

**THE HIGH COURT
JUDICIAL REVIEW**

[2021] IEHC 613
[2018 No. 605 JR]

**IN THE MATTER OF SECTION 5 OF THE ILLEGAL IMMIGRANTS (TRAFFICKING) ACT
2000 AS AMENDED**

BETWEEN

K.N.M. ORSE K.M.

APPLICANT

AND

THE MINISTER FOR JUSTICE AND EQUALITY

RESPONDENT

JUDGMENT of Humphreys J. delivered on Monday the 4th day of October, 2021

1. The applicant was born in 1986 in Morocco. He left his home country in 2006 and lived in Spain from 2006 to 2007, in France in 2008, in Belgium from 2008 to 2012 and in the UK from 2012 to 2014.
2. His presence in mainland Europe was illegal and he didn't apply for asylum there. He entered the UK illegally and then applied for asylum there under a false name.
3. He seems to have come to the State in January 2014 and applied for protection on 8th January, 2014 falsely claiming to be from Kuwait. He also used a different spelling of the name he is now using.
4. The decision of the Refugee Applications Commissioner refusing the asylum claim on 11th June, 2015 noted that he had refused to take part in a language analysis interview.
5. He appealed to the Refugee Appeals Tribunal on 21st August, 2015.
6. He finally came clean on 11th May, 2017 when applying to the International Protection Office for subsidiary protection. In his questionnaire he admitted that he was Moroccan and left his home country because of poverty.
7. He sought to give notice of intention to marry, but on 21st August, 2017 the HSE refused to allow the marriage to be solemnised as it considered that there were grounds to consider the marriage to be one of convenience. The decision noted that the applicant had told untruths - that is in a context where it is a criminal offence to give false information to the Registrar. That refusal decision was unchallenged.
8. The HSE noted that the parties "had inconsistent answers regarding their first engagement and first anniversary celebrations", "had different answers when asked about the last movie they went to together", and that "party 2 has only been to party 1's accommodation once and could not describe it". There were inconsistent answers about how often each go to the other's houses and neither party had much knowledge of each other's pay or expenses". They couldn't say how much they were saving towards the wedding".

9. On 30th August, 2017, the IPO examination of file recommended that the applicant should not be given leave to remain.
10. There was a review decision on 22nd May, 2018 under s. 49(9) of the International Protection Act 2015 which concluded that there were no obstacles to family life being established in Morocco and that the applicant and his alleged partner were aware of the precarious nature of his immigration status.
11. On 6th July, 2018, a deportation order was made which was issued to the applicant on 16th July, 2018.
12. On 23rd July, 2018, leave was granted in these proceedings, the primary reliefs sought being a challenge to the s. 49(9) decision and to the deportation order.
13. On 12th August, 2018, the applicant married his partner in an Islamic ceremony. It was accepted that this was not a valid legal marriage.
14. On 26th October, 2018, the applicant submitted a s. 3(11) application under the Immigration Act 1999 which was received on 2nd November, 2018 requesting revocation of the deportation order.
15. These proceedings were listed for hearing on 6th April, 2019. On the date of the hearing, the applicant notified the court and the respondent for the first time that the applicant's partner was pregnant.
16. Having heard the applicant's submissions and before the conclusion of the respondent's submissions, I suggested that the proceedings be adjourned to allow the applicant to seek revocation of the deportation order in the light of the new development, particularly given that the partner was an Irish citizen and hence the child would be as well. Having heard submissions, and against the respondent's objection, I adjourned the proceedings at that point.
17. On 29th April, 2019, the applicant made an additional submission in support of the s. 3(11) revocation application having regard to the pregnancy.
18. The child was born on 17th July, 2019 and an application pursuant to the CJEU judgment in *Zambrano* (Case C-34/09 *Zambrano v. Office national de l'emploi* (Court of Justice of the European Union, 8th March, 2011, ECLI:EU:C:2011:124)) was made on 27th November, 2019.
19. On 6th April, 2021, the s. 3(11) application was granted and the deportation order was revoked.
20. On 8th April, 2021, the *Zambrano* application was granted and the applicant was given stamp 4 leave to remain. Notice of that decision was given immediately.

21. Formal notice of the revocation decision was given on 8th July, 2021 although perhaps the applicant had a fair idea that that was coming in light of the stamp 4 decision.
22. The proceedings accordingly don't need to be determined and are, therefore, moot save as to costs. In that regard both sides seek their costs.

Costs of the proceedings

23. The proceedings are rendered moot as a consequence of a change in circumstances. The proceedings as originally constituted referred to the alleged rights of the applicant who was at that point an unsettled migrant and not legally married to his alleged partner. The legal context changed fundamentally when the partner became pregnant. That change of circumstances gave rise to fresh submissions under s. 3(11) and, following the birth, to an application under *Zambrano*. Those applications gave rise to ministerial decisions in both cases. That meant that the proceedings as originally constituted no longer had to be determined.
24. The core principles have been set out by the Supreme Court, particularly in *Cunningham v. President of the Circuit Court* [2012] IESC 39, [2012] 3 I.R. 222 and *Godsil v. Ireland* [2015] IESC 103, [2015] 4 I.R. 535, as attempted to be summarised in *M.K.I.A. (Palestine) v. International Protection Appeals Tribunal* [2018] IEHC 134, [2018] 2 JIC 2708 (Unreported, High Court, 27th February, 2018), as noted by the Court of Appeal in *Hughes v. Revenue Commissioners* [2021] IECA 5, [2021] 1 JIC 1511 (Unreported, Court of Appeal, Murray J. (Costello and Pilkington JJ. concurring), 15th January, 2021) at para. 30.
25. The main problem for the applicant in the application of these principles to the present case is that there was no causal connection between the bringing of the proceedings and the revocation of the deportation order because the revocation derived from what the respondent in written legal submissions referred to as "an external factor" (para. 33), namely the pregnancy and subsequent birth of the child. Hence the ministerial decisions cannot be regarded as an explicit or implicit acknowledgement of the legal validity of the applicant's challenge because those decisions would have been made in the light of the pregnancy and birth whether the proceedings had issued or not. That is a fundamental difference between this case and the *Godsil* case.
26. While the State did seek to suggest that the mootness of the proceedings can be attributed to the applicant, by analogy with the doctrine in relation to cases that become moot due to the act of a party, pregnancy and birth is a *sui generis* event and not the sort of thing that can properly be classified as an "act" of the applicant or one "within his control". To suggest that is to try to inappropriately shoehorn this unique event into the language of the caselaw on mootness. Many would-be parents can testify that the real hand on the tiller is that of the goddess of fortune. Prospective parents have influence, yes obviously; but control, certainly not.
27. Sure, the applicant could have notified the Minister of the partner's pregnancy earlier, but I don't think that is a basis for an order of costs against him because failure to act earlier

didn't in itself change the essential mootness or otherwise of the proceedings. Even if I am wrong and one was to hold that against him, it doesn't apply to the *Zambrano* application which could only have been made after the birth and which was promptly notified after that point.

28. In one sense, with the wisdom of hindsight, the original hearing date was possibly unnecessary, but an applicant does have the right to seek a hearing date for his or her case as it stands. So this applicant didn't commit any legal wrong by asking for the hearing date, and obviously since I don't have to determine the issues as originally pleaded (and I am not going to do so now), it would, therefore, be inappropriate to hold any hypothetical argument as to a potential adverse outcome of those proceedings against the applicant for costs purposes.

Conclusion

29. There is an event in favour of the applicant in the sense that the proceedings sought to challenge the deportation order, and that order has now been revoked. However, the event was caused by the pregnancy of the applicant's partner and the subsequent birth of the child. That is not an event that can, without abuse of language, be described as an "act" of the applicant or a matter "within his control". The event was not causally connected to the proceedings in that the grounds on which the deportation order was revoked formed no part of the grounds of challenge.
30. The only connection to the proceedings was that during the proceedings I suggested that the finalisation of the hearing be adjourned pending the making of an appropriate application to the Minister. I did then adjourn the proceedings, over the State's objection, but doing so doesn't create a causal relationship between the bringing of the proceedings and the making of the application, let alone its outcome.
31. Applying the caselaw and mootness to the *sui generis* context of proceedings that become moot due to pregnancy and birth of a child, I think that such events are best viewed as developments that are not dependent on acts of the parties and, therefore, as developments that give rise to a presumption of no order as to costs, unless there is a causal connection with the proceedings. The ultimate event didn't have any such causal connection except in the purely incidental sense that I suggested that the applicant make a further application to the Minister. That I highlighted a possible pragmatic solution rather than simply decide the case (with the arguable potential for it to be decided adversely to him given the precarious nature of his status which was the background to the case as actually pleaded) is possibly just the applicant's good luck, but in any event is not the sort of causal connection that an applicant can rely on in order to seek costs. That is obvious if one thinks about it – otherwise the court would be severely disincentivised from entertaining, still less supporting, pragmatic solutions if that gave rise to some expectation that whoever came out ahead in such a separate process would reappear demanding the costs of the proceedings. Overall having regard to the factors discussed above, there is a presumption of no order as to costs and I don't think that that presumption has been adequately displaced here.

Costs of the costs issue

32. On 11th March, 2021, in anticipation of formal revocation, the applicant wrote to the CSSO saying that he was entitled to costs and was open to any reasonable offer. A similar letter was sent on 14th April, 2021 following the stamp 4 decision.
33. On 9th July, 2021, after formal notification of the revocation of the deportation order, the CSSO wrote making an open offer as to no order as to costs and said that if the applicant didn't agree, the State would seek a costs hearing, would make its own application for costs and would draw the court's attention to the letter.
34. The matter was listed for mention on 12th July, 2021 and by that date the applicant had rejected the State's offer in discussions, although not in writing. A hearing date for the costs issue was sought. That costs hearing took place on 30th July, 2021.
35. In respect of the costs of the costs hearing, the State submitted that there had to be some incentive for applicants to agree to reasonable proposals and to obviate the need for hearings. Apart from where special costs rules apply, in a context where one rejects an open offer (or one without prejudice save as to costs) and one doesn't do any better following a hearing, there has got to be some potential exposure because otherwise one is inflicting costs on the other side unnecessarily and without consequence (not to mention absorbing court resources unnecessarily). Fairness would normally (and that certainly applies here) require a party to bear the costs that were unnecessarily incurred in disputing the ultimate position of no order that was so correctly anticipated by other side's offer. On balance, in such circumstances I will award costs to the respondent for the period on and after 12th July, 2021 being the date when costs arising from the rejected offer started accumulating.

Order

36. Accordingly, the order will be as follows:
- (i) there will be no order as to costs (including any reserved costs) prior to 12th July, 2021 and
 - (ii) there will be an order for costs to the respondent against the applicant in respect of all costs (including any reserved costs) incurred on and after that date.