

THE HIGH COURT

JUDICIAL REVIEW

[2018 No. 926 J.R.]

BETWEEN

D.O.A. (NIGERIA), V.S., J.A.S.A. (AN INFANT SUING BY AND THROUGH HER MOTHER AND NEXT FRIEND V.S.) AND J.E.M.A. (AN INFANT SUING BY AND THROUGH HER MOTHER AND NEXT FRIEND V.S.)

APPLICANTS

AND

THE MINISTER FOR JUSTICE AND EQUALITY

RESPONDENT

JUDGMENT of Mr. Justice Richard Humphreys delivered on the 29th day of April, 2019

1. If anyone still clings to the discredited theory that all a judicial review applicant needs to disclose to the court is what was before the decision-maker, a reading of the present case might possibly prove educational.
2. The present tangled tale goes back over two decades. The applicants are a father and mother of Nigerian origin and their two children. The mother claimed in correspondence on 4th January, 2018 that she knew the father for over twenty years, implying that they met by 1998, if not before. The mother came to the State in March, 2002, heavily pregnant, and applied for asylum immediately on arrival. She later withdrew that claim. The third-named applicant is the older child who was born in 2002 and was entitled to citizenship on birth in accordance with the (since-amended) law in force at that time.
3. The father says that he left Nigeria in January, 2005 and went to the U.K. for a year. The younger child, according to Mr. Michael Conlon S.C., for the applicants, was conceived in the U.K. in 2005, when the mother apparently travelled there from Ireland. Ms. Elizabeth Cogan B.L. for the respondent indicated that it was to be presumed that the mother had by that stage been given a Stamp 4 permission which would have allowed travel, although she had no definite instructions on that.
4. The father then unlawfully came to Ireland in January, 2006 under the assumed identity of a British citizen cousin, and obtained employment and social welfare benefits on that fraudulent basis. In February, 2005, the mother was granted permission to remain in the State under the Irish Born Child Scheme.
5. The younger child was born in Ireland on 7th March, 2006. As the mother had only been lawfully resident in Ireland for approximately thirteen months prior to the birth, the fourth-named applicant was not entitled on birth to be an Irish citizen. However, the younger child's birth certificate had an incorrect father's name on it, namely the real father's British citizen cousin, which was, it is to be inferred, entered for the purpose of making a fraudulent claim for an Irish passport on behalf of the younger child. It is deposed to on behalf of the respondent by Mr. Kenneth Kavanagh in his affidavit at para. 36 that "*it appears the Fourth Named Applicant was issued with an Irish passport on the basis of false information in respect of the identity of her father*".
6. The mother then appears to have been admitted to Trinity College, Dublin to study a professional qualification in 2007, according to correspondence from the applicants dated 15th September, 2014. Since then she appears to have qualified and risen to a management position. On 13th November, 2010, a passport was granted to the younger child. As noted above this was apparently on the basis of a false identity having been submitted for the father. On 5th October, 2012 the mother was naturalised as an Irish citizen. Throughout the process of application to the Minister, and indeed at all stages in the proceedings up to the date of the hearing, the parents have claimed that they were married in a traditional marriage ceremony, although evasively they never provided any particulars whatsoever of this alleged marriage. When this issue came up at the hearing Mr. Conlon took instructions and then stated that this alleged traditional marriage ceremony happened in Ireland in January, 2013. He then had to concede on that basis that it was no longer being claimed that this is a legal marriage. On that bombshell, the applicants' whole Article 41 argument simply imploded while counsel was on his feet.
7. On 22nd May, 2014, the father sought permission to remain in the State as the parent of what were said to be two Irish citizen children. Correspondence then ensued in relation to his chequered immigration history and the incorrect details registered under the heading of father for the two children, the older one having been registered with a completely false father's name and the younger one with the name of the father's British citizen cousin. As part of this correspondence, the Minister wrote on 25th May, 2015 seeking DNA evidence and stating that the documentation provided to the Passport Office when applying for the passport for the younger child featured false and misleading information "*that may render such a document void*". The father then arranged for the appropriate DNA tests which he says established that he was the actual father of the children. This appears to have been accepted by the relevant State authorities. He was requested to ensure that the birth certificates were corrected and this appears to have been done. The Minister then sought some further information in support of his application, some of which was provided.
8. In December, 2015, the younger child's apparently falsely procured passport expired and in 2016 a new passport was applied for with the father's correct name. As Ms. Cogan puts it, there was "*some sort of disclosure at that point*", and, while in the absence of the file she cannot be definitive about what exactly happened, it is to be assumed that from that point onwards the Minister for Foreign Affairs and Trade was made aware of the true circumstances of the younger child's parentage. A new passport application was refused for that reason, apparently, and the younger child then applied for naturalisation as an Irish citizen.
9. In the meantime, the father had been charged with theft and fraud offences arising from falsely claiming social welfare. His solicitor informed the Minister by letter dated 8th June, 2017 of his next court attendance date. The Minister replied on 9th June, 2017 that the applicants should advise of the outcome. On 9th October, 2017, the Minister again requested the applicant's solicitor to do so, in default of which the application would be deemed to be withdrawn. The Minister's approach was that when that letter was not responded to within the time specified, the application was deemed to be withdrawn. Thus while the applicants' solicitor's affidavit says that the *Zambrano* application was refused, that in fact doesn't appear to be correct. Rather, the application appears to have been treated as withdrawn by the Minister.
10. In December, 2017 a notice of intention to deport the first-named applicant was issued. Also, in December, 2017 the applicant

was sentenced to two years' imprisonment following his conviction for theft and fraud offences. The younger child was naturalised on 21st May, 2018, and, given the history I have mentioned above, it is to be assumed that that was on the basis of a correct understanding of the factual situation on behalf of the Minister at that point in time.

11. The Minister made a deportation order against the first-named applicant on 14th September, 2018. The primary relief sought in the present proceedings is *certiorari* of that order. The first-named applicant is due to be released from custody on 13th June, 2019. Leave to seek the relief in the present judicial review was granted on 12th November, 2018, and a statement of opposition was delivered on 12th March, 2019. In the proceedings I have received submissions from Mr. Conlon (with Mr. Ian Whelan B.L.) for the applicants and from Ms. Cogan for the respondent.

The plea that the parents are married

12. The case was pleaded, and indeed opened, on the basis that the parents were married. A remarkable feature of the case is that the applicants' whole legal submissions on Article 41 rights were premised on the proposition that the parents are married, but the applicants never provided details as to where, when or how the alleged marriage took place. Only when this issue came up in the course of the hearing did it emerge that this marriage supposedly took place in Ireland in 2013 in a traditional and non-legally binding Nigerian ceremony. Faced with that situation, as noted above, Mr. Conlon is not arguing that it is recognised in Irish law. That somewhat remarkable development nullifies most of the basis of the applicant's submissions, both to the Minister and indeed to the court. Indeed, there is a major question of disclosure here, to which I will return, because the statement of grounds, which was relied on at the *ex parte* stage, contends that the second-named applicant is the "wife", without qualification or explanation, of the first-named applicant.

13. While Mr. Conlon submits that the decision that is impugned in the proceedings proceeds on the assumption that the parties can rely on Article 41 of the Constitution, the wording of that decision seems careful to avoid using the word "wife" in relation to the mother. It cannot fairly be read as an acknowledgment that they are to be recognised as married in Irish law and indeed it is clear now that they are not. The statement of opposition legitimately puts this in issue. While one could certainly advance the argument that parties who are not legally married but in an equivalent type of relationship should be afforded equivalent constitutional rights (see my judgment in *I.R.M. v. Minister for Justice and Equality* [2016] IEHC 478 [2016] 7 JIC 2932 (Unreported, High Court, 29th July, 2016) and *M. v. Minister for Justice and Equality* [2018] IESC 14 [2018] 1 I.R. 417 [2018] 2 I.L.R.M. 81 *per* Clarke C.J. at para. 12.12)) it cannot really be said here that the applicants have given a full and frank account of their relationship such that it should be regarded as a coherent and credible account of one akin to marriage for the purpose of the judicial review. More fundamentally, the pleadings are premised not on the basis of a marriage-like relationship but on the false premise that the applicants can rely directly on Article 41 in respect of the relationship between the mother and father. This is to say the least a strange situation given that the applicant's legal submissions purport to mark the Minister's homework and correct his legal reasoning in a minute and micro-specific format while at the same time the applicants are humbugging the court on the fundamental issue of whether they are married or not. I will return to this issue later.

Ground 1 - allegation that the Minister erred in viewing the ECHR as the primary source of fundamental rights protection

14. Complaint is made that the Minister acted on the mistaken understanding that art. 8 of the ECHR was directly effective and that it, rather than Article 41 of the Constitution, was the primary source of fundamental rights protection. That is not a basis for *certiorari* of a deportation order (see discussion in *Seredych v. Minister for Justice and Equality* [2018] IEHC 187 3 JIC 2206 (Unreported, High Court, 22nd March, 2018)). In any event Article 41 does not apply to the relationship between the parents here.

Ground 2 - alleged failure to consider or evaluate the constitutional rights of the applicants

15. Ground 2 alleges that the Minister acted unreasonably and irrationally and failed to recognise, identify or evaluate the rights of the applicants under the Constitution, and in particular Articles 40, 41 and 42. Complaint is also made about the Minister's approach as amounting to a view that Article 41 goes no further than art. 8 of the ECHR and that the State is not obliged to respect a married couple's choice of residence unless an insurmountable obstacles test is satisfied. The legal basis for this argument has largely fallen away with the revelation that the parents are not married. In any event, a similar argument was rejected in *Seredych v. Minister for Justice and Equality* [2018] IEHC 187 [2018] 3 JIC 2206 (Unreported, High Court, 22nd March, 2018) at para. 8, relying on the judgment of Denham J., as she then was, in *Oguekwe v. Minister for Justice, Equality and Law Reform* [2008] IESC 25 [2008] 3 I.R. 795 at 823.

Ground 3 - alleged failure to consider the family rights of the applicants

16. Ground 3 complains that the Minister was obliged to consider and decide the application with due regard to a list of rights of the applicants "as a lawfully married couple and a family within the meaning of Article 41" and that the respondent's failure to decide the application with appropriate regard to those rights renders the decision invalid. Again, the legal basis for much if not all of this submission has fallen away given the exposure of the parents' misleading claim to be married. In any event, I rejected a similar point in *Jahangir v. Minister for Justice and Equality* [2018] IEHC 37 [2018] 2 JIC 0102 (Unreported, High Court, 1st February, 2018) in circumstances where, as here, the Minister considered the substance of the rights at issue even if they were considered under the heading of art. 8 rather than the Constitution. A decision should not be condemned merely for the lack of a correct box-ticking exercise if it is correct in substance.

Ground 4 - alleged disproportionality and/or Zambrano issue

17. Ground 4 alleges that the decision is disproportionate both by reference to the Constitution and European Union law, specifically the decision in Case C-34/09 *Ruiz Zambrano* which, while not mentioned in the ground, is implied by reference to the EU law provisions related to it. As far as Irish law is concerned, balancing the competing interests and rights in a proportionate manner is a matter for the Minister in the first instance (see *O.A.B. v. Minister for Justice and Equality* [2018] IEHC 142 [2018] 2 JIC 2709 (Unreported, High Court, 27th February, 2018) at para. 13 (xix)). The decision has not been shown to be unlawfully or unconstitutionally disproportionate. Of course the children will be deprived of their rights to the direct care and company the father, although the parties may have to find other ways to maintain contact. That is not in itself disproportionate. Such a situation would apply to any deportation order against a parent. It is certainly a shame that the father is being parted physically from the children, but possibly he should have thought about that before engaging in massive abuses of the immigration system and the criminal law of the State. It is clear that the parent of an Irish citizen child may be deported in principle (see *Lobe and Osayande v. Minister for Justice, Equality and Law Reform* [2003] IESC 3 (Unreported, Supreme Court, 23rd January, 2003)). Insofar as the applicants make a *Zambrano* point, Mr. Conlon accepts that the tenor of the submission made was that there will be a family separation and he further accepts that it hasn't been suggested that the children will go to Nigeria. Therefore the *Zambrano* issue simply does not arise (see *P.N.S. (Cameroon) v. Minister for Justice and Equality* [2018] IEHC 504 [2018] 7 JIC 1607 (Unreported, High Court, 16th July, 2018) para. 46, *O.A.B. (Nigeria) v. Minister for Justice and Equality* [2018] IEHC 142 [2018] 2 JIC 2709 (Unreported, High Court, 27th February, 2018) at para. 13(iii), and numerous other authorities). Even if, which hasn't been shown, the Minister erred in some way in considering what would happen if the children did go to Nigeria, that is academic because they aren't going to Nigeria.

Ground 5 - alleged failure to provide reasons that the applicants' humanitarian considerations were not of sufficient weight

18. Ground 5 alleges that the Minister should have provided reasons for the finding that the humanitarian considerations in favour of the applicants were not of sufficient weight. The notion that detailed reasons are required for the refusal of an *ad misericordiam* submission has itself been rejected previously (e.g. *Odeh v. Minister for Justice and Equality* [2016] IEHC 654 [2016] 12 JIC 0701 (Unreported, High Court, 7th December, 2016) at para. 8, see also *D.E. v. Minister for Justice and Equality* [2018] IESC 16 [2018] 2 I.L.R.M. 324 per O'Donnell J. at para. 11), and I do so again here.

Ground 6 - alleged failure to correctly balance the rights of the applicants

19. While a point was made under this heading relying on various observations, some possibly *obiter*, of Hogan J. in *Gorry v. Minister for Justice and Equality* [2017] IECA 282 (Unreported, Court of Appeal, 27th October, 2017), the basis of the argument largely falls away following the discovery that their claim to be married is untrue. In any event, it is not necessary to get excessively caught up in a semantic micro-analysis of differences between the wording of Article 41 of the Constitution and art. 8 of the ECHR. While the constitutional language is semantically more emphatic in certain respects, that does not automatically translate into a difference in effect in every case. The Constitution and the ECHR can be read as fundamentally directed to the same object of providing proportionate protection for private and family life with enhanced protections in the context of marriage and related or equivalent relationships. The decision here identifies any rights that the applicants are seeking to rely on and the Minister is not obliged to discuss those narratively or to write a legal essay.

Ground 7 - alleged disproportionality

20. A point is made about disproportionality under ground 7 but it is accepted that this is essentially covered by ground 4 above.

Ground 8 - alleged failure to balance the rights of the applicants

21. While a point about balancing the rights of the applicants is also made under the heading of ground 8, it is again accepted that this is something of a repetition of the point made under ground 4, and certainly adds nothing to it.

Ground 9 - alleged irrational finding that there was no authority to support the proposition that an Irish citizen is entitled to reside in the State with their spouse

22. Complaint is made that the Minister said that there appeared to be no authority supporting the proposition that an Irish citizen, or a person entitled to reside in the State, may have a right to reside here with his or her spouse. Mr. Conlon submits that there is such authority. The sense of the Minister's decision, even if the wording could be improved, is that there is no authority giving an absolute right to that effect and the Minister is certainly correct about that. Anyway the point is irrelevant as the parents are not spouses.

Ground 10 - alleged contradiction in the decision

23. Complaint is made that the decision is contradictory insofar as it contemplates the situation both of the children going to Nigeria and alternatively of remaining here. That is not a contradiction; rather it is a consideration of two alternative scenarios, which is certainly not a ground for *certiorari* (see *O.A.B. (Nigeria) v. Minister for Justice and Equality* [2018] IEHC 142 [2018] 2 JIC 2709 (Unreported, High Court, 27th February, 2018) at para. 13(xiv)).

Ground 11 - lack of proportionality analysis

24. Complaint is made that the Minister should have conducted a proportionality analysis for the purposes of art. 8(2) of the ECHR. However, given that the father is an unsettled migrant, there is no requirement to conduct a detailed proportionality analysis, save in exceptional circumstances, which don't exist here.

Conclusion and Order

25. The carnival of mendacity that is the applicants' immigration history culminated in the first-named applicant codding the Minister to the effect that he was married. That turns out not to be so in any legally operative sense. The applicants then sought to cod their lawyers and, through them, the court by issuing proceedings premised on that assertion and by claiming marriage-related rights under Article 41 of the Constitution. Mr. D.O.A.'s Article 41 point should have been dead on arrival had his approach not been so unharnessed from the duty of candour. Mid-way through the hearing, when I asked for particulars of the alleged marriage, the factual position emerged for the first time, and the applicants' case in that respect disintegrated in front of their lawyers' eyes. The court was certainly misled prior to that point. Responsibility for that situation lies with the applicants. There is however also a duty on lawyers to interrogate their instructions in order to ensure that the court is not misled (see e.g., *J.A. v. Minister for Justice and Equality* [2018] IEHC 343 [2018] 5 JIC 0102 (Unreported, High Court, 1st May, 2018), *Martins v. Minister for Justice and Equality* [2018] IEHC 268 (Unreported, Keane J., 2nd May 2018), *Bebenek v. Minister for Justice and Equality* [2018] IEHC 323 (Unreported, Keane J., 30th May, 2018), codified in Practice Direction HC81). Counsel suggested that it was not a huge problem that the applicants did not disclose that the parents were not legally married, and thus that Article 41 didn't apply to the relationship between them, because the decision-maker treated that provision as applying. But that unacceptable submission highlights the absurdity of the "disclose only what was before the decision-maker" theory. That approach has the implication that if you mislead the decision-maker or withhold important facts you must be entitled to do the same to the court. However, I would not dream of considering any criticism of lawyers in this case or holding them responsible. That is for one simple reason – to do so is entirely unnecessary. The ludicrous situation in which they found themselves is punishment enough.

26. The proceedings are dismissed. I note that no application was made at any stage for an injunction.