Bundesinisterium Fuer Inneres*, (Judgment of 15th November 2011). The applicants were third country nationals who wished to live with their family members, being EU citizens resident in Austria and nationals of that State. The EU citizens had never exercised their right to free movement and were not financially maintained by the applicants in the proceedings.

36. The referring Austrian Court noted that the third country nationals and their Union citizen family members wished to reside together but that unlike the situation in *Zambrano* there was no risk that the Union citizens could be deprived of their means of subsistence if the third country nationals were refused Austrian residence/work permits. The Court ruled that Council Directive 2004/38 did not apply as the Union citizens had never exercised free movement rights. Turning to the provisions of the Treaty and to citizenship, the Court, referring to the decision in *Zambrano*, said:

> "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."

37. The Court emphasised that a third country national seeking EU derivative rights must put forward a case that if the right is refused, the Union citizen would be forced to leave the territory of the Union.

38. Thus, in *Dereci*, one detects a ratcheting up of the language deployed by the CJEU in describing the level of interference with Union citizen rights which a third country national must establish if derivative rights are sought. I refer to para. 68 of this judgment which says:

> "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 added]

39. My view is that the jurisprudence of the ECJ on third country national rights is founded upon a simple principle. A third country national seeking to reside in the Union for the purposes of accompanying a Union citizen (in circumstances not governed by Council Directive 2004/38/EC), must establish that if he or she is refused the right to be present in the host state, the Union citizen will be forced to leave the territory of the Union.

40. In the present case, Mr. Nicolas's situation is not unlike that of Mr. Iida (see paras. 28 to 34, supra). He has not been refused permission to be present in Ireland. At present, he has permission to reside and work in the State.

41. I accept the submission by the respondent that persons who enjoy permission to remain in the State on a 'Stamp 4' basis usually have the permission renewed annually. It can safely be said that there is no present risk of Mr. Nicolas having to leave the Union, and it seems unlikely, at least in the short term, that he will be deprived of a right to be in Ireland.

42. However, even if there were a risk of Mr. Nicolas being required to leave Ireland, it has not been asserted, much less established, that his daughter, would be thereby forced to leave Ireland and the European Union. Unlike the situation in *Zambrano* and in *Lopka*, his Union citizen daughter would have the care and comfort of one parent whose right to be in Ireland is not in question.

43. In my view, the fact that the second and third named applicants are Polish nationals where the mother is exercising free movement rights does not alter the nature of a third country national's derivative rights. EU law only requires a Member State to grant derivative rights to a third country national based on their relationship with an EU citizen where the refusal of such would interfere either with a Union citizen's right to be present in the Union, including on the territory of his or her home State, or interfere with a Union citizen's right to free movement, by being present in a host State. In either situation, the third country national will have to establish that a negative decision on his or her right to be anywhere in the Union will impede either of those rights enjoyed by a Union citizen.

44. In passing I note that a child of an EU citizen born in a host state does not, by its presence in that state, exercise free movement rights (see paras 27 and 39 in *Alopka*, supra). Thus the third named applicant is not exercising free movement rights in Ireland. If the refusal of residency for her father resulted in her being required to take up residence in Poland, this would not be an interference with her freedom of movement as this is not a right she has ever exercised in Ireland.

45. The answer to the preliminary question posed is that a third country national parent only enjoys a right of residence derivative (from his/her EU citizen child residing in a host member state if the third country national establishes that refusal of the right of residence will force the EU citizen child (i) out of the territory of the Union or (ii) back to the child's home state, provided the child's presence in the host state results from the exercise of free movement rights. The applicant in this case has not established and has not sought to establish that his daughter would be forced to live outside the territory of the Union (or in her home state) if he does not get acquire residency based on her Union citizenship.

46. At the urging of the respondent, the Court was asked to consider a second preliminary point as to whether the applicant was deprived of the reliefs sought because he had failed to seek derivative residence rights based on his relationship with his current Polish partner. In view of the answer I have given to the first question, I am not of the view that it is necessary for me to answer the second. The parties may now address the Court on whether further matters require a decision and if there are, the second preliminary issue will be addressed with whatever remains.