High Court of Ireland Decisions

Judgment

Title:	Gopee & ors -v- Minister for Justice, Equality & Law Reform
Neutral Citation:	[2016] IEHC 687
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Judgment by:	Faherty J.
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THE HIGH COURT

JUDICIAL REVIEW

[2015 No. 750 J.R.]

BETWEEN

DHANRAJ GOPEE, SARAH HICKEY

AND

RUBY HICKEY (A MINOR SUING

BY HER NEXT FRIEND SARAH HICKEY)

APPLICANTS

AND

MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM

RESPONDENT

JUDGMENT of Ms. Justice Faherty delivered on the 25th day of November, 2016

1. This is an application for leave to bring judicial review proceedings. The reliefs for which leave is sought are for:

> (a) a declaration that the first named applicant is entitled under EU law to remain in the State from the date of his application for permission to reside in the State until its determination, the said application based on the rights of his child, the third named applicant, under EU law, and/or for an order of *mandamus* requiring the respondent to furnish an undertaking that no steps will be taken to deport the first named applicant pending the determination of his application;
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> (b) a declaration that the respondent erred in law in refusing to furnish an undertaking that the first named applicant would not be deported pending his application to remain on the basis of parentage of an Irish citizen child
>
> (c) An interim or interlocutory injunction restraining any step being taken to deport the first named applicant pending the determination of the proceedings.

Background

2. The first named applicant, a Mauritian national, entered the State on 26th July, 2009 on a student visa. In 2012, he met the second named applicant and their child, the third named applicant, was born on 4th December, 2012. The year prior to this event, in December 2011, in the course of his third academic year, the first named applicant made a late application for an extension of his student visa and an extension of three months was granted up to 26th March, 2012. He subsequently made a second late application for renewal of his visa on 18th June, 2012, which was refused and he was referred to the Department of Justice Student Review Group.

3. By email 11th July, 2012, the first named applicant wrote to the respondent regarding the renewal of his visa. This was acknowledged on 25th July, 2012 and on 31st October, 2012, the Irish Nationalisation and Immigration Service (INIS) sought a copy of his passport and evidence of private medical insurance for the purposes of processing the extension of his permission to remain in the State. On 27th November, 2012, the first named applicant reported the loss of his passport and Garda National Immigration Card (GNIB) card to Pearse Street Garda Station. On 28th November, 2012, he sought an extension to his student visa and apologised for the delay in seeking such an extension, acknowledging that he was "illegal in the State". This correspondence cited his new address as being at North Circular Road, Dublin. On 30th November, 2012, INIS wrote to the first named applicant at the given address, advising that "as an exceptional measure" permission to remain was granted until 7th January, 2013, "on student (Stamp 2A) conditions". This permission was given so that the first named applicant could pursue a course of studies and he was advised that he was not permitted to enter into employment or engage in any business or profession. He was requested to attend the local immigration office to have the appropriate permission endorsed on his passport and have a certificate of registration issued "upon production of private medical insurance". He was advised, *inter alia*, that further permission could be sought provided he enrolled on a degree level course.

4. By subsequent letter of 1st February, 2013, INIS requested particulars of the first named applicant's "current circumstances and activities" in the State and he was given until 28th February, 2013 to reply. The letter advised that if the requested documents were not received by the due date it was the intention of INIS to issue a notification under s. 3 (4) of the Immigration Act, 1999 (proposal to deport).

5. By letter dated 6th March, 2013, INIS sent a proposal to deport letter to the first named applicant, at his given address, setting out the reasons therefor and the options that were available to him.

6. On 25th February, 2014, the first named applicant's file was examined pursuant to s. 3 of the Immigration Act 1999 and a recommendation was made for his deportation which was endorsed on 14th March, 2014. On 27th March, 2014, a deportation order was made which issued under cover of letter of 11th April, 2014, wherein the first named applicant was advised that he was obliged to leave the State by 28th April, 2014. In the alternative, he was directed to present himself on 1st May, 2014 to make arrangements for his removal.

7. It is common case that the first named applicant did not present himself on 1st May 2014. There is dispute between the parties as to why this was so, a matter which is adverted to in the applicant's submissions.

8. On or about 7th October, 2015, the first named applicant made an application for residency in the State based on his parentage of an Irish citizen child, the third named applicant, pursuant to the ECJ judgment in the case of *Ruiz Zambrano v.Office Nationale de l'Emploi(Case C-34/09) ("Zambrano").* This application was replied to by way of letter from INIS on 8th October, 2015, informing him that all such applications were required to be submitted on an "Irish Citizen Child" application form.

9. The first named applicant was arrested on 5th November, 2015, and detained in Cloverhill until 11th November, 2015 on foot of the deportation order. On 13th November, 2015, GNIB requested that he present himself at their office on 7th January, 2016, in order to facilitate his deportation from the State. Enquiries were made on his behalf as to the time and service of the deportation order and INIS issued a letter on 19th November, 2015, clarifying the deportation order had been issued to the first named applicant at a named address at North Circular Road Dublin 7. On 24th November, 2015, the applicant's solicitors wrote to INIS advising that he never in fact resided at an address at North Circular Road and sought confirmation that the deportation order related to him. It is not in dispute in these proceedings but that the deportation order pertains to the first named applicant.

10. On 6th November, 2015, the first named applicant re-filed an application for residency based on his parentage of the third named applicant, by completion of the requisite form.

11. In light of his application for residency, on 4th December, 2015, his solicitors wrote to INIS requesting a "written undertaking" that the first named applicant would not be deported pending the examination of his application for residency.

12. On 8th December, 2015, the respondent replied in the following terms:

> "In relation to your request for an undertaking that your client will not be removed from the State pending the determination of his application, while no such undertaking can be provided, it can be taken that no steps will be taken to have your client removed from the State other than in accordance with the law and following due process.
>
> Please be advised that your client's 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 to when your client's case will be finalised. However, your client can be assured that there will be no

avoidable delay in bringing his case to finality."

13. Following further correspondence from the applicant's solicitors, a similar response issued from the respondent on 15th December, 2015.

14. The application for leave to judicial review the failure to provide an undertaking was made on 21st December, 2015. By order of MacEochaidh J., of the same date, he directed the application be made on notice to the respondent and granted an interim injunction to 11th January, 2016, which was subsequently extended, pending the determination of the within proceedings.

The applicants' submissions

15. The applicants' principal submission is that the deportation order made in respect of the first named applicant should be stayed pending the outcome of his application to remain. It is submitted that the third named applicant, as an Irish and European Union citizen has an entitlement to the company of the first named applicant in the State under Article 20 TFEU as applied by the ECJ in *Zambrano.* As this right derives from the third named applicant's EU treaty rights it is thus not dependant on the conferring of a right by the respondent

16. The proposition which the applicants seek leave to advance in judicial review proceedings is that the third named applicant has a right to the company of her father in the State pending the determination of the *Zambrano* application. If the applicants are correct in this proposition, then the deportation order made against the first named applicant should not be enforced, pending the leave to remain application filed by the first named applicant. Counsel submits that in order for the third named applicant to have an effective remedy under the law (which under EU law the court is obliged to fashion), there is reason (albeit that there exists a valid deportation order) following a change of circumstances where the first named applicant became the parent of a Irish citizen child, that the deportation order should be stayed for a limited period pending the processing of his application to remain based on *Zambrano.* This is to ensure that there is an effective remedy as required by EU law for the third named applicant.

17. Counsel submits that the application of EU law in the present case requires the relief sought by the applicants given that the first named applicant is the father of an EU citizen and has taken an active role in her upbringing, something unknown to the respondent at the time of the deportation order. This, combined with the need to vindicate EU rights, constitutes a fact of such gravity as to stay the implementation of the deportation order.

18. Contrary to the respondent's arguments as set out in the affidavit of Mr. James Boyle, and in their submissions, there has been no lack of candour on the part of the first named applicant such as to disqualify him from seeking relief from the court.

19. As disposed to in his supplemental affidavit sworn 26th February, 2016, the first named applicant confirmed that the letter addressed to INIS in November, 2012, which advised of his change of address, was written by a friend at his request. However, he avers that he was not aware that his friend had inserted the friend's own address and not the first named applicant's in the said letter. Consequently, the deportation order which was issued to the North Circular Road address came as a surprise to him. Moreover, the insertion of the said address had a detrimental effect in terms of the first named applicant's residential status as he also did not receive the letter dated 30th November, 2012 which had given him an extension of his student permission to 7th January, 2013.

20. It is submitted that notwithstanding the aforesaid chain of events between 2012 and

2014, the first named applicant was not maintaining that there was inadequate service of the deportation order. He seeks only to stay the enforcement of the deportation order pending the determination of his application for leave to remain based upon his parentage of third named applicant. The right is analogous to residence rights which arise under Directive 2004/38/EC (the Free Movement Directive) one of which is the right to remain in the State (including the right to work) pending a decision on an application for an EU residence card. The grant of a residency card is declaratory in nature, as set out by the ECJ; it is recognition of the right by the Member State and not the conferring of a right. In this regard, counsel relies on the *dictum* of Cooke J. in *Decsi v. Minister for Justice, Equality and Law Reform* [2010] IEHC 342.

21. It is submitted that while the respondent has procedural autonomy to determine how EU rights are protected, this is subject to the EU principles of effectiveness and equivalence, as expressed by Murray J. in *T.D. v. Minister for Justice, Equality and Law Reform* [2014] IESC 29.

> *"29. The principle of equivalence requires that a national procedural rule be applied without distinction, whether the right alleged to have been infringed has its source in Community Law or national law, in circumstances where the purpose and cause of action are similar. In short, national procedural rules must not treat the safeguarding of rights under European Union law less favourably than the safeguarding of rights under national law in similar proceedings. (See, for example, Case C-63/08 Pontin [2009] E.C.R. I-10467)*
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> *30. The principle of effectiveness means that even where national procedural rules are compatible with the principle of equivalence, they must nonetheless not be such as to render it practically impossible or excessively difficult to assert rights derived from E.U. law before the national courts. (See, for example, Case 268/06 Impact [2008] E.C.R. I-02483, para. 46, and case law cited therein).*
>
> *31. The requirements of equivalence and effectiveness embody the general obligation on the Member States to ensure judicial protection of an individual's rights derived from the law of the European Union."*

22. Under the principle of the effective protection of the third named applicant's EU rights, the first named applicant should be permitted to remain in the State pending the outcome of his *Zambrano* application. If the outcome is positive this does no more than recognise the third named applicant's rights under EU law and the first named applicant's derivative right. Thus, the right of the third named applicant to the company of the first named applicant must be protected by the national courts. This requires in the circumstances a stay or injunction of the deportation order in order to protect the family unit.

23. With respect to the principle of equivalence, it is submitted that an appropriate comparator to an application for permission to remain on the basis of parentage of an Irish citizen child is an application by a third country national family member of an EU citizen to reside for a period of longer than three months pursuant to Regulation 7 of the European Communities (Free Movement of Persons) (No. 2) Regulations 2006. Regulation 7 (3) provides that: "subject to Regulation 20 (grounds for removal from the State), a person the subject of an application made under para. (1)(a) may remain in the State pending a decision on the application." Counsel accepts that the right given under Art. 7 (3) of the Free Movement Directive and the right of the third named applicant under *Zambrano* derive from EU law. Nevertheless, counsel argues that there are grounds to argue the principle of equivalence in a substantive judicial review

hearing. It is submitted that the 2006 Regulations, which transpose the 2004 Directive, are a national law albeit that they transpose EU rights.

24. Counsel submits that for the purpose of the present case, that the national procedural rule in issue is that the respondent will not given an undertaking that the first named applicant, the person seeking leave to remain based on his parentage of an (EU citizen), can remain in the State pending the determination of his application. Accordingly, the applicants wish to argue equivalence by reference to Art. 7 rights in the Directive as transposed into national law. In support of this argument, counsel refers to the opinion of advocate General Geelhoed in the case of *Baumbast v. Secretary of State for the Home Department (Case C-413-09)* (at para. 121).

25. Furthermore, given that what is an issue is permission to remain in the State on the basis of the parentage of an Irish citizen child, the respondent is implementing EU law. Thus, in determining an application under EU law on foot of the first named applicant's asserted rights and the right of the third named applicant, the EU Charter on Fundamental Rights applies. In this regard, counsel relies on Articles 7, 24 and 47 of the Charter, in particular the principle of an effective remedy before the court.

The presumption is that there must be a relationship to be protected. If the deportation order is to be effected, it means that the first named applicant would be unable to maintain his access to the third named applicant, contrary to her rights under Article 24.3 of the EU Charter. The fact that the first named applicant has no valid permission to be here at present or that he is working illegally does not negate the third named applicant's EU rights; this is clear from *Zambrano*.

26. Counsel relies on the decision of the Supreme Court in *Cosma v. Minister for Justice, Equality and Law Reform* (10th July 2006) in support of his contention that there may be cases in which an injunction might be granted despite the fact that the deportation order was not the subject of challenge. It is submitted that the High Court has the same inherent power as referred to by McCracken J. in Cosma to grant interlocutory orders pending a determination of the first named applicant's application for leave to remain based on *Zambrano*. The exceptional circumstances requirement are met in this case, counsel submits, by virtue of the fact that the first named applicant has sought leave to remain based on the third named applicant's EU rights, which application is being processed.

27. It is submitted by the applicants that they thus meet the arguable case test for the grant of an interlocutory injunction as set out in *Okunade v. Minister for Justice, Equality and Law Reform* [2012] 3 I.R. 152, by virtue of there being an application for leave for judicial review of the respondent's refusal to provide the requested undertaking. It is further submitted that, having regard to the test in *Okunade*, the greatest risk of injustice lies in deporting the first named applicant for a decision reached on his *Zambrano* application, as deporting him would sunder the family unit. In this regard, counsel for the applicants refers to the emphasis placed by Clarke J. on the effect on the infant child.

The respondent's submissions

28. The respondent asserts that there are no grounds upon which the court should grant leave in this case. First, there is no basis upon which to challenge the deportation order which is not, in fact, being challenged. Furthermore, there is no basis upon which an EU Treaty rights decision can be challenged as no decision has been made in respect of the first named applicant's application for leave to remain based upon his parentage of the third named applicant. It is thus submitted that the absence of any measure which can be reviewed means that the court must inexorably refuse leave in this case. There is simply nothing which is underlying the applicant's request for an injunction or stay of

the deportation order. The respondent is under no legal obligation to give an undertaking. Therefore, the failure to do so is not amenable to challenge. There is, therefore, nothing underlying the statement of grounds and, accordingly, no arguable case is made out under the *Okunade* principles. Counsel cannot identify any case that has come before the courts where there was no underlying decision and yet gave rise to an application for an injunction or stay. All of the case law relied on by the applicants relate to actual decisions with legal consequences, which were challenged. In the present case, there is only a refusal to provide an undertaking which, counsel submits, is not justiciable.

29. As there is nothing upon which the court can grant a stay or injunction, the arguments canvassed by the applicants' counsel with regard to effectiveness and equivalence must be viewed only as abstract concepts.

30. In any event, there is no lack of effectiveness in the Irish legal or administrative system. There was no restriction on the first named applicant seeking leave to remain following the birth of the third named applicant. Furthermore, in the deportation process, the first named applicant could have raised the issue of her birth which the respondent would have been obliged to consider under s. 3(6) of the Immigration Act 1999, as amended.

31. The only basis for any alleged ineffectiveness is that the first named applicant went under the radar and did not engage with the respondent until late 2015. The reason that the first named applicant is now in a position to make any argument is because he seeks to rely on his own behaviour which, it is submitted, the court should not ignore in the context of its exercise of its equitable jurisdiction.

32. Counsel submits that the applicants seek to put before the court an *ad misericordiam* plea that seeks to gloss over the relevant facts. The first named applicant's case is pitched on the basis of a claimed change of circumstances since the making of the deportation order, namely the respondent's consideration of his application for leave to remain based on the third named applicant's EU rights. It is contended, however, that there has been no change of circumstances. The relevant facts are that the third named applicant was born in December 2012. The deportation process commenced in 2013, in respect of which the first named applicant was invited to make representations which the respondent was obliged to consider in the context of the first named applicant's family life and personal life. This opportunity was afforded to the first named applicant but not availed of. In the present case, there is little factual doubt as to what occurred. The first named applicant arrived on a student visa in 2009. He let it run out but obtained an extension. He sought, and obtained a further extension for which he was not legally eligible, and thereafter, did not engage with the respondent. It is submitted that he has offered no credible explanation for this state of affairs.

33. The explanation proffered by the first named applicant as to his lack of knowledge of the deportation order, namely that he left it to a friend to write a letter on his behalf because his English was not good and that his friend inserted the incorrect address in the letter cannot be viewed as credible in circumstances where the first named applicant was a student in the State for three years and given that he had previously corresponded with the respondent.

34. Moreover, the communication received on 28th November, 2012 specifically referred to the first named applicant having to move address in respect of which he gives an address at North Circular Road, Dublin. There can be nothing accidental about this communication. Even if the first named applicant's explanation is to be accepted, it begs the question as to why his friend (who he says resided at the North Circular Road

address) did not forward his mail to him.

35. Counsel contends that it was open to the first named applicant in late 2012, and in 2013, to advise the respondent that he had become the father of an EU citizen child. He did not do so until October/November, 2015. Had he engaged with the respondent throughout 2013, all of the arguments which he now makes could have been made prior to the deportation order. However, he did not do that and was effectively under the radar until late 2015. It is thus submitted that the first named applicant's circumstances cannot be said to be exceptional.

36. While the first named applicant wishes the deportation order to be stalled pending the determination of his application for leave to remain, such a course of action is not required in order for his application to be determined. Furthermore, there is no protection issue involved in returning him to Mauritius.

37. The analogy which is drawn between the applicants' circumstances and rights under the Free Movement Directive is without merit. The first named applicant is not an EU national. He has no direct EU rights. He has only an asserted right based on his parentage of an EU citizen child. Furthermore, in *Zambrano*, the ECJ did not say that a generalised right of residence attached to all non-national parents of EU citizen children.

38. While in *Cosma*, the Supreme Court states there can be exceptional circumstances, same do not arise in this case. The first named applicant, knowing that he was illegally in the State as of November 2012 did not engage thereafter and, most specifically, did not do so after the birth of his child - which he could have done.

39. It is further submitted that the first named applicant does not have to be in the State for his *Zambrano* type application to be processed. Even the 2006 Free Movement Regulations, to which analogy is claimed in these proceedings, envisages that many applications may be determined when persons are outside the State.

40. As far as the present case is concerned, at best, there is an assertion that the deportation order should be revoked on the basis of matters brought to the attention of the respondent a number of years after they could have been. It is not the position that the first named applicant is being asked to comply with a deportation order that may be unlawful, as the deportation order cannot be challenged and is not being challenged.

41. It is submitted that if the court finds an arguable case, the first named applicant cannot satisfy the test that the greatest risk of injustice would lie in the refusing of a stay or injunction. As per the criteria listed by Clarke J. in *Okunade,* (at para. 104) the respondent satisfies factor (b)(i) of *Okunade* as the deportation order is valid and not under challenge. Furthermore, factor (b)(ii) is satisfied as the public interest requires the orderly implementation of the State's immigration policy. It is further submitted that the additional factors arising from the facts which should be weighed (factor (b)(iii) in *Okunade*), lie in favour of the respondent. Such factors comprise the first named applicant's conduct in the context of the lack of any *bona fide* intent to engage with the respondent between the end of 2012 and late 2015.

The first named applicant cannot satisfy factor (iv) of the *Okunade* test, as the deportation order is not challenged. Equally, any adverse consequences for the first named applicant in respect of any decision on his *Zambrano* application do not arise, as in the event that he is successful in this application, he can then return to the State.

42. With regard to the issue of damages, the first named applicant would not be in a position to recompense the State if allowed to remain and his *Zambrano* application is

ultimately refused.

43. Counsel also stresses the principle that lawful orders must be allowed to have effect which was recognised by Clarke J. in *Okunade,* where he states:-

> *"Recognising the entitlement of such persons or bodies to carry out their remit without undue interference is an important feature of any balancing exercise. It seems to me to follow that significant weight needs to be placed into the balance on the side of permitting measures which are prima facie valid to be carried out in a regular and orderly way."* (Para. 92)

44. This *dictum* must weigh in favour of the respondent given that the applicants do not challenge the validity of the deportation order, unlike the situation in *Okunade* where the deportation order was challenged.

45. Counsel submits that when all of the *Okunade* criteria are applied to the present case, they favour giving effect to the deportation order. Thus, there is no compelling case to say that a legally valid order should not be implemented.

Considerations

46. The issue before the court is whether the applicants have established substantial grounds to an arguable threshold so as to warrant the granting of leave.

47. In summary, the statement of grounds asserts:

> a. in failing to furnish the applicants with an undertaking that no steps will be taken to deport or remove the first named applicant from the State pending the determination of his application for permission to remain in the State on the basis of parentage of an Irish citizen child, the respondent breached the principles under European Union law of equivalence and effectiveness;
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> b. In failing to furnish the applicants with an undertaking that no steps will be taken to deport or remove the first named applicant from the State pending the determination of his application and in requiring the first named applicant to present himself to GNIB on 7th January, 2016 to facilitate his deportation from the State, the respondent is acting in breach of the third named applicant's rights under Article 20 TFEU; and
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> c. If the first named applicant were deported or removed from the State pending the determination of the within proceedings, a greater risk of injustice would lie on the side of the applicants. The second and third named applicants are Irish and therefore Union Citizens and cherish the presence and role of the first named applicant in the upbringing of the third named applicant. If it is the case that the applicants ultimately succeed in their application but the first named applicant is deported or removed from the State in the interim, this will entail considerably hardship for the applicants for which damages would not be an adequate remedy.

48. What is firstly to be determined for the purposes of grounds (a) and (b) of the statement of grounds is whether there is a "reviewable measure" to which the court can look in order to ascertain whether the applicants have established substantial grounds to an arguable degree so as to be permitted to challenge that measure.

49. Counsel for the respondent argues that there is no such measure since the deportation order is not being challenged, and given that the respondent has not yet issued a decision on the residency application.

50. Thus, the question comes down to whether the first named applicant has an entitlement to receive the requested undertaking from the respondent, which would be in effect a stay on a deportation order in circumstances where he is not challenging the validity of the deportation order and where no decision has yet issued in respect of his leave to remain application based on his parentage of an EU citizen child and his consequent request for the revocation of the deportation order on this basis. In the course of these proceedings, counsel for the respondent argued forcefully that there has been no change of circumstances such as might merit the revocation of the deportation order. The court refrains from addressing this argument. Whether there are grounds for revocation is a matter for the respondent to determine upon due consideration.

51. Insofar as the applicants' counsel's submissions alluded to an implicit rejection by the respondent of the request to revoke the deportation order which was made on 24th November, 2015, no such refusal has issued. As is clear from the respondent's correspondence of 2nd December, 2015, no decision has been made on this request which is clearly bound up with the first named applicant's *Zambrano* application, presently under consideration. Obviously, as effectively conceded by the respondent, if the first named applicant's application for residency is successful, the deportation order will be revoked.

52. Notwithstanding that first named applicant is not challenging the validity of the issuing of the deportation order and that his permission to remain application is as yet undetermined, his counsel argues that given that his right to remain in the State, as asserted, flows from the third named applicant's EU rights, the first named applicant must have a right to stay the implementation of the deportation order in order for there to be an effective remedy for the applicants, and including giving effect to the third named applicant's EU rights. Counsel asserts that it is in this limited sense that there is a challenge to the validity of the deportation order.

53. In the first instance, as a matter of general principle, I do not accept the proposition that for there to be an effective remedy the first named applicant must necessarily be entitled to stay the enforcement of a deportation order. In *Okunade*, Clarke J. rejected a similar argument by stating:

> *"[82] It seems to me that the first question arising in the Campus Oil test, being as to whether the moving party has established a fair or arguable question to be tried, remains the starting point in considering whether a stay or injunction should be granted in judicial review proceedings or in ordinary plenary proceedings. In that context I note the argument put forward on behalf of the first applicant which suggested that imposing the Campus Oil test amounted to denial of access to the court or a failure to provide for an effective remedy. The argument started by noting, correctly so far as it goes, that persons in a position such as the first applicant are entitled to an effective remedy before a court (whether as a matter of Irish constitutional jurisprudence or, where engaged, under European Union law). However, the argument then went on to suggest that an applicant who had sought leave within the time limits prescribed by the relevant legislation but whose application for leave had not been heard by reason of the unavailability of a judge, must necessarily be entitled to remain in the jurisdiction pending the leave application if such a party was to enjoy an effective remedy. I do not accept that argument."*

54. To return now to the question as to whether there is a reviewable measure or decision in issue in the present proceedings. In response to the respondent's argument that there is no reviewable measure for the court to stay, the applicants' counsel submits that the first named applicant is seeking a "practical solution" in light of the fact of his pending *Zambrano* application.

55. First, it seems to me that what is effectively being canvassed on behalf of the applicants is that the court should somehow deem the deportation order a reviewable measure, thus enabling the challenge which the applicants seek the leave of the court to bring against the respondent. I am not persuaded that there is any merit in the applicants' arguments in this regard. The deportation order is a lawful and subsisting measure which is not challenged in these proceedings notwithstanding counsel's roundabout attempt to impugn it by dint of reliance on the first named applicant's subsequent application for residency. It is also worth bearing in mind that if the application is successful and the deportation order is revoked, this will not invalidate the making of the deportation order itself.

56. At best, the present proceedings are in response to the Minister's refusal to provide an undertaking that she will not enforce what is for all intents and purposes a valid deportation order, pending the currency of the first named applicant's application for residency in the State. The basis upon which he has filed an application to remain in the State rests largely, though not exclusively, upon the decision of the ECJ in *Zambrano*.

57. The decision in *Zambrano* was rendered by the ECJ on 8th March, 2011. In summary, the background to the case was as follows: Mr. Zambrano and his wife were Colombian nationals with one child who in 1999 were refused asylum in Belgium. In 2000, an order was made requiring them to leave. They were however permitted to remain in Belgium on the principle of non-refoulement. Mr. Zambrano made a number of applications for residence permits which were unsuccessful although on his third application he obtained a residence certificate from 13th September 2005 to 13th February 2006. He commenced working illegally in Belgium without a work permit and by 2001was in full-time employment. Although without a work permit, his work was declared to the Belgian National Security Office and he and his employer were subject to statutory social security contributions. Following the temporary suspension of his employment in October 2005, he sought temporary unemployment benefit but was refused on the basis that he did not hold a work permit. He commenced proceedings before the Belgian Employment Tribunal and shortly thereafter he was again employed on a full-time basis with the same employer. However, following an inspection by the Belgian authorities, an order for the immediate termination of his employment issued as he did not have a work permit and his employment duly ended. Mr. Zambrano's application for full-time unemployment benefit was refused. By this time he had two further children who were Belgian, and therefore EU citizens.

58. The Belgian Employment Tribunal referred a number of questions to the ECJ 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 were dependent, in a Member State of which the citizen children are nationals and in which they reside.

59. The ECJ held as follows:-

> *"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... .*
>
> *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....

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.

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.

45. Accordingly, the answer to the questions referred is that 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."

60. As is evident from the judgment, the ECJ formed the view that the refusal of the residence permit would compel the entire family to leave Belgium as, absent any right to reside, Mr. Zambrano would not be able to access resources to provide for his family.

61. Counsel for the applicants makes the case that the factual matrix in the case of *Zambrano* was not any different to the applicants' circumstances in that, in *Zambrano*, the non-national parent was working illegally in Belgium as is the case with regard to the first named applicant. He asserts that in *Zambrano*, the ECJ proceeded on the assumption that the *Zambrano* children required their non-national parents to provide for them, and thus work and reside in Belgium. Accordingly, the case is made that there is no reason to suggest that the applicants' situation will be any different.

62. The present status of the first named applicant's "*Zambrano*" application is that it remains to be determined. There is some dispute between the parties as to whether the first named applicant has addressed queries raised by the respondent. Following the re-filing of the application in November, 2015, the first named applicant was advised that the information provided by him did not clearly indicate the role he was playing in the third named applicant's life and specific information was sought by the respondent in this regard. According to the respondent's sworn affidavit in these proceedings, only a partial response was received from the first named applicant to this request and the respondent takes issue with the fact that there was no sworn affidavit by the second named applicant, as requested, and no explanation from the first named applicant as to why it took until 28th November, 2013 for him to be registered as the third named applicant's father. The applicants contend that outstanding queries have been addressed as of December, 2015, and that in particular, there is no merit to the respondent's submission regarding the lack of sworn affidavit from the second named applicant in the context of the *Zambrano* application. She has sworn a statutory declaration outlining the first named applicant's contact with the third named applicant.

63. At this juncture such dispute as may arise regarding the extent of the first named applicant's responses to the queries raised by the respondent are merely between the parties as no decision has issued. Accordingly, it is not the function of the court to comment on any claimed deficiencies in the first named applicant's response to the queries raised. Counsel for the respondent makes the case in these proceedings that the first named applicant does not live with the second named applicant and they are not married. She asserts that his relationship to the third named applicant is of a much more tentative nature than that which presented in *Zambrano*. It is asserted therefore that a real issue arises as to the extent of his relationship with the third named applicant. These are all matters presently under consideration by the respondent and it is not the court's function to comment on the strengths or otherwise of the residency application or otherwise trespass upon the considerations which the respondent must afford to the residency application.

64. As can be seen from the ECJ's judgment in *Zambrano*, the focus was on the EU dependent children and a factual scenario where the refusal of residence to a non-national parent meant that children would not benefit from EU rights under Article 20 TFEU as they would *de facto* have to leave the territory of the EU with their parents.

65. It is well established that the non-national parent of an EU citizen child does not have an automatic right of residence in the State. It is not a case of a right of EU status for the non national parent; it has to be ascertained in accordance with the ECJ judgment in *Zambrano*. Such a right for the first named applicant will flow if the refusal of residence resulted in the third named applicant (the EU citizen) having to leave the territory of the EU. All of this falls to be determined by the respondent.

66. In the grounds sought to be advanced, the first named applicant contends that the respondent's refusal to give the undertaking sought is in breach of the third named applicant's rights under Art. 20 TFEU. I do not accept that this argument as sustainable. No decision has been made by the respondent on the residency application, determining, one way or another, whether the third named applicant's Art. 20 rights are engaged, and in respect of which an application to the court could then be brought to challenge such decision, if adverse to the first named applicant.

67. Overall, I am satisfied that the first named applicant has not identified any decision which could be considered challengeable as being invalid, at this point in time. The present challenge is premised on the respondent's refusal to give an undertaking in the terms sought in the letter of 4th December, 2015. I agree with the respondent's counsel that the challenge is misconceived. While the deportation order was a decision amenable to challenge, it is not challenged. Equally, as I have said, while the first named applicant's *Zambrano* application, presently under consideration, is potentially amenable to challenge once a decision issues, no decision has in fact issued. Thus, in the absence of any decision which the applicants can, at this point in time, identify as capable of challenge, and in the absence of any evidence of a failure by the respondent to perform a legal duty, they have not persuaded the court that there is a reviewable measure or a failure perform a legal duty attributable to the respondent to which the court can look for the purposes of this leave application. The first named applicant is caught between a valid deportation order and an as yet undetermined residency application in respect of which a determination remains to be made as to whether the third named applicant's EU rights are engaged by the deportation of the first named applicant and/or whether there are other circumstances upon which the deportation order should be revoked. In the interim, I find that there is no legal obligation on the part of the respondent to provide the requested undertaking. Thus, insofar as the applicants seek an order of *mandamus,* this relief is misconceived. Equally, the nature of the declaratory relief sought does not, to my mind, add to the substance of the case that is being advanced on behalf of the applicants. Furthermore, counsel for the applicants has not provided authority to the

effect that as someone without established rights under EU law, or otherwise, the first named applicant has a right to remain in the State pending the determination of his residency application.

68. Accordingly, while the claim is made that the respondent has breached the EU principles of effectiveness and equivalence, I do not regard it as incumbent on the court to embark on a consideration of this argument since in the absence of any reviewable measure capable of challenge, the applicant's arguments in this regard must be regarded as abstract concepts, as contended for by counsel for the respondent. In any event, insofar as an effective remedy is concerned, as already referred to, *Okunade* is authority for the proposition that an applicant does not have to remain in the jurisdiction in order to enjoy an effective remedy.

69. In the course of his submissions, counsel for the applicants referred the court to various provisions of the EU Charter pertaining to the rights of the child. It is by now well settled that the rights provided for in the EU Charter only come into play when EU rights are engaged. The third named applicant's Art. 20 TFEU rights will only come into play if she has to leave the territory of the EU. By her residence in Ireland, the third named applicant is not exercising any free movement rights. As I have already said, given that a decision on the current residency application has not issued, there is no evidence before the court of any reviewable decision (adverse to the first named applicant) which could potentially raise the question of the engagement of third named applicant's rights as an EU citizen. In those circumstances, there is no basis for this court to embark upon a consideration of whether the provisions of the EU Charter are applicable to the third named applicant's circumstances. I do not perceive the refusal to give the undertaking sought by the applicant's as the respondent "implementing" EU law, as envisaged by Art. 51(1) of the Charter.

The inherent jurisdiction argument

70. In the course of his submissions that an injunction or stay could be granted by this court despite there being no challenge to the deportation order, the applicants' counsel relied on *Cosma* where McCracken J. states:

> *"The only issue now remaining before the court is whether an injunction ought to be granted restraining the respondent from deporting the appellant pending the determination of this appeal. There unquestionably is a valid deportation order in being, and the issue in this appeal is whether the Minister ought to have revoked that order, but the validity of the order itself is not being, and cannot be, challenged in this appeal.*
>
> *On a matter of general principle I am quite satisfied that the Supreme Court has an inherent power to grant interlocutory orders pending the hearing of an appeal where such order is necessary to protect the rights of the parties. An example which immediately comes to mind is that the court may order the preservation of property which is the subject matter of the proceedings. However, any such order must be made sparingly and only in circumstances where it will not conflict with the undisputed rights of any of the parties.*
>
> *Order 58 rule 18 of the Rules of the Superior Courts provides:-*
>
> > *"An appeal to the Supreme Court shall not operate as a stay of execution or of proceedings under the decision appealed from, except so far as the High Court or the Supreme Court may order; and no intermediate act or proceeding shall be thereby invalidated,*

except so far as the High Court or the Supreme Court may direct."

In this case the "decision being appealed from" is a decision of the respondent made under section 3(11) not to revoke a deportation order against the appellant. There is no appeal and can be no appeal from the decision of the learned High Court judge refusing relief in relation to the deportation order itself. It has been held by the High Court that the deportation order is valid, and that finding cannot be challenged before this court. If the court were to grant an injunction such as is being sought by the appellant, the effect would be to thwart the operation of the perfectly valid deportation order and would, at least to some degree, prevent the operation of a perfectly valid and unappealable High Court order.

There might indeed be circumstances, although it is hard to envisage them, where the Supreme Court might exercise its inherent jurisdiction to grant an injunction which could have this effect, for example it might conceivably be exercised when a previously unknown fact comes to light, being a fact which was unknown at the time of making of the deportation order, and which is one of such gravity as might stay implementation of the deportation order."

71. Aside altogether from the question of whether, where there is no challenge to the deportation order the first named applicant's circumstances might nevertheless qualify for the grant of an injunction or stay (akin to the type of exceptional circumstances outlined by McCracken J. in *Cosma*), the more pertinent consideration, as far as this court is concerned, is that in *Cosma* there was a reviewable measure in issue, namely the Minister's refusal to revoke a deportation order. In the present case, there is no such measure, for the reasons I have already outlined. Thus, I find that there is no legal basis underlying the applicants' counsel's contention such as might impel the court to consider whether the exceptional circumstances requirement in *Cosma* has been met in this case.

72. With regard to the injunctive relief sought in these proceedings, and to ground (c) of the statement of grounds, namely that the greater injustice would lie on the side of the applicants if the first named applicant is deported, this argument is premised on an arguable case having been made out under the *Okunade* principles for the granting of a stay or injunction in the context of judicial review proceedings. In *Okunade,* Clarke J. set out his two pronged test for the grant of a stay or interlocutory injunction in the following terms:

"[I]n considering whether to grant a stay or an interlocutory injunction in the context of judicial review proceedings the court should apply the following considerations:-

(a) the court should first determine whether the applicant has established an arguable case; if not the application must be refused, but if so then;

(b) the court should consider where the greatest risk of injustice would lie. But in doing so the court should:-

(i) give all appropriate weight to the orderly implementation of measures which are prima facie valid;

(ii) give such weight as may be appropriate (if any) to any public interest in the orderly operation of the particular scheme in which the measure

under challenge was made; and,

(iii) give appropriate weight (if any) to any additional factors arising on the facts of the individual case which would heighten the risk to the public interest of the specific measure under challenge not being implemented pending resolution of the proceedings;

but also,

(iv) give all due weight to the consequences for the applicant of being required to comply with the measure under challenge in circumstances where that measure may be found to be unlawful.

(c) in addition the court should, in those limited cases where it may be relevant, have regard to whether damages are available and would be an adequate remedy and also whether damages could be an adequate remedy arising from an undertaking as to damages; and,

(d) in addition, and subject to the issues arising on the judicial review not involving detailed investigation of fact or complex questions of law, the court can place all due weight on the strength or weakness of the applicant's case." (Para. 104)

73. In *Okunade*, the issue was whether the judicial review applicant was entitled to an automatic stay or injunction as of right so as to prevent a "*relevant measure*" from having force pending a full trial of the issues. (Para. 60) In that case, at the time of the injunction application, the applicants were challenging both the refusal of subsidiary protection and the making of a deportation order. However, as I have found in the present case, there is no reviewable measure in issue. Thus, in the absence of there being, in the words of Clarke J., a " *challenged measure*" (emphasis added) in respect of which leave to seek judicial review might be granted, the applicants do not have a substantive cause of action upon which to claim injunctive relief. Accordingly, they cannot be said to have met the arguable grounds threshold set out by Clarke J. in *Okunade*. Having so found, it is thus unnecessary for this court to embark on a consideration of where the greatest risk of injustice would lie in the context of whether or not to grant an interlocutory injunction.

74. I recognise entirely that this is an unfortunate scenario from the applicants' perspective. It is entirely understandable that the applicants would wish that the first named applicant would remain in the State pending the determination of the residency application. However, the court has found no legal basis to sustain the arguments put forward on his behalf.

Summary

By reason of all of the foregoing, I do not find that substantial grounds have been made out to an arguable level such as would merit the granting of leave in this case.

The relief sought in the Notice of Motion is denied.