Zambrano and its impact on immigration law in the United Kingdom

In the increasingly restrictive and depressing times we immigration lawyers work in, and I’m thinking particularly of the proposed changes to legal aid and the ongoing erosion of the options available to economic migrants to the UK from outside the European Union (EU), it is pleasing to be able to write about a recent judgement from the Court of Justice of the European Union (CJEU) which is having a wide ranging positive effect in our field.

R Zambrano v Office national de l’emploi (ONEm)

Case C-34/09

This case was handed down on 8 March 2011. It was about social security but considered article 20 of the Treaty on the Functioning of the European Union (TFEU) which confers the status of citizen of the EU on every person holding the nationality of a Member State.

In considering the rights of the Belgian children of Mr Zambrano, a Colombian national living in Belgium with his children, the CJEU held that 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 a refusal to grant such a person a work permit, has the effect of depriving those children of the genuine enjoyment of the
Right of residence

The claimants What this means in practice in the UK is that British citizens living in the UK who have never exercised any right of free movement within the EU and who are dependent on a third country national can rely on the Zambrano judgement and assert that the third country national has a right of residence here because otherwise the British citizen is unable to enjoy the substance of his/her rights as an EU citizen. Prior to this British citizens could generally only rely on EU law rights where they had moved to another Member State and been economically active there before returning to the UK under the Surinder Singh principle.

This development is ground-breaking. It applies not only to dependent British citizen children but to dependent British citizen adults. The Home Office has taken six months to decide how to implement the judgement but has now published guidance and, courtesy of a freedom of information request, full details of their processes where Zambrano applies have been made available. From 19 September 2011 the Home Office has accepted applications made under EU law seeming to meet the Zambrano criteria and will issue a certificate of application which allows the applicant to work pending full consideration of the application.

The applicant must provide evidence that the dependant is a British citizen, evidence proving the relationship between them and adequate evidence of the dependency between them. The dependency, according to the Home Office guidance, cannot simply be financial.

The impact of Zambrano

This is unquestionably significant and will enable many people in the UK without current immigration status to regularise themselves because a British citizen is dependent on them and to have an immediate right to work while their application is under consideration. The judgement is unusually short and there are various cases pending in the CJEU to clarify issues arising out of the judgement. It has already been referred to in the Upper Tribunal of the Immigration and Asylum Chamber alongside case law relating to article 8 of the European Convention on Human Rights (the right to family and private life) in the case of Omotunde (best interests – Zambrano applied – Razgar) Nigeria [2011] UKUT 247 (IAC).

Taking Zambrano with the Supreme Court’s decision earlier this year in ZH (Tanzania) v Secretary of State for the Home Department [2011] UKSC 4 which considered the best interests of the child in the immigration context, and other relatively recent cases such as Chikwamba v Secretary of State for the Home Department [2008] UKHL 40 and Beoku Betts v Secretary of State for the Home Department [2008] UKHL 39 the case law in this area is definitely moving in the right direction. Section 55 of the Borders, Immigration and Citizenship Act 2009 requires the Secretary of State for the Home Department to ensure immigration decisions take into account “the need to safeguard and promote the welfare of children who are in the UK” and it appears that this obligation is now being taken into account very seriously by the courts.

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Case law update

Kettling under challenge in domestic and international courts

The European Court of Human Rights’ Grand Chamber is deliberating on arguments that the police tactic of mass kettling - where a group is held against their will because it is supposed some might breach the peace - violates the fundamental right of liberty. If the arguments succeed, kettling will need to be abandoned altogether. The test cases were brought by four of several thousand people who were detained within a police cordon for more than seven hours on 1 May 2001 at Oxford Circus in central London. Two of the four - Bronwyn Lowenthal and Peter O’Shea - are represented by Bindmans. They were bystanders who happened to be in the area at the time of the demonstration. Back in the UK, in December the Court of Appeal will hear a police appeal against the successful challenge to kettling and oppressive force during the Climate Camp demonstration in Bishopsgate in April 2010.

Justice in sight, six decades on

Relatives of the 24 unarmed rubber plantation workers shot dead in December 1948 by British troops in the Malaysian village of Batang Kali have been granted permission for their judicial review to proceed to a full hearing in the UK Courts. The hearing is likely to take place in Spring 2012 and will examine whether the Secretaries of State for Defence and the Foreign and Commonwealth Office acted lawfully last November when they refused to hold a public inquiry into both the killings and their cover up, and to make any form of reparation to the victims’ families. The judge who granted permission, Silber J, commented that the case raised issues that were both “arguable” and “of importance.”

Procedural update

Judicial Review time limits: the tyranny of Rule 54.4 marches on where no EU law angle

Unlike most types of legal proceedings where claimants know where they stand in terms of time limits (and claimants can have as long as 12 years to bring a claim), where judicial review is the only option claimants and their lawyers always need to take swift action when they realise that there may be grounds for bringing a claim. This point cannot be emphasised strongly enough. This is because judicial review proceedings must be issued in the High Court “promptly; and in any event not later than three months after the grounds to make the claim first arose” [Civil Procedure Rule 54.5]. What the court will consider ‘prompt’ will depend on the circumstances of each case. Thus, the term ‘promptly and in any event’ causes great uncertainty for claimants when they cannot even be sure that they will be on time if they issue a claim within three months.

The ‘promptitude’ requirement is supposed to ensure that public bodies have certainty as to the legal validity of their actions, and so they are not inconvenienced by always having to wait for three months to see if a claim is brought before, for example, they can get on with a planning development, closing a library, introducing a new law or policy, or implementing budgetary cuts. From a claimant perspective, in most cases three months seems like a reasonably short period for a public body to have to wait.

There was some hope that the rule would be more clearly defined following a recent European Court of Justice case called Uniplex (UK) Ltd v NHS Business Services Authority (C-406/08) (2010) PTSR 1377 ECJ (3rd Chamber). In that case the court decided that a time limit in procurement regulations
based on ‘promptitude’ - expressed in terms identical to judicial review time limits rule - gave rise to uncertainty and thus breached EU law, as it infringed the principle that remedies should be effective.

Many public lawyers considered that this might be expanded to apply to other areas of judicial review as it seemed irrational to have two different sets of time limits depending on whether the grounds raised EU law issues or not. However, both in May in the planning case R(Salford Estates (No.2) Ltd) v. Salford County Council [2011] EWHC 2097 (Admin)[2] and in September in the unreported case of R(McCrae) v. Hertfordshire DC(2011) QBD (Admin) the High Court found that the requirement that judicial review proceedings be commenced promptly, as well as within the three-month time limit, remained applicable in cases that did not raise any issue of EU law notwithstanding the Uniplex ruling that time limits had to be certain.

Therefore, in judicial reviews not raising EU-law issues, claimants and their lawyers must continue to act expeditiously as soon as they consider that a claim may need to be brought. They must issue the claim as early as possible and in any event no later than three months of the decision they are challenging.

Lawyer in the news

Paul Ridge

Bindmans partner Paul Ridge has recently been in the news providing pro-bono legal advice and negotiation for Occupation London Stock Exchange (Occupy LSX) at St Paul’s.

Paul specialises in public law with a particular interest in community care and housing. His work includes cases to the House of Lords in G v Barnet, a matter relating to Children Act rights to housing and the Court of Appeal and most recently, in a matter of adverse possession rights to land worth over £10 million.

He is regularly instructed by the Official Solicitor to act on behalf of adults who lack capacity to make their own decisions and has conducted a number of cases involving obtaining community care assessments for vulnerable adults, as well as in the protection of property of vulnerable adults.

Paul has experience of bringing cases against a wide range of public bodies as well as acting for individuals and organisations, including advice to the Law Society relating to recovery of unrecouped payments on account from law firms.

Clients say Paul is “exceptional” and “has an encyclopaedic knowledge of obscure housing statutes” (extract from The Legal 500 UK 2011 directory) and “a great lawyer” whom sources highlight as “commanding respect” within the sector (from Chambers UK 2012 directory).