[2020] IEHC 86

THE HIGH COURT
JUDICIAL REVIEW

[2020 No. 39 J.R.]

BETWEEN

S.M.A. (NIGERIA)

APPLICANT

AND

THE MINISTER FOR JUSTICE AND EQUALITY

RESPONDENT

JUDGMENT of Mr. Justice Richard Humphreys delivered on the 11th day of February, 2020

1. The applicant is named in the proceedings as Mr. S.M.A., and claims to be from Nigeria, although he seems to have a couple of other aliases and at least one other asserted nationality. He produced a Sierra Leonean identity card to the authorities, but falsely denied this in these proceedings on affidavit, forcing the respondent to exhibit that document. Information from a Home Office fingerprint match indicates that the applicant applied in Abuja for a U.K. visa on 12th May, 2008 using a different name, and that that application was refused.

2. The applicant claims that he arrived in the State in June 2008, but the respondent has put forward evidence that a person who appears to be the applicant, using the name of S.M. with a date of birth in 1991, entered the State on 1st November, 2008 and claimed asylum on 12th December, 2008 posing as Sierra Leonean. The latest affidavit submitted by the applicant, accepts that he made such a fraudulent claim (see para. 22).

3. The asylum claim was rejected on 26th May, 2009. The applicant appealed to the Refugee Appeals Tribunal, which rejected the appeal on 27th August, 2009. At that point he was represented by Daly Lynch Crowe and Morris Solicitors.

4. On 19th October, 2019 the applicant instructed new solicitors, Trayers & Co., who applied on his behalf for leave to remain and subsidiary protection on 23rd November, 2009.

5. On 15th October, 2015 the Refugee Applications Commissioner wrote to the applicant saying that his fingerprints matched with an application for a visa by a Nigerian national going by the name of Mr. S.A.O. with an alleged date of birth in 1987. The applicant failed to account for this at the time, although he now appears to accept that he did make such a false visa application (see para. 23 of his affidavit).

6. The applicant failed to attend the subsidiary protection interview, and on 30th March, 2015 the commissioner wrote stating that his application was being refused. That was the end of the applicant's protection history. A letter notifying the applicant of this outcome was returned marked not called for.

7. On 14th April, 2015 a further leave to remain submission was made by Trayers & Co. On 17th July, 2015 a fresh proposal to deport was issued, seemingly because no particular further action had been taken on foot of the proposal to deport that accompanied the notification of refusal of protection. That proposal was returned to sender. It was

however copied at Trayers & Co. who replied on 23rd June, 2015 stating that they had instructions to apply for leave to remain, but no further representations were in fact made.

8. On 6th July, 2015 the proposal was again reissued and again returned to sender. Trayers & Co. were asked to account for the fingerprint match but do not seem to have been in a position to do so at that point.

9. On 8th February, 2017 a child appears to have been born to the applicant and a Ms. S.E.P., an Irish woman, who the applicant knows or knew as S.M.B. (even she seems to have aliases). The applicant's counsel says that she gave the applicant the wrong name and the impression I had was that this was to keep him at something of a distance. The birth certificate does not specify a father for this child.

10. On 2nd March, 2017 Trayers & Co., who had, up to this point, been referring to the applicant as Mr. M., sent further correspondence which for the first time referred to the applicant as Mr. S.A. and gave an updated address. On 27th March, 2017 the Department wrote to the applicant asking him to deal with issues of serious concern. That correspondence was returned as not called for.

11. On 17th August, 2017 the applicant notified the International Protection Office of a further change of address, to Drumcondra Road Lower (see para. 16 of the affidavit of Alan King and para. 17 of the affidavit of the applicant). On 6th September, 2017 the applicant changed solicitors to Burns Kelly Corrigan. That firm does not appear to have submitted any representations on his behalf. On 7th September, 2017 the applicant was granted joint guardianship of the child.

12. On 28th May, 2018 a second child named K.Z.K. was born. This child has a different surname because the mother is in another relationship and used a surname similar to the father's surname although strangely not the exact surname. The father is a Mr. Z.K.A. so seemingly there is yet another layer of aliases coming through in the next generation as well. Again, the applicant's case is that the mother used the new boyfriend's surname in order to give the applicant the brush-off. The birth certificate has been produced although not exhibited and names Mr. Z.K.A. as the father. The mother apparently now has yet another child with this individual and has married him at some point in the meantime.

13. On 9th August, 2019 a further letter regarding the proposed deportation order was sent and returned not called for. On 30th August, 2019 a deportation order was made under s. 3(1) of the Immigration Act, 1999. That order has not at any stage been challenged. On 27th September, 2019 the order was sent to the applicant's last notified address in Drumcondra Road Lower and copied to Burns Kelly Corrigan. The correspondence was returned, predictably enough, as not called for. The applicant does not dispute that (see para. 18 of the affidavit of Alan Kane and para. 18 of the applicant's affidavit). Now the applicant does say, implausibly in the light of his fairly consistent practice of not attending to any official correspondence, that he had used a friend's address at that location and

stayed there from time to time and that the friend did not report any correspondence to the applicant. Prior to his arrest, the applicant was exercising some custody, although it is accepted that the mother was exercising the bulk of the custody in relation to the eldest child at least.

14. On 2nd January, 2020 the applicant was arrested and has been detained since then in Cloverhill Prison.

15. On 10th January, 2020 the applicant's custody was formalised by an order of Judge Gibbons, in the form of custody for four hours on a Sunday. The applicant was also appointed joint guardian of the second child. Rody Kelly Corrigan Solicitors and Mr. Femi Daniyan B.L. represented the applicant in those proceedings. I have been told that Judge Gibbons was not actually given the birth certificate of the second child but was apparently told that another person is named as the father, and he appointed the applicant as guardian anyway on the basis he was satisfied that the applicant was the father. I am also informed that this was because the mother eventually admitted that, after several years of denying the applicant's paternity.

16. The applicant has an application pending to be heard on 20th March, 2020 for access to the second child.

17. Following his arrest, he instructed Mulhall & Co. to deal with the immigration matter and on 14th January, 2020 an application was made by them to revoke the deportation order. By a separate letter the applicant made a first attempt to apply under *Gerardo Ruiz Zambrano v. Office national de l'emploi*, Case C-34/09 (Court of Justice of the European Union, 8 March, 2011), to remain on the basis of parentage of an Irish citizen child. That was received by the Department on 16th January, 2020. The revocation application remains outstanding. However as regards the *Zambrano* application the Minister replied on 16th January, 2020 stating that *"this office cannot accept [the] application for permission to remain in the State as the parent of an Irish citizen child due to the following missing documentation*" which was then listed. That was the first of three separate refusals to accept attempted or purported applications under the *Zambrano* judgment by the applicant. One thing that is clear at the present time is that, given that the children are in the primary custody of the mother, removal of the applicant will not result in the children ceasing to effectively exercise their rights as EU citizens.

18. The applicant then issued the present proceedings, and I granted leave on 20th January, 2020 as well as an injunction against removal from the State. I endeavoured to accelerate the hearing given that the applicant was in custody. I will come later to the reliefs claimed in the proceedings.

19. Around 22nd January, 2020 a second attempted *Zambrano* application was made, which was erroneously dated 14th January, 2020. That was received in the Department on 23rd January, 2020. Unlike the first attempt, that included the form required by the administrative scheme but on 23rd January, 2020 the Minister again refused to accept the application due to lack of documentation.

The present proceedings

20. The present proceedings were initially heard on 24th January, 2020, adjourned to 27th January and then to 29th January, 2020 for further hearing. On the latter occasion, I continued the injunction until a further hearing date on 10th February, 2020 conditional on a formal *Zambrano* application being made by close of business on Friday 31st January, 2020. I allowed the applicant to amend his statement of grounds without prejudice to any point that the respondent might make at the resumed substantive hearing. In fact, the new *Zambrano* application was not made in time, so the injunction lapsed and was not renewed. The third purported *Zambrano* application was not actually made until 4th February, 2020 and seems to have been received on 5th February, 2020. That was also rejected as inadmissible on 7th February, 2020 in the absence of any documentation showing that the child was an Irish citizen. That application only seemed to relate to the first child. On a resumed hearing date various further shortcomings in the pleadings came to light and the matter had to be adjourned yet again to 11th February, 2020. I have now received helpful submissions from Mr. Colm O'Dwyer S.C. and Mr. Daniyan B.L., who also addressed the court, and from Mr. Robert Barron S.C. and Ms. Sarah K.M. Cooney B.L., who likewise also addressed the court, for the respondent.

The amended pleadings

21. There are only two substantive reliefs sought in the amended statement of grounds:

(i). "*an injunction restraining the deportation of the applicant from the State until the determination of the applicant's application for the revocation of the deportation order dated the 10th January, 2020 and pursuant to s. 3 (11) of the Immigration Act, 1999 as amended*" and

(ii). "an injunction restraining the deportation of the applicant from the State until the determination of the applicant's application for residency on the basis of his parentage of Irish citizen children".

22. The applicant's submission in relation to an injunction was to say that there was a fair question to be tried, the balance of convenience favoured the applicant and damages are not an adequate remedy. Reliance was placed on the decision in *Okunade v. Minister for Justice, Equality and Law Reform* [2012] IESC 49, [2012] 3 I.R. 152. However, the *Okunade* principles only apply to interlocutory injunctions, not to an injunction as a final order of the court. That is a substantive remedy. To get an injunction as a final order, one has to actually demonstrate an *entitlement* to such an injunction, as opposed to merely showing that the balance of convenience or justice favours such an order: see *N.M. (Georgia) v. Minister for Justice and Equality* [2018] IEHC 494 (Unreported, High Court, 31st July, 2018), *Nadeem v. Minister for Justice and Equality* [2018] IEHC 394 (Unreported, High Court, 8th May, 2018) and *B.S. (India) v. Minister for Justice and Equality* [2019] IEHC 367 (Unreported, High Court, 10th May, 2019). So the caselaw relied on by the applicant does not in fact apply.

23. The grounds raised in the amended statement of grounds raise a series of issues which are best deconstructed on a proposition-by-proposition basis. The first point made is *"the*

applicant has not had the opportunity of informing the respondent and substantiating that he is the parent of two Irish citizen children until the determination of the District Court in January 2020". That is manifestly not correct. Such information as the applicant had could have been put forward earlier.

24. The next proposition is *"the applicant has now made an application for permission to remain in the State on the basis of his parentage of Irish citizen children"*. That in itself is simply a statement of fact, not a ground for an injunction as such.

25. The next point is "*the applicant sought the revocation of a deportation order made in respect of him and has since received no acknowledgement or reply to his application".* Again, that is a statement of fact rather than a ground for relief.

26. The next proposition advanced is "*due to the urgency of his case and the consequences of the applicant's deportation on Irish citizen children the applicant is entitled to a decision in early course*". Unfortunately, that is not a legally sound proposition. An enforceable legal entitlement to a decision could not conceivably arise after such a very short lapse of time in connection with an application made only last month.

27. The next claim made is "*he should not be deported prior to a decision being made on his revocation application in the circumstances of the case*". It is well established that s. 3(11) of the 1999 Act is not suspensive. An injunction under this particular heading could only arise if it could be said that the applicant has a likelihood of success in the forthcoming s. 3(11) application. One cannot in fact say that there is such a likelihood of success because the Minister is entitled to require applicants to make any *Zambrano* applications through the administrative scheme that the Department has established rather than through s. 3(11) on a stand-alone basis. Thus, a stand-alone revocation application to the same effect cannot be said to have a probability of success such as to warrant an injunction on that ground alone.

28. The next proposition advanced is that "*the respondent has not considered or determined the revocation application and thus refused to accept three 'Zambrano' applications on the basis that the applicant has inter alia been unable to secure documents including passports of the children from their mother*". As phrased, that is simply a statement of fact rather than a legal ground for relief.

29. The final point made in the grounds is "*in the premises the respondent has adopted an overly formal approach to this application and now intends to deport the applicant without consideration of the best interests of the children and/or the rights of the children as EU citizens under Article 20 TFEU and/or their constitutional rights as Irish citizen children"*. This, at last, is a ground that could in principle conceivably be a legally valid basis for an injunction. Mr. Barron, however, offers two broad answers to that complaint.

30. Firstly, the applicant has not made a valid application by providing all necessary documentation. If he had done so, all of the various points he wished to make would be considered. The applicant says that the requirements imposed by the Department are not

practicable and that access to some of the documents such as the first child's passport is outside of his control due to the fact that the mother is extremely uncooperative. However, an examination of the Department's latest letter of 7th February, 2020 indicates that at least some of the material sought by the Department was in principle within the applicant's control. If the matters referred to were all matters outside the applicant's control then the applicant could surmount this particular hurdle, but that has not been shown to be the case here.

31. Secondly, even if there had been a valid pending *Zambrano* application, we are not as yet in *Zambrano* territory given that there is no suggestion that the children, or either of them, would be compelled to leave the territory of the EU: see *Bakare v. Minister for Justice and Equality* [2016] IECA 292 (Unreported, Court of Appeal, 19th October, 2016). At its height, the applicant's case is that he may at some future point acquire such a relationship with the children that they might be compelled to leave the State, but in the absence of that being the case at the present time, the applicant does not qualify under the established Zambrano doctrine. The high watermark of the applicant's case was *K.A. and Others v Belgische Staat* Case C-82/16 (Court of Justice of the European Union, 8th May, 2018) which condemned the failure to examine the merits of an application where there existed a relationship of dependency such that the Union citizen would be compelled to leave the territory of the Union. That does not apply here. Also by distinction with *K.A.*, the Department of Justice and Equality is not refusing to examine a residency application "*solely*" on the ground that the applicant is subject to a ban on entering on the territory (see para. 62 of *K.A.*) The application is not being examined because necessary supporting documentation has not been provided. For those reasons, the applicant has not shown a likelihood of success in the applications such as to warrant the grant of an injunction as a substantive relief.

Order

32. I have no particular enthusiasm about declining an injunction here, even bearing in mind that the applicant is largely the author of his own misfortune. In an ideal world, the applicant might be entitled to prosecute his family law proceedings to finality, and have time to put forward the best possible attempt to advance his *Zambrano* points. It only partially alleviates my discomfort to say that there is no particular ideal solution, given the competing problems of the applicant's maximum period of custody imminently running out, the deportation arrangements which are in place for the coming days, the speculative nature of the EU law points being made which go significantly beyond existing authority, the applicant's history of deception and evasion which means the likely effect of further significant adjournment of the case with a stay on deportation would be his release and (at least temporary) disappearance, the probable futility of even considering a reference to the CJEU given the mootness that would inevitably overtake the case, the lengthy period that probably would be required to untangle the multiplying issues in the family law end of things, not least the newly-emerging details, not yet on affidavit, that another man is named on the birth certificate as father of the second child, the fact that the Department's decision not to accept the *Zambrano* applications as admissible is not challenged on the current pleadings, the fairly continuous churn in relation to the

pleadings and the multiple versions that have been offered, the fact that yet a further fairly major reconfiguration of the pleadings probably would be called for if all of the various issues raised at the hearing were to be teased out to their absolutely final logical ramifications, the applicant's failure to seek to extend time to challenge the deportation order, which if granted would have taken the time pressure off by stopping the clock for the release of the applicant, and finally the fact that the Minister has not yet decided the s. 3 (11) application, which if he had, would have provided a decision which, if challenged, would also have to have the effect of stopping the clock, allowing a more leisurely opportunity to consider the issues prior to the compulsory release and likely consequential disappearance, at least temporarily, of the applicant.

33. Fenced in on all sides as the court is, the only realistic way to resolve the case is simply to apply existing settled caselaw, which unfortunately does not favour the applicant for the reasons explained. Accordingly, the order will be to dismiss the proceedings, although I do so without much enthusiasm.