THE SUPREME COURT

IN THE MATTER OF THE CONSTITUTION OF IRELAND
IN THE MATTER OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS ACT 2003

Record No. 2018/146

Clarke C. J.
O'Donnell J.
Dunne J.
Charleton J.
O'Malley J.

BETWEEN

MICHAEL (A MINOR), SARAH (A MINOR), AZMI (A MINOR), AFSAR (A MINOR), (ALL SUING THROUGH THEIR MOTHER AND NEXT FRIEND MS. X), MS. Z. AND MS. X

APPLICANTS/RESPONDENTS

AND

MINISTER FOR SOCIAL PROTECTION, THE ATTORNEY GENERAL AND IRELAND

RESPONDENTS/APPELLANTS

Record No. 2018/145

BETWEEN

EMMA
(A MINOR SUING BY HER MOTHER AND NEXT FRIEND MS. Y) AND MS. Y

APPLICANTS/RESPONDENTS

Judgment of Ms. Justice Dunne delivered on the 21st day of November 2019

1. This is an appeal from the decision of the Court of Appeal (Peart J., Irvine J. and Hogan J.) delivered on the 5th June, 2018 in a judgment of Hogan J. which allowed the appeal by the applicants/respondents in each case from the decision of the High Court (White J.) on the 17th January, 2017. Both cases concern the question of when a payment of child benefit arises to parents whose immigration status has not yet been determined finally by the State but a child of the relevant family had either status as an Irish citizen or as a refugee. The two cases were heard together in the High Court and a single judgment was delivered by that Court and again the same approach was taken in the Court of Appeal and will be taken in this Court.

2. For ease of reference I will refer to the appellants, where appropriate, as the State. The names of all of the respondents have been anonymised.

Background facts in relation to the X family

3. The facts are undisputed. Mr. and Ms. X are citizens of Afghanistan. They came to Ireland in May 2008 with their eldest child, using false Pakistani identity documents and United Kingdom visas issued on foot of those documents. There are four children of the family, one of whom was Afsar who was born in Pakistan on the 20th May, 2006. The remainder were born in Ireland, namely, Azmi born on the 10th August, 2008, Sarah born on the 26th July, 2009 and Michael born on the 5th April, 2013. Initially, the parents were treated as Pakistani nationals as they originally had Pakistani identity documents but

these were revealed to be false. Subsequently their citizenship of Afghanistan was established by way of passports and identity papers. A decision was taken to transfer the family to the United Kingdom under EU rules but at that stage the family went into hiding. Deportation orders were signed by the Minister for Justice in March 2012 on the basis that they were Pakistani nationals. Subsequently, the youngest child, Michael, the first named applicant herein, made an application for refugee status and the Refugee Appeals Tribunal on appeal from the Refugee Applications Commissioner on the 9th December, 2014 declared him to be a refugee. This was communicated by letter of the 8th January, 2015 to Michael. Thereafter, on the 14th January, the remaining members of the family applied pursuant to s. 18 of the Refugee Act 1996 (hereinafter referred to as "the Act of 1996") for family reunification. Permission was granted on the 11th September, 2015 to the family to remain with Michael.

4. It appears that apart from the period when the family was in hiding they have lived in direct provision.

5. An application was made for child benefit in respect of the four children by Ms. X on the 19th February, 2015. That application was refused on the 2nd April, 2015 on the basis that Ms. X was not habitually resident in the State, since she was at that point in time still awaiting the decision from the Department of Justice and Equality on her application for residency based on s. 18 of the Act of 1996. These proceedings were then issued on the 26th June, 2015 seeking judicial review of that decision refusing child benefit.

6. A further application was made for child benefit in respect of the four children on the 8th October, 2015. That application was granted by a decision of the 16th October, 2015. Ms. X was permitted to claim the payment with effect from the 11th September, 2015, the date upon which she was granted permission to remain in the State. She now claims that she is entitled to child benefit in respect of Michael from the 8th January, 2015 to the 11th September, 2015.

Background facts in relation to Emma's appeal

7. Emma is an Irish citizen child born on the 23rd December, 2014. Her Irish citizenship derives from her father who is an Irish citizen. Her parents are not married. Her father has some contact with her but Ms. Y, the second named applicant in the proceedings, her mother, has sole custody of Emma. Ms. Y is a Nigerian citizen who arrived in the State in November 2013. She applied for asylum on the 21st November, 2014 but was unsuccessful before the Refugee Applications Commissioner and then brought an appeal to the Refugee Appeals Tribunal. At the time when the proceedings were commenced she was awaiting a hearing before the Refugee Appeals Tribunal. After the birth of Emma, Ms. Y on the 11th September, 2015, applied to the Minister for Justice and Equality for permission to remain in the State as the parent of an Irish citizen child based on the decision of the CJEU in *Ruiz Zambrano v. Office National de l'Emploi* (C-34/09) [2011] ECRI–1177 (hereinafter referred to as "*Zambrano*"). On the 6th January, 2016 Ms. Y was granted Stamp 4 permission to remain in the State for three years on the basis of her parentage of Emma. She has been in receipt of child benefit payments since that date. Ms. Y made an application for child benefit in respect of Emma on the 16th October,

2015. The application was refused on the basis that prior to the 6th January, 2016 she was not habitually resident in the State. Proceedings were then issued on the 4th December, 2015 seeking review of that decision. As mentioned above, following the regularisation of her immigration status, Ms. Y was permitted to claim child benefit with effect from the 6th January, 2016, the date upon which she was granted permission to remain. In these proceedings she claims to be entitled to child benefit in respect of Emma from the date of her birth on the 23rd December, 2014 to the 6th January, 2016.

8. Finally, it should be noted that throughout the relevant period for which child benefit is claimed, Emma and Ms. Y resided together in the direct provision system.

The law

9. It would be helpful to set out a number of legal provisions which arise for consideration in these proceedings. As Article 40.1 of the Constitution provides:

> "All citizens shall, as human persons, be held equal before the law.
>
> This shall not be held to mean that the State shall not in its enactments have due regard to differences of capacity, physical and moral, and of social function."

10. Article 18 of the Charter of Fundamental Rights of the European Union (CFREU) provides:

> "The right to asylum shall be guaranteed with due respect for the rules of the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees and in accordance with the Treaty on European Union and the Treaty on the Functioning of the European Union." (Hereinafter referred to as "the Treaties").
>
> Article 20 of the CFREU provides:
>
> > "Everyone is equal before the law."

11. Article 8 of the European Convention on Human Rights (hereinafter referred to as "the ECHR") provides:

> "1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

Article 14 of the ECHR provides:

> "The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language,

religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

12. It is necessary also to refer to the provisions of the following Directive, Directive 2004/83/EC (hereinafter referred to as "the Qualification Directive") which sets out qualifying criteria for applicants for refugee status or subsidiary protection and defines the rights to be afforded to persons granted those statuses, including, *inter alia*, access to social welfare. The measure sets out minimum standards, permitting Member States to adopt more favourable provisions provided they are compatible with the Directive.

13. The Qualification Directive was repealed and recast by Directive 2011/95/EU (hereinafter referred to as "the Qualification Directive Recast") with effect from 21st December, 2013. However, Recital 50 of the Qualification Directive Recast provides:

> "In accordance with Articles 1, 2 and Article 4 (a) of the Protocol (No. 21) on the position of the United Kingdom and Ireland in respect of the Area of Freedom, Security and Justice, annexed to the TEU and to the TFEU, and without prejudice of Article 4 of that Protocol, the United Kingdom and Ireland are not taking part in the adoption of this Directive and are not bound by it or subject to its application."

14. Thus, as can be seen, although the 2004 Qualification Directive has been repealed by the 2011 Directive, the position is that as far as Ireland is concerned, not having adopted the 2011 Qualification Directive Recast, Ireland remains bound by the 2004 Qualification Directive.

15. At this point it would be helpful to refer to certain provisions of the Social Welfare Consolidation Act 2005, as amended (hereinafter referred to as "the Act of 2005"). Section 219(1) states:

> "A child shall be a qualified child (in this Part referred to as 'a qualified child') for the purposes of child benefit where -
>
> (a) he or she is under the age of 16 years, or
> (b) having attained the age of 16 years he or she is under the age of 19 years and -
>
> (i) is receiving full-time education, the circumstances of which shall be specified in regulations, or
> (ii) is, by reason of physical or mental infirmity, incapable of self-support and likely to remain so incapable for a prolonged period,
> and
>
> (c) he or she is ordinarily resident in the State, and
> (d) . . ."

16. Section 220 provides:

"(1) Subject to subsection (3), a person with whom a qualified child normally resides shall be qualified for child benefit in respect of that child and is in this Part referred to as 'a qualified person'.

(2) For the purpose of subsection (1) -

(a) the Minister may make rules for determining with whom a qualified child shall be regarded as normally residing,

(b) a qualified child shall not be regarded as normally residing with more than one person, and

(c) . . .

(3) A qualified person, other than a person to whom section 219(2)(a), (b) or (c) applies, shall not be qualified for child benefit under this section unless he or she is habitually resident in the State."

17. Section 246(4) of the Act of 2005, as amended, states that:

"A deciding officer or a designated person, when determining whether a person is habitually resident in the State for the purposes of this Act, shall take into consideration all the circumstances of the case including, in particular, the following:

(a) The length and continuity of residence in the State or in any other particular country,

(b) the length and purpose of any absence from the State,

(c) the nature and pattern of the person's employment,

(d) the person's main centre of interest, and

(e) the future intentions of the person concerned as they appear from all the circumstances."

18. Section 246(5) provides:

"Notwithstanding subs. (1) to (4) and subject to subs. (9), a person who does not have a right to reside in the State shall not, for the purposes of this Act, be regarded as being habitually resident in the State."

19. Section 246(6) provides:

"The following persons shall, for the purpose of subs. (5), be taken to have a right to reside in the State:

(a) an Irish citizen under the Irish Nationality and Citizenship Acts 1956 to 2004;

(b) . . .

(c) a person in relation to whom a refugee declaration within the meaning of the Act of 2015 is in force, or is deemed under that Act to be in force;

(c)(a) a person in relation to whom a subsidiary protection declaration within the meaning of the Act of 2015 is in force, or is deemed under that Act to be in force;

(d) . . ."

20. Other provisions of s. 246 deal with the position of individuals who have been given permission to reside in the State, or persons who have a right to enter and reside in the State by reason of EU measures in relation to the free movement of persons.

21. Section 246(7) provides that certain persons shall not be regarded as being habitually resident in the State including a person awaiting a grant of permission to reside in the State and a person who has been notified under s. 3(3)(a) of the Immigration Act 1999 that the Minister for Justice, Equality and Law Reform proposes to make a deportation order, amongst others.

22. Finally, Section 246(8) provides that a person who has been granted permission to enter and remain in the State and who has been given a declaration that he she is a refugee shall not be regarded as being habitually resident in the State before the date on which the declaration was given or the permission was granted.

23. For the sake of completeness, it should be noted that a number of references in the Act of 2005 to the Act of 1996 have been replaced by references to the International Protection Act 2015 and the Regulations made thereunder. Nothing turns on this.

The judgments of the High Court and the Court of Appeal

24. First of all, the learned High Court judge, White J., considered the nature of child benefit. Having referred to the relevant legislation to be found in the Act of 2005, as amended, and having referred to an averment contained in an affidavit of an Assistant Principal Officer of the Department for Social Protection in the Child Benefit Section, sworn in the course of the proceedings as to the interpretation of child benefit, he concluded at paragraph 26 of his judgment as follows:

> "Child Benefit although paid for the benefit of a qualified child, is paid to a qualified person for the benefit of that child. It is not an automatic right of the qualified child to receive the benefit. The statutory framework envisages that the child must be a qualified child pursuant to s. 219 of the Act and that the payment must be made to a qualified person, and subject to s. 220(2) of the Act the Minister may make rules for determining with whom a qualified child should be regarded as normally residing."

25. He then referred to the status of an asylum seeker and in particular to the provisions of s. 9 of the Act of 1996 which permits an asylum seeker to enter the State and remain in the State and to a number of authorities as to the entitlements of a person seeking asylum until such time as a decision is made on their application. Reference was made to the judgment of the High Court in the case of *B.K. (a minor suing by her mother and next friend, D.M.) v. Minister for Justice, Equality and Law Reform*, (Unreported, Feeney J., 21st December, 2011) and to a decision of the English Court of Appeal in the case of *Blakesley v. Secretary of State for Work and Pensions* [2015] 1 WLR 13150 and he concluded at paragraph 40 of his judgment as follows:

> "In summary, the consent granted to an asylum seeker pursuant to s. 9 of the Refugee Act 1996, to enter the State and remain there is a restricted consent pending the determination of the status of the asylum seeker. If the asylum seeker is subsequently granted refugee status or family reunification the legal rights that accrue to the applicant and flow from the new status operate from the date of the grant of declaration by the relevant body in this State and are not backdated so as to entitle the asylum seeker to claim benefits he or she would not be entitled to if not entitled to reside in the State."

26. In this context he observed that the State had chosen to deal with the welfare of asylum seekers by way of direct provision rather than using the provisions of social protection and social welfare legislation (see paragraph 41 of his judgment).

27. He then considered at paragraphs 47 and 48 the position of Emma and concluded that despite the fact that Ms. Y had made an application to regularise her status and claim "*Zambrano*" rights, she was not entitled to child benefit given that:

> "During this process the first and second applicants remained in direct provision having their basic needs met by the State. The Court has already held that child benefit was not the automatic right of the child, as it was payable to the second applicant as a qualified person. During the time period in question from 23rd December, 2014 to January 2016, there was never any risk that the first applicant would be compelled to leave the EU.
>
> The applicants do not have a right to Child Benefit and to have it backdated to date of birth on the basis of *Zambrano* rights."

28. The High Court then proceeded to consider the issue as to whether or not the requirement of habitual residence of the qualified person was discriminatory. In coming to a view on this topic, the High Court referred to a number of authorities including the decision of the High Court in *Genov & Anor v. Minister for Social Protection & Ors* [2013] IEHC 340, at p. 25 where Hedigan J. stated:

> "The respondents state that it has always been and it remains the State's view that those without a right to reside in the State should not have access to social welfare entitlements and thus have made this a requirement in s.246 cited above. I accept the respondents' argument that this provision is objectively justified in the interests of preserving the limited resources of this State in funding its social welfare system. This clearly is a logical and reasonable rationale, is one that stands independent of the nationality of the applicants herein because it applied to all citizens of Member State other than Ireland regardless of their nationality and seems proportionate to the legitimate aim of best using the limited resources of the State."

29. The High Court considered the position in relation to the X family and then the position of Emma and her mother. White J. noted that in the X family there was a somewhat anomalous situation in relation to Michael in that he had refugee status but that his

mother, the "relevant putative qualified person" did not have habitual residence in Ireland. That did not occur until she was granted family reunification rights on the 11th September, 2015. The High Court recognised that there was also a somewhat anomalous situation in that the position of Michael in relation to child benefit was different to that of a child of a qualified parent who had a right of residence. Nonetheless, the Court concluded that this was not something which could be regarded as ". . . constitutionally infirm in accordance with Irish constitutional principles, as the first applicant had at all times the right to reside with the sixth applicant in direct provision and was having his needs met by direct provision. Though not ideal, it was objectively justified as the respondent was entitled to preserve the requirement of habitual residence for Social Welfare benefits." He concluded that there was not invidious discrimination applicable in the case of Michael as the condition of habitual residence applies equally to Irish citizens and non-Irish citizens and the equality guarantee in the Constitution does not require identical treatment for all persons without recognition of difference of circumstances.

30. In the case of Emma, the High Court noted that an anomalous situation also arose given that an Irish citizen, Emma, resided with her mother, an asylum seeker who was not habitually resident. Until such time as the mother had her position regularised she was not a qualified person entitled to claim child benefit. In the circumstances, the State was entitled to maintain the integrity of the habitual residence qualification. The Court did not consider this situation to be constitutionally infirm for the reasons outlined in relation to Michael.

31. It was noted that during the period at issue, the parties in that case continued to have access to direct provision.

32. The Court then considered the provisions of Articles 20, 23 and 28 of EU Directive 2004/83 and the Charter of Fundamental Rights of the European Union and concluded that there was no breach of Article 28 of the Qualification Directive which did not require the backdating of social benefits. It was noted that habitual residence is a prerequisite for all social welfare entitlements in Ireland irrespective of the status of the applicant. Even though there was a delay because of the requirement for the sixth applicant in the X family's proceedings to regularise her position and for the mother of Emma in the second set of proceedings to have her status regularised, such delay was not considered to be disproportionate or an intolerable interference with the rights of Michael or Emma in each case. The Court further concluded that there was no breach of Articles 20 or 23. Finally, White J. was of the view that no breach of Article 18 of the Charter of Fundamental Rights of the EU had occurred. Likewise, for similar reasons he expressed the view that there was no breach of Article 5(1) and Article 8 of the European Convention on Human Rights. He concluded his judgment by saying at paragraphs 71 and 72:

> ". . . the court is of the opinion that the only anomalous situation that arises in the facts of these proceedings is the position of the first applicant who was declared a refugee on 8th January, 2015, but did not receive the benefit of child benefit until 11th September, 2015, when his family were granted family reunification rights,

and in the Second Action when the First Applicant was an Irish citizen from date of birth on 23rd December 2014 to January 2016 the regularisation of her mother's residence status.

I have already stated because the applicants were entitled to direct provision during this period of time and having the assistance provided by that system, and because there was not culpable delay their Convention rights were not breached. If there were, for example, culpable delays on the part of the respondents in dealing with the application for family reunification, or the *Zambrano* rights of the second applicant in the second action then the situation may well have been different."

33. In the event, he concluded that the applicants were not entitled to the reliefs sought.

34. The Court of Appeal (Hogan J., Peart and Irvine J. concurring) came to a different conclusion and allowed the appeal (see [2018] IECA 155) of the applicants.

35. In the course of the judgment, reference was made to the affidavit sworn by Ms. Tara Burns, an Assistant Principal Officer, on behalf of the State, which White J. had also referred to, and which described child benefit as follows:

"Child benefit is a payment offered by the State to eligible persons designed to meet some of the expenditure associated with the additional costs incurred in bringing up a child. Many of the additional costs associated with bringing up a child are/were not in fact incurred by the applicants herein as a consequence of residing with (sic) the direct provision system. Currently, child benefit is paid to around 610,000 families in respect of some 1.16m children with an estimated expenditure of around €1.9bn. in 2014.

Child benefit is one of a number of payments the Department of Social Protection makes to families with children: these include qualified child increases, family income supplement and the back to school clothing and footwear allowances. Each of these payments is part of an overall system of child and family support payments consisting of both universal and more selective and targeted payments.

In the light of the foregoing ... the applicants do not require child benefit during such period that they are residing in direct provision. The needs and requirements of the applicants ... were provided by the State in an alternative manner..."

36. Hogan J. observed at paragraph 32:

"All of this is doubtless correct, but the same can equally be said of other low income families who also benefit from a range of State supports, yet one (sic) has suggested that child benefit should not be payable to such families. At the other end of the economic scale child benefit is payable in respect of the children of the affluent and the wealthy, even though their children are likely to lead a privileged lifestyle even in the absence of such payments. It is also perhaps significant that child benefit is a universal payment made to all parents regardless of means on

> behalf of children resident in the State who are under a certain age. The State thereby has acknowledged its interest in making an important contribution to the welfare of all children resident in this jurisdiction, regardless of parental circumstances."

37. It is also worth noting an earlier observation of Hogan J. as to the nature of child benefit when he stated at paragraph 17 of the judgment:

> "Child benefit is a universal payment paid to the qualifying parent which is not subject to a means test. It must, of course, be accepted that child benefit is not in any sense hypothecated by law for the benefit of the child or otherwise held on trust by the parent for her interest, so that the parent is in principle free to do with these moneys as he or she may think fit. It is nonetheless a payment made by the State to parents to assist in defraying the additional expenses associated with child-rearing. In practice, these monies are used by the majority of parents to help with the necessaries of life such as food, clothing, child care and the educational expenses of their children. In the case of the economically less well circumstanced such as the present appellants, child benefit payments are often vital to ensure that children receive adequate clothing and nourishment."

38. The Court of Appeal proceeded to consider the issue by reference to the right of equality guaranteed to citizens under Article 40.1 of the Constitution. Dealing with the case of Emma, it was observed that Emma was a citizen of the State and had an unqualified right to reside here. It was further noted at paragraph 27 that she owes qua citizen "a duty of loyalty to the nation and fidelity to the State: see Article 9.3 of the Constitution. The State in turn owes her a duty by virtue of Article 40.1 to be treated equally before the law." Thus, the Court identified the question to be asked as being whether by denying child benefit by reason of the immigration status of the parent claiming that benefit it could be said that Emma was not being treated equally with her peers. It was stated in paragraph 30 of the judgment that:

> "Emma can point to the fact all other citizen children resident in the State - virtually without exception - can avail of this benefit through their parents or guardians."

39. The Court of Appeal then considered the fact that the State provides many fiscal benefits and payments to the family through the Direct Provision system and observed that: ". . . child benefit is a universal payment made to all parents regardless of means on behalf of children resident in the State who are under a certain age". It was then noted that Emma as an Irish citizen resident in the State had a strong claim to be treated in the same way as fellow citizens similarly resident in the State. That being so, the Court of Appeal then went on to consider whether the exclusion of Irish citizen children from access to child benefit could be justified objectively on the basis that the qualifying parent did not have an entitlement to reside in the State and that her immigration status was uncertain. The Court of Appeal acknowledged that the exclusion of persons with an uncertain immigration status served an important public policy and immigration goal by deterring opportunistic asylum claims and generally reducing the attractiveness of the State as a

destination for "welfare tourism". It was noted however that the restrictions at issue in this case were indirect and barred the making of a payment for the benefit of the citizen child in order to deter an opportunistic claim that its parents might make. Thus, the Court of Appeal concluded: ". . . the statutory exclusion seeks in effect *to deter the conduct of the parent* but at the expense of a payment *designed for the benefit of the child*". Accordingly, the Court of Appeal concluded that this ". . . points to an inherent unfairness and lack of proportionality in the legislative scheme of exclusion from what is otherwise a universal benefit scheme otherwise payable in respect of all children resident in the State".

40. Reference was made to the decision of the Supreme Court in the case of *NHV v. Minister for Justice* [2017] IESC 35, [2017] 1 ILRM 105 which considered the absolute ban on asylum seekers seeking employment. This Court in that case held that the restriction was unconstitutional on the grounds that it effected a disproportionate interference with the right to earn a livelihood. The Court of Appeal noted that in that case the restrictions concerned the asylum seeker personally whereas in the present case the restriction is one which was at best indirect.

41. Reference was also made by the Court of Appeal to the decision of the European Court of Human Rights in *Niedzwiecki v. Germany* [2006] ECHR 928, (2006) 42 EHRR 33 (hereinafter referred to as "*Niedzwiecki*"). In that case, the German Constitutional Court had found that the relevant provisions of the German Child Benefits Act were incompatible with the right to equal treatment under Article 3 of the Basic Law. As noted in paragraph 40 of the judgment of the Court of Appeal:

> "The Constitutional Court held that the different treatment of parents who were and who were not in possession of a stable residence permit lacked sufficient justification. As the granting of child benefits related to the protection of family life under Article 6.1 of the Basic Law, very weighty reasons would have to be put forward to justify unequal treatment. Such reasons were not apparent. In so far as the provision was aimed at limiting the granting of child benefits to those aliens who were (sic) likely to stay permanently in Germany, the criteria applied were inappropriate to reach that aim. The fact that a person was in possession of a limited residence title did not form a sufficient basis to predict the duration of his or her stay in Germany. The German Constitutional Court did not discern any other reasons justifying the unequal treatment."

42. Ultimately, that case came before the European Court of Human Rights and at that stage the complaint made was confined to the refusal of benefits for a period of time between July and December 1995. It was nonetheless held that this exclusion amounted to a breach of Article 8 of the European Convention on Human Rights read in conjunction with Article 14. The Court of Appeal quoted from the decision of the European Court of Human Rights in paragraph 41 of its judgment to the following effect:

> "By granting child benefits, States are able to demonstrate their respect for family life within the meaning of Article 8 of the Convention; the benefits therefore come

> within the scope of that provision. . . It follows that Article 14 – taken together with Article 8 – is applicable.
>
> According to the Court's case-law, a difference of treatment is discriminatory for the purposes of Article 14 of the Convention if it 'has no objective and reasonable justification', that is if it does not pursue a 'legitimate aim' or if there is not a 'reasonable relationship of proportionality between the means employed and the aim sought to be realised'. The Contracting States enjoy a certain margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment . . ."

43. Given that the European Court could not discern sufficient reasons justifying the different treatment, it found that there had been a violation of Article 14 of the Convention. Thus the Court of Appeal stated that the reasoning in that case "re-inforces my earlier conclusions regarding the inherent unfairness and lack of proportionality in excluding Emma's mother as a qualifying parent by reason of the latter's uncertain immigration status".

44. Accordingly, the Court of Appeal concluded in relation to Emma's appeal that the State did not provide an objective justification for the statutory exclusion of Emma for eligibility for child benefit prior to the grant of status to her mother in 2016 and this exclusion was judged to be a breach of Article 40.1 of the Constitution.

45. The Court of Appeal then went on to consider the X family's appeal. The Court of Appeal observed that the main difference between Emma and Michael is that Emma, as an Irish citizen had an unqualified right to reside in Ireland. Michael did not have a right to reside in Ireland until such time as he was declared to be a refugee in January 2015. The Court of Appeal was of the view that citizenship, or in the case of Michael and his family, the lack of citizenship was critical. Thus, the legislation which meant that child benefit was not payable for him given the fact that his parents did not enjoy the right to reside in the State was not unconstitutional so far as he and his family were concerned.

46. The Court of Appeal went on to consider the role of EU law in his case and concluded, having considered Article 23 of the Geneva Convention and a number of provisions of EU law, that s. 246 of the 2005 Act was not inapplicable or otherwise contrary to the requirements of EU law by limiting payments of child benefit (and other social assistance payments) until the status of international protection has been granted.

47. However, the Court of Appeal concluded that the payment of child benefit, being for the benefit of the child, was payable from the date of the acquisition of refugee status by Michael and not the date upon which his mother was granted permission to reside in the State.

48. In order to give effect to its judgment the Court of Appeal made an order, inter alia, in Emma's appeal to the effect that:

"Insofar as s. 246(6) and (7) of the Social Welfare Consolidation Act 2005 prevents the payment of child benefit in respect of an Irish citizen child resident in the State solely by reason of the immigration status of the parent claiming such benefit said provisions are incompatible with the provisions of the Constitution."

49. And the Court having made such a declaration suspended its declaration for a period of time to allow this appeal. In the case of the X family, the Court granted a declaration to the effect that Michael's mother while residing with Michael in the State was entitled "pursuant to Article 28 of Directive 2004/83 to child benefit in respect of the first named applicant from the date of recognition of the first named applicant as a refugee on the 8th January, 2015 for so long as the first named applicant continues to be a 'qualified child' for the purposes of child benefit and that insofar as s. 246(6) and (7) of the Social Welfare Consolidation Act 2005 preclude the payment of such benefit these provisions are as a matter of European law to be disapplied". There was a stay placed on the payment of the child benefit referred to pending the determination of this appeal.

Discussion
Child benefit

50. Child benefit is a payment made by the State to eligible persons to assist in meeting some of the costs associated with bringing up a child as was pointed out by Tara Burns in the affidavit referred to above. It is a universal benefit payable to all those who are eligible regardless of their means. As was acknowledged by the Court of Appeal in its judgment in a passage referred to previously, ". . . child benefit is not in any sense hypothecated by law for the benefit of the child or otherwise held on trust by the parent for her interest, so that the parent is in principle free to do with these moneys as he or she may think fit". It is as was stated in the Court of Appeal ". . . a payment made by the State to parents to assist in defraying the additional expenses associated with child rearing". The State does not in any way dictate the manner in which child benefit can be spent and that is a matter which is entirely within the discretion of the person to whom the child benefit is payable.

51. Reference has been made previously to the Act of 2005 and to the definition of a "qualified child" to be found in s. 219 of the Act of 2005 which has been set out above. There is no doubt but that Michael and Emma come within the definition of a "qualified child". It is then necessary to consider who is eligible to receive child benefit. Section 220 sets out the parameters for establishing who is a qualified person entitled to receive child benefit. First of all, it is a person with whom a qualified child normally resides. Section 220 makes provisions enabling the Minister to make rules for determining with whom a qualified child shall be regarded as normally residing. Section 220(3) goes on to provide that a qualified person shall not be qualified for child benefit unless he or she is habitually resident in the State.

52. To summarise, child benefit is payable in respect of a qualified child to a qualified person, namely, a person with whom the qualified child normally resides provided that that person is habitually resident in the State. The qualified person in receipt of child benefit

is entitled to use child benefit for whatever purpose they consider appropriate and are not obliged to spend it exclusively on the qualified child or for the benefit of the qualified child directly or indirectly as the case may be. No doubt, the majority of people use child benefit for the benefit of their children but this may be done by pooling the sum of money available by way of child benefit with other family resources for the benefit of the family as a whole. Nevertheless, child benefit, when payable, is not something that is required to be used solely and exclusively for the benefit of the child concerned. The child concerned or a person acting on behalf of the child is not entitled to dictate to the recipient of child benefit how that sum of money is used. The child is not entitled to receive the payment of child benefit.

Habitual residence

53. Once there is a qualified child and a qualified person, before child benefit becomes payable, it is necessary to establish that the qualified person is habitually resident in the State (see s. 220(3) of the Act of 2005 referred to above). Section 246 of the Act, as has already been seen, contains provisions in relation to the meaning of habitual residence. Section 246(4) sets out a number of circumstances which may lead to a decision as to whether or not someone is habitually resident in the State including the length and continuity of residence in the State, the length and purpose of any absence from the State, the nature and pattern of the persons' employment, the persons' main centre of interest and the future intentions of the persons concerned as they appear from all the circumstances. The term "habitual residence" is not unfamiliar and references to "habitual residence" as a relevant criterion can regularly be found in EU law. For example, the Insolvency Regulation (EU) 2015/848 (Recast) provides at Article 3(1):

> "In the case of any other individual, the centre of main interests shall be presumed to be the place of the individual's habitual residence in the absence of proof to the contrary. This presumption shall only apply if the habitual residence has not been moved to another Member State within the 6-month period prior to the request for the opening of insolvency proceedings."

54. In insolvency proceedings, proceedings can be opened in the courts of the Member State within which the centre of the debtor's main interest is situated and accordingly one can see the relevance of the individual's habitual residence for this purpose. The concept of habitual residence is often an important factor from the point of view of EU law in relation to the status of individuals. The concept of habitual residence arises in a number of other areas where it is relevant to establishing the courts of which Member State should be in a position to deal with particular issues. Another example can be found in Council Regulation (EC) No. 2201/2003 concerning parental responsibility which provides that jurisdiction to deal with matters of parental responsibility rests in the courts of the Member State in respect of a child who is habitually resident in that Member State when the matter comes before the court. The Regulation goes on to provide for certain exceptions to the general rule referred to above. It is not necessary to set out those in any detail. As can be seen, the term "habitual residence" is by no means an unfamiliar term.

55. Turning back to the provisions of the Act of 2005, it will be seen that the Act expressly provides at s. 246(5) that a person who does not have a right to reside in the State shall not, for the purposes of the Act, be regarded as being habitually resident in the State.

56. Section 246(6) sets out a list of those who are regarded as having a right to reside in the State, including *inter alia*, an Irish citizen, a person who has been declared to be an Irish citizen, a person who has obtained a refugee declaration or a subsidiary protection declaration and persons who have been given a right to enter and reside in the State.

57. Section 246(7) goes on to provide for circumstances where a person will not be regarded as being habitually resident in the State for the purposes of the Act of 2005. It expressly provides, as can be seen from the provisions of the section set out previously, firstly, that a person who has applied for a declaration of refugee status and who is awaiting a decision on such application and secondly, a person who has made such an application but whose application has been refused shall not be regarded as habitually resident in the State. Also included in the category of those who will not be regarded as habitually resident are persons who have been notified of a proposal for the making of a deportation order.

58. The final provision which is relevant to note is that once a declaration has been given or an individual is granted permission to remain in the State, that individual will not be regarded as having been habitually resident in the State for any period before the date on which the declaration referred to was given or permission was granted (see s. 246(8) of the Act). Thus, while a person may have been in the State for a period of time pending a decision either to grant them refugee status/subsidiary protection or alternatively to grant them permission to remain in the State, the period of time pending such decision will not be included in the period of habitual residence and habitual residence will date from the time when such permission or declaration was given or granted.

59. In short, it can be seen from a consideration of the Act of 2005 that child benefit is payable to a qualified person who normally resides with a qualified child where the qualified person is habitually resident in the State. A qualified person is not habitually resident in the State if they are not an Irish citizen, or a person who has been granted refugee status/subsidiary protection or, alternatively, is not a person who has been given permission to reside in the State.

60. It will be recalled that the Court of Appeal in its judgment in respect of Emma's appeal concluded that s. 246(6) and (7) were incompatible with the Constitution insofar as they prevented the payment of child benefit in respect of an Irish citizen child by reason of the immigration status of the parent. In the X family's appeal, the Court of Appeal took the view that s. 246(6) and (7) contravened Article 28 of the Qualification Directive and were required to be disapplied where it would otherwise prevent child benefit being claimed in respect of a non-citizen child resident in the State from the date of his or her declaration as a refugee notwithstanding the fact that the parent claiming the benefit did not at that time have permission to remain within the State. Interestingly, the Court of Appeal was of the view that it was permissible as a matter of constitutional law for the Oireachtas to

decide that Michael's parents were not entitled to child benefit in respect of him because they did not then have appropriate immigration status until the decision was made to permit family reunification. Nevertheless, as already explained, the Court of Appeal was of the view that the non-payment of child benefit in respect of Michael from the date upon which he was granted refugee status was not in accordance with Article 28 of the Qualification Directive.

61. The State in its written submissions made a number of observations. At paragraph 40 of their submissions they say:

> "For the time period with which the case is concerned, the beneficiary of refugee status was Michael, the "qualified child". The "qualified person" on whom the right to seek child benefit in relation to Michael was conferred was the sixth named applicant, Michael's mother, who did not as of that time have the benefit of refugee or subsidiary protection status. It is submitted, therefore, that on a proper analysis of child benefit, there is no breach of Article 28 of the Qualification Directive."

Later on, regarding the equal treatment point they say (at paragraph 41):

> "In fact, it seems clear that the entitlements under Article 28 of the Qualification Directive, as under Article 23 of the Geneva Convention ("the contracting States shall accord to refugees lawfully staying in their territory the same treatment with respect to public relief assistance as is accorded to their nationals"), arise from the time of the recognition of refugee status, and are not backdated to the date of application"

Later at paragraph 53 they say:

> "Insofar as the effect of the requirement is to lead to any difference in treatment between Emma and other Irish citizen children, it is clear that that difference in treatment is not arbitrary or capricious but rather in furtherance of a legitimate aim of the State – preserving the limited resources of the State available for the payment of social welfare – and, having regard to the provision made for Emma in the direct provision system, is clearly proportionate to that aim."

In essence, it is contended by the State that the Court of Appeal erred in considering the questions that arose on the appeals by treating child benefit as a social welfare benefit to which a child is entitled and carrying out its analysis of the statutory provisions on that basis. It is contended that child benefit should be considered not as a benefit to which the child is entitled but rather as a benefit to which a parent (or person *in loco parentis*) may be entitled in respect of a child in their care. If such approach to child benefit is taken it is contended that there is no incompatibility with the Qualification Directive and no breach of the guarantee of equal treatment under the Constitution or of the rights of the respective applicants having regard to the provisions of the European Convention on Human Rights.

62. The arguments thus relied on by the State are predicated on the assertion that under Irish law there is no entitlement on the part of the child to receive child benefit. Instead, it is the entitlement of the parent (or guardian) of the child. Therefore, it is contended that the Court of Appeal erred in approaching the issues in this case as though child benefit was the entitlement of the child. It was pointed out that the approach of the Court of Appeal would have consequences for other social welfare benefits or payments.

63. It is difficult to avoid the conclusion that the Court of Appeal could only have reached its decision by viewing child benefit as the entitlement of the qualified child rather than the entitlement of the qualified person. It is only by doing so that the view could have been taken that the treatment of Emma was a breach of Article 40.1 of the Constitution and that the failure to allow child benefit to be paid to Michael's mother until such time as she was permitted to stay in the State was not in compliance with Article 28 of the Qualification Directive. Can that approach by the Court of Appeal be correct?

64. The approach taken by the Court of Appeal in Emma's appeal was to consider whether the Oireachtas could deprive an Irish citizen child resident in the State of child benefit by reason of the immigration status of the adult claimant. The Court queried whether the State was by its laws treating Emma equally before the law in accordance with Article 40.1 of the Constitution. The Court of Appeal ultimately concluded that Emma was not treated equally with her peers as other citizen children resident in the State can avail of child benefit through their parents or guardians. The Court did consider whether or not there was an objective justification for the approach taken by the Oireachtas but concluded that the approach taken by the Oireachtas amounted to an inherent unfairness and lack of proportionality ". . . in the legislative scheme of exclusion from what is otherwise a universal benefit scheme otherwise payable in respect of all children resident in the State".

65. It seems to me that that conclusion could only have been reached on the basis that Emma has an entitlement to child benefit. However, in my view, such a view is misconceived. Child benefit is payable by the State to help parents or those *in loco parentis* defray the costs associated with bringing up a child. It is not however a payment made to a child or one which a child is entitled to receive. It is a payment made to a qualified person – that is the person with whom the child normally resides. The fact that the child is a citizen of Ireland is not the determining feature. Emma as a citizen is entitled to reside in this jurisdiction. However, her entitlement to reside in the State does not alter the fact that if her parent or guardian is not habitually resident in the State then the payment of child benefit does not arise, regardless of the citizenship status of the child. The simple fact of the matter is that all qualified persons who are habitually resident in the State are entitled to receive child benefit. There is no difference of treatment between a qualified person who is a citizen, a person who has been declared to be a refugee or a person who has been granted permission to reside in the State or a person who is an EU citizen and is entitled to reside in the State by virtue of the right of free movement of EU citizens within the Member States. The criterion that must be fulfilled is that of habitual residence of the person to whom child benefit is payable. In

this regard, an Irish citizen child is in no better and no worse position than any other child. For child benefit to be paid, the qualified person must be habitually resident within the State. The status of the child is neither here nor there.

66. The Court of Appeal, when considering the restriction imposed by the requirement for habitual residence before payment could be made to a qualified person, took the view that the restriction in respect of the payment of child benefit, while serving an important public policy and immigration goal by deterring opportunistic asylum claims barred the making of a payment for the benefit of the citizen child in order to deter the conduct of the parent. This was characterised by the Court of Appeal as in inherent unfairness and lack of proportionality in the legislative scheme.

67. The Court of Appeal in dealing with the equality provision in the Constitution referred to a lengthy passage, from the judgment of O'Donnell J. in the case of *Murphy v. Ireland* [2014] IESC 19, of the Constitution (see paragraph 28 of the judgment). In the course of the passage referred to, O'Donnell J. stated:

> "Matters such as gender, race, religion, marital status and political affiliation, while not all immutable characteristics, can nevertheless be said to be intrinsic to human beings' sense of themselves. Differentiation on any of these grounds, while not prohibited, must be demonstrated to comply with the principles of equality. This is the sense in which the principle of equality is most commonly employed in constitutions and international instruments. It is plain however, that no discrimination on such grounds exists, or is alleged, in this case. Nonetheless, Article 40.1 is in general terms and accordingly it may be that significant differentiations between citizens, although not based on any of the grounds set out above, may still fall foul of the provision if they cannot be justified. It is unnecessary here to seek to determine the level of scrutiny the Constitution would require to be applied to any particular differentiation in the absence of one of the factors identified above. The principle of equality in general terms requires that like persons should be treated alike, and different persons treated differently, by reference to the manner in which they are distinct."

68. It was in reliance on that passage that the Court of Appeal proceeded to consider whether there was a justifiable reason for differing treatment between Emma as a citizen child and other citizen children within the State. The restriction of payment to those who are habitually resident is neutral in the sense that it applies to all applicants for child benefit equally. Thus, the State has contended that the provisions of the Act of 2005 do not discriminate against Emma. The requirement in relation to habitual residence is addressed to the qualified person only. The legislation at issue relates to a benefit payable to the qualified person and not the qualified child. That being so, it does not appear to me to be appropriate to compare the position of Emma, a citizen child, with the position of any other citizen child. As pointed out by O'Donnell J. in the passage above, the principle of equality requires that like persons should be treated alike. As the payment of child benefit is to a qualified person, the like person for this purpose should be another

qualified person, not the child whose existence may give rise to the payment. For that reason, I cannot agree with the approach of the Court of Appeal when it concluded at paragraph 36 that "the restrictions are at best indirect and bar the making of a payment designed for the benefit of the citizen child in order to deter opportunistic asylum claims which its parents might make."

69. It is necessary at this point to consider a further basis relied on by the Court of Appeal in reaching its conclusions in the case of Emma. Particular reliance was placed on the decision of the European Court of Human Rights in *Niedzwiecki v. Germany* referred to above. The applicants in their submissions also placed reliance on that decision.

70. The facts of the *Niedzwiecki* case are summarised in the judgment of the European Court of Human Rights but can be simply stated as follows. The applicant was a Polish national. He entered Germany in 1987. Until January 1997 he was in possession of a limited residence title for exceptional purposes. In April 1997 he obtained an unlimited residence permit. His daughter was born in July 1995 and in December 1995 he requested a child raising allowance for the first year of the child's life under the relevant German legislation. That was refused. He appealed that decision and it was held that he did not meet the requirements of the Child Raising Allowance Act as he was not a German national and he did not have the necessary unlimited residence permit. According to the relevant provisions of the Child Raising Allowance Act, the limited residence title for exceptional purposes did not suffice for the allowance. Ultimately, he brought proceedings which ended up in the German Constitutional Court (Bundesverfassungsgericht). That Court subsequently held on the 6th July, 2004 that the pertinent provisions of the relevant Act violated the right to equal treatment enshrined in the German Basic Law. In the meantime, the matter was also brought before the European Court of Human Rights and in its judgment, the Court held at paragraph 31 onwards:

> "31. By granting child benefits, states are able to demonstrate their respect for family life within the meaning of Article 8 of the Convention; the benefits therefore come within the scope of that provision (see, *mutatis mutandis*, *Petrovic*, cited above, (paragraph 30). It follows that Article 14 – taken together with Article 8 – is applicable.
>
> 32. According to the Court's case-law, a difference of treatment is discriminatory for the purposes of Article 14 of the Convention if it 'has no objective and reasonable justification, that is if it does not pursue a 'legitimate aim' or if there is not a 'reasonable relationship of proportionality between the means employed and the aim sought to be realised'. The Contracting States enjoy a certain margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment (see, among other authorities, Willis, cited above, paragraph 39).
>
> 33. The Court is not called upon to decide generally to what extent it is justified to make distinctions, in the field of social benefits, between holders of different categories of residence permits. Rather it has to limit itself to the question

> whether the German law on child benefits as applied in the present case violated the applicant's rights under the Convention. In this respect the Court notes the decision of the Federal Constitutional Court concerning the same issue which was given after the proceedings which form the subject matter of the present application had been terminated (see paragraph 24 above). Like the Federal Constitutional Court, the Court does not discern sufficient reasons justifying the different treatment with regard to child benefits of aliens who were in possession of a stable residence permit on one hand and those who were not, on the other. It follows that there has been a violation of Article 14 in conjunction with Article 8 of the Convention."

71. The State in the course of its arguments point out that what was at issue in that case was not a difference in treatment of the applicant's children compared with other children whose parents might qualify for child benefit but rather the difference in treatment between the applicant who had a temporary right to reside, renewable every two years – and a person with a permanent right to reside. That was the difference in treatment between two classes of persons, both with a right to reside, which the Court found was not objectively justified. The State then went on to make the point that the factual situation in that case contrasted with the facts in these cases in that the difference in treatment in the present cases relates to those with no right to reside at all and those who for one reason or another do have a right to reside. It was contended that such difference in treatment can be objectively justified and is reasonable in the interests of preserving the limited resources of the State in funding the social welfare system and comes within the margin of appreciation. It is also pointed out that there is a significant difference between the facts of these cases and that of *Niedzwiecki* in that the applicant was the parent and not the child. The claim in that case was not in any way based on the entitlement of the child to the benefit and the finding was a finding on foot of the Convention that there had been discrimination against the applicant in respect of his right to respect for his family life. Indeed, criticism was made of the judgment of the Court of Appeal for its characterisation of the judgment in *Niedzwiecki,* at paragraph 37 where the Court said:

> "What is striking about this case is that the German legislation had similarly provided that child benefit was not payable to children resident in Germany whose non-citizen parents did not enjoy what was described as 'stable residence permit' entitling them to live in Germany."

72. It is correct to say, as the State points out, that the German legislation did not provide for child benefit to be payable to children resident in Germany. It is payable to the parent.

73. What was at issue in the *Niedzwiecki* case was a difference of treatment between different classes of rights of residence holders. The German legislation did not permit payment of child benefit to those who did not have a "stable" right of residence, i.e., one which was limited to a two year period, albeit renewable, while those who had a permanent right of residence were entitled to payment of the child benefit. Thus, the area of discrimination arose between holders of residence permits. It was in that context that both the German

Constitutional Court and the European Court of Human Rights in that case concluded that there were not sufficiently discernible reasons justifying the different treatment with regard to child benefits of aliens who were in possession of a stable residence permit on the one hand and those who were not on the other.

74. The facts of that case can be contrasted with the facts of these cases. In that case, there was discrimination between holders of different classes of holders of rights of residence. In these cases, at the time when the payment was refused the claimants in each case, that is, Emma's mother and Michael's mother, did not have rights of residence and therefore were not habitually resident within the State and could not be so regarded until such time as a decision was made in respect of their right to reside in the State. There is no discrimination between various categories of those entitled to reside in the State.

75. As I have noted, what was at issue in the *Niedzwiecki* case was a difference of treatment between different classes of rights of residence holders. It seems to me that there is a clear contrast between a situation involving those with different classes of rights of residence and those who do not have any such rights of residence. The German legislation did not permit payment of child benefit to those who did not have a "stable" right of residence. Thus, a right of residence which was limited to a two year period, albeit renewable, was not a "stable" right of residence in contrast to those who had a permanent right of residence and who were thus entitled to payment of child benefit. Therefore, as can be seen, the area of discrimination at issue in that case arose between holders of residence permits. As I have mentioned, it was in that context that both the German Constitutional Court and the European Court of Human Rights concluded that there were not sufficiently discernible reasons to justify the difference in treatment.

76. The State in this case has argued that there are legitimate reasons for providing that child benefit is only payable to those who are habitually resident in the State. Those who are not entitled to reside in the State as of right may in the fullness of time acquire such a right either through a declaration of refugee status or alternatively if on some other basis they are granted permission to reside in the State. I am satisfied that the State is entitled to have in place measures designed to prevent unlimited migration. It has long been recognised that states are entitled to impose restrictions on such migration. The State must be entitled to regulate the manner in which it provides for those in the State whose status has not yet been determined. The Act of 2005 ensures that those who are granted permission to reside in the State or a declaration of refugee status are thereafter entitled to payment of child benefit without distinction between such individuals and any other person entitled to reside in this jurisdiction. That this is so is amply demonstrated by the facts of this case in which it has been seen that once the right to reside was granted to Emma's mother and to Michael's mother, child benefit became payable. Accordingly, I cannot see any basis upon which it could be said that there was any lack of equal treatment such as to give rise to a breach of Article 40.1 of the Constitution.

77. The State is entitled to have in place appropriate measures to determine who may reside in the State and is equally entitled to decide the basis upon which social welfare benefits

are payable to those within the State. I cannot see any basis upon which the decision of the European Court of Human Rights in *Niedzwiecki* could be relied on to suggest that the restrictions contained in the Act of 2005 amount to a form of discrimination for which there are no discernible reasons to justify the difference in treatment between those who are habitually resident in the State and those who are not. Indeed, the Court of Appeal at paragraph 34 of its judgment noted that:

> "It is true that the exclusion of persons with such an uncertain status serves important public policy and immigration goals by, *e.g.,* serving to deter opportunistic asylum claims and generally by reducing the attractiveness of the State as a destination for what is sometimes described as welfare tourism."

78. Therefore, there are valid reasons for the restrictions contained in the Act of 2005.

The X family's appeal

79. The appeal in respect of the X family focused on Article 28 of the Qualification Directive. It provides as follows:

> "Member States shall ensure that beneficiaries of refugee or subsidiary protections receive in the Member State that has granted such status, the necessary social assistance, as provided to nationals of that Member State."

Also of relevance is Recital 33 of the Directive which provides as follows:

> "Especially to avoid social hardship, it is appropriate, for beneficiaries of refugee or subsidiary protection status, to provide without discrimination in the context of social assistance the adequate social welfare and means of subsistence."

80. Speaking of Article 28, Hogan J. at paragraph 55 of the judgment stated as follows:

> "Article 28 makes it perfectly clear that Member States are required to make social assistance payments (such as child benefit) only to those who have been granted international protection status. This in turn implies that such an obligation arises *only* from the date such status has been *granted* and not otherwise."

81. He went on to state at paragraph 56 onwards:

> "In these circumstances I find myself concluding that s. 246 of the Act of 2005 is not inapplicable or otherwise contrary to the requirements of EU law by confining the payment of child benefit to the date upon which that status was granted. But what was that date?
>
> 57. In the light of the conclusions which I have already reached in relation to Emma, it seems to me that in reality that day is the day on which Michael was granted refugee status given that, to repeat already made, (*sic*) the child benefit payment is designed for the benefit of the child, even if it is made payable to the qualifying parent. This means that the State was obliged to pay child benefit in respect of Michael so long as he resided in the State with

effect from the date of his recognition as a refugee, *i.e.,* with effect from January 2015. Article 28 of the Qualification Directive does not permit that payment to be withheld because the person applying for the benefit on behalf of Michael (*i.e.*, Ms. X) did not herself have immigration status."

82. The case made on behalf of the State in respect of Michael is similar to that made in respect of Ms. Y, the mother of Emma, namely that it is the position of the claimant that one has to have regard to and not that of the child. What is required by Article 28 is that the beneficiary of refugee or subsidiary protection status should receive payments on the same basis as nationals. Ms. X was not a beneficiary of refugee or subsidiary protection status and therefore the provisions of the Act of 2005 preventing her from having access to child benefit until such time as she was granted permission to remain are not contrary to Article 28. The Court of Appeal acknowledged in the passage above that the Act of 2005 was not contrary to the requirements of EU law but as we have seen, chose to backdate the payment of child benefit to the date on which Michael was declared to be a refugee rather than the date on which his mother was given permission to reside in the State.

83. It seems to me that the approach of the Court of Appeal both in respect of Emma and Michael is almost to equate the claimant for child benefit in each case with the status of the child. In the case of Emma, an Irish citizen, her mother was treated by the Court of Appeal as having the right to reside in the State from the date of her birth, notwithstanding that permission to reside on the basis of her birth was not applied for immediately and once applied for, had to be considered by the Minister. In the case of Michael, the benefit of a declaration of refugee status from the point of view of the Court of Appeal, entitled his mother to claim child benefit from that date as opposed to the date upon which she was given permission to reside in the State, following an application made by her on the basis of family reunification. Again, the Minister was entitled to consider the application. The approach taken by the Court of Appeal in this regard is, in my view, mistaken. The claimant is manifestly the qualified person as defined under the Act of 2005 and not the child who has benefited from being an Irish citizen or alternatively the declaration of refugee status as the case may be. One only has to consider briefly one aspect of the matter which makes this clear. After Emma was born Ms. Y sought permission to remain in the State based upon her parentage of Emma. As is now clear, that application was granted and Ms. Y was given permission to reside in the State. From that date onwards she has been entitled to claim child benefit in respect of Emma. However, it cannot be gainsaid that in considering the question of whether or not to grant permission to reside, the Minister must be entitled to make inquiries as to whether or not it would be appropriate in any given case to grant permission to reside. One can envisage circumstances where, notwithstanding the fact that an individual is the parent of a child entitled to reside in the State, that the parent may not be given permission to reside. To give an extreme example, the Minister would be entitled to refuse permission to reside to a person who was known to be actively engaged in terrorist activities. It is obvious that there will be some time-lag between the date of application for permission to reside and a decision being made on such an application given the necessity for the

Minister to satisfy him or herself that it is appropriate to give permission in any given case. That being so, it is difficult to see how there could be any obligation to pay child benefit before such decision has been reached. I cannot see any basis upon which the delay necessitated by a consideration of the application for a right to reside with either the citizen child in the case of Emma or the refugee child in the case of Michael could be a breach of Article 40.1 of the Constitution in the case of the citizen child or Article 28 of the Qualifications Directive in respect of the refugee child or a child granted international protection.

Other issues

84. The Court of Appeal in the course of its judgment did not find it necessary, given its conclusions, to deal with another argument made on behalf of Ms. Y in the course of the case. This was her reliance on *Zambrano* rights. The decision of the Court of Justice of the European Union (CJEU) in the case of *Zambrano* concerns rights of residence. In that case, a Columbian couple were living without leave in Belgium and had two children who were Belgian nationals and, by definition, as Belgian nationals they were also EU citizens. The father had lost his job but could not obtain unemployment benefit because he had no right to reside in Belgium. The Belgian authorities attempted to deport him from Belgium. The CJEU held that Belgium could not remove him and was bound to give him a residence card showing that he had the right to reside so that he could work to support his family. It was assumed by the Court of Justice that in the circumstances of the case the refusal to give him a residence card was such that it would lead to the children having to leave the European Union. In those circumstances the Member State concerned had to give a "right of residence". The issue has arisen as to when such rights derived from the decision in *Zambrano* arise. In this context it was argued on behalf of Ms. Y that this has been clarified in the case of *K.A.*, Case C 82/16 in which a Grand Chamber of the CJEU held:

> "Further, it must be borne in mind that, in the first place, the right of residence in the host Member State, accorded by Article 20 TFEU to a third-country national who is a family member of a Union citizen, stems directly from that provision and does not presuppose that the third-country national already has some other right of residence in the territory of the Member State concerned and, in the second place, since the benefit of that right of residence must be accorded to that third-country national from the moment when the relationship of dependency between him or her and the Union citizen comes into being, that third-country national can no longer be considered, from that moment and for as long as that relationship of dependency lasts, as staying illegally in the territory of the Member State concerned, within the meaning of Article 3(2) of Directive 2008/115."

85. Relying on that passage, it is contended on behalf of Ms. Y that her right of residence must be afforded to her from the date of birth of Emma and that accordingly, child benefit in respect of Emma was payable from that date. Therefore, in reliance on that decision, it is contended that the right to reside arose on the date of birth of Emma and thus having a right to reside the only question thereafter that could possibly arise is whether or not Ms.

Y could establish that she was habitually resident in the State from the date of birth of Emma. It was further contended that the provisions of s. 246(8) of the Act of 2005 do not expressly prohibit the retrospective backdating of child benefit to a claimant who has been granted a right to reside pursuant to Article 20 TFEU/*Zambrano*.

86. The State in its submissions contended that the decision in *Zambrano* was focused on the effect of a decision to refuse a right of residence and a grant of a work permit to a third-country national whose minor children were dependent upon him, those children being European Union citizens, such that the refusal meant that the children were deprived of the enjoyment of their rights as European Union citizens. Reference was made to paragraph 44 of the decision of the CJEU in which it was stated:

> "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, in fact, be unable to exercise the substance of the rights conferred on them by virtue of their status as citizens of the Union."

87. Accordingly, as was pointed out by the State in their submissions, the national measures applicable in *Zambrano* had the effect that citizens of the Union had to leave the territory of the Union to accompany their parents. Therefore, it is contended that a central tenet of the decision in *Zambrano* is that the national measure must have the effect of depriving the Union citizen child of the genuine enjoyment of the substance of the rights attaching to the status of EU citizenship before such rights can be said to offend Article 20 of the TFEU. Indeed, this approach was recognised in the decision of the Court of Appeal in the case of *Bakare and Anor. V. Minister for Justice and Equality* [2016] IECA 292 in which the Court considered the effect of the Zambrano decision. Hogan J. giving the judgment of the Court, quoted from the decision in Case C 256/11 *Derechi* [2011] ECR I – 11315 at paragraph 17 onwards of his judgment and it is worth quoting his observations in full:

> "17. The Court of Justice accordingly found [in *Derechi*] that the reasoning in *Zambrano* simply did not apply:
>
> > "65. Indeed, in the case leading to that judgment [in *Zambrano*], the question arose as to whether 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 have such an effect. The Court considered in particular that such a refusal would lead to a situation where those children, who are citizens of the Union, would have to leave the territory of the Union in order to accompany their parents. In those circumstances, those citizens of the Union would, in fact, be unable to exercise the substance of the rights conferred on them by

virtue of their status as citizens of the Union (see *Ruiz Zambrano*, paragraphs 43 and 44).

66. It follows that the criterion relating to the denial of the genuine enjoyment of the substance of the rights conferred by virtue of European Union citizen status refers to situations in which the Union citizen has, in fact, to leave not only the territory of the Member State of which he is a national but also the territory of the Union as a whole.

67. That criterion is specific in character inasmuch as it relates to situations in which, although subordinate legislation on the right of residence of third country nationals is not applicable, a right of residence may not, exceptionally, be refused to a third country national, who is a family member of a Member State national, as the effectiveness of Union citizenship enjoyed by that national would otherwise be undermined.

68. Consequently, the mere fact that it might appear desirable to a national of a Member State, for economic reasons or in order to keep his family together in the territory of the Union, for the members of his family who do not have the nationality of a Member State to be able to reside with him in the territory of the Union, is not sufficient in itself to support the view that the Union citizen will be forced to leave Union territory if such a right is not granted."

(emphasis supplied)

18. In my judgment, this last paragraph – which I have taken the liberty of highlighting – shows the true rationale of *Zambrano: is it likely that the administrative decision taken by the Member State will in practice oblige the parents to take the EU citizen children with them so that the latter are obliged to leave the territory of the Union?"*

[Emphasis added].

88. Hogan J. then continued at paragraph 24 of the judgment:

> "It is accordingly clear from a consideration of post-*Zambrano* case-law that the critical consideration is whether the denial of residency or similar rights to one or both third country nationals who the parents of EU citizen children is likely to bring about a situation where those children are in practice compelled to leave the territory of the Union."

89. Relying on that authority, the State contends that there is no evidential basis in the case of Ms. Y for contending that the national measure in issue in these proceedings and applied to the case have denied Emma the substance of her rights conferred by virtue of her status as a citizen of the Union or that the refusal to pay Ms. Y child benefit prior to the decision granting her a right of residence was likely to bring about a situation where Emma was compelled to leave the EU. A number of points were made on behalf of the State in this regard. It was emphasised that child benefit was provided to parents and would only ever have been payable to Ms. Y and not to Emma and thus the right to child

benefit was not a right conferred on Emma by virtue of her status as a citizen of the Union. Secondly, it was contended that although Ms. Y failed to meet the eligibility requirement of habitual residence, this did not have the effect of denying Emma the genuine enjoyment of the substance of her rights. It was pointed out that at the relevant time all of her material needs were being met through the direct provision system.

90. In circumstances where Emma and Ms. Y were availing of direct provision it was argued that it could not be said that the failure to pay Ms. Y child benefit would have the effect of compelling Ms. Y and Emma to leave the territory of the Union.

91. Finally, it was contended that if there was a denial to Emma of the substance of her rights this arose in circumstances where Ms. Y only applied for residence nine months after the birth of Emma.

92. The State also takes issue with the contention on behalf of Ms. Y and Emma that the grant of so-called *Zambrano* rights is declaratory of pre-existing rights. The State disagrees with such contention and argues that the decision in *Zambrano* does not provide any support for that proposition and further argues that there is nothing inconsistent with EU law in restricting the entitlement to child benefit to those to whom a right to reside has in fact been granted. For those reasons, they argue that Ms. Y and Emma cannot rely on the existence of *Zambrano* rights to contend that the payment of child benefit to Ms. Y in respect of Emma should be backdated and that a failure to do so is a breach of those rights.

93. Having considered this issue it seems to me that the appropriate question to ask is the one posed by Hogan J. at paragraph 18 of his judgment referred to above in respect of the rationale of *Zambrano*, namely, is it likely that the administrative decision taken by the Member State will in practice oblige the parents to take the EU citizen children with them so that the latter are obliged to leave the territory of the Union? The State pointed out that in this case, Emma having been born on the 23rd December, 2014, an application for child benefit was first made on the 16th October, 2015. The application was refused on the basis that Ms. Y did not meet the requirement of habitual residence given that she did not have a right of residence in the State at that time. However, a decision was subsequently made to give Ms. Y a right of residence given the fact that she was the parent of an Irish citizen child and child benefit was payable from the date of that decision. If one considers the issue that arises from the existence of *Zambrano* rights as posed by Hogan J., it seems to me that the only way in which there could be a breach of *Zambrano* rights would be if it could be shown that the failure to backdate child benefit payments in respect of Emma would have obliged Ms. Y to leave the territory of the Union. It was noted by White J. in the course of his judgment on this issue at paragraph 47 as follows:

> "After the birth of her child the second applicant made an application to regularise her status and claim *Zambrano* rights. During this process the first and second applicants remained in direct provision having their basic needs met by the State. The Court has already held that Child Benefit was not the automatic right of the

child, as it was payable to the second applicant as a qualified person. During the time period in question from 23rd December 2014 to January 2016, there was never any risk that the first applicant would be compelled to leave the E.U.

> 48. The applicants do not have a right to Child Benefit and to have it backdated to date of birth on the basis of *Zambrano* rights."

94. It appears that the absence of payment of child benefit did not impact on Ms. Y such that she was obliged to take Emma out of the E.U. in order to provide adequately for her. In the circumstances the reliance on the decision in *Zambrano* does not appear to me to avail Ms. Y and Emma. At issue, it should be remembered, is the question of backdating the payment. The payment was made from the date upon which the decision to recognise the right of Ms. Y to reside in the State was made. S. 246(9) of the Act of 2005 makes it clear that a person cannot be regarded as habitually resident until permission to reside in the State is granted. It is possible for some social welfare payments in certain circumstances to be backdated but there is no power to backdate a payment to a point in time before the event giving rise to the entitlement, so, for example, in the case of Ms. Y her entitlement to child benefit arose not on the birth of Emma but on the date upon she was given the right to reside and her payments of child benefit were back dated to that date. (See, for example, S.I. No. 142 of 2007).

95. It is undoubtedly the case that Ms. Y, by virtue of the birth of her child, Emma, an Irish citizen, had a strong claim to a right of residence in this State. In due course, her right to reside on that basis was recognised. The Act of 2005 provides that in order to be eligible for payment of child benefit, a qualified person has to be habitually resident in the State. Section 246(5) of the Act of 2005 expressly provides that a person who does not have a right to reside in the State shall not be regarded as being habitually resident in the State. Could Ms. Y claim that the payment of child benefit must be backdated to the date of Emma's birth, the date from which her right to reside derives?

96. Ms. Y relies on the decision in *K.A.* referred to above to argue that the right of residence must be accorded to her as and from the date on which Emma was born and that while payment of child benefit might be withheld pending an application based upon *Zambrano* rights, once the right is recognised, she is entitled to back-payments and the prohibition on backdated payments in the Act of 2005 should be disapplied.

97. It should be borne in mind that the decision in *K.A.* concerned a number of applicants who were the subject of "entry bans" in Belgium. In the course of its judgment in that case having made the observation cited above at paragraph 89, the Court went on to acknowledge that, notwithstanding that there may be a right of residence, there can be exceptions to the grant of a right of residence. At paragraph 90 it was stated as follows:

> "As regards, second, the fact that the entry ban is due to public policy grounds, the Court has previously held that Article 20 TFEU does not affect the possibility of Member States relying on an exception linked, in particular, to upholding the requirements of public policy and safeguarding public security. That said, in so far

as the situation of the applicants in the main proceedings falls within the scope of EU law, assessment of that situation must take account of the right to respect for private and family life, as laid down in Article 7 of the Charter, an article which must be read, when necessary, in conjunction with the obligation to take into consideration the child's best interests, recognised in Article 24(2) of the Charter . .

91. Further, as a justification for derogating from the right of residence of Union citizens or members of their families, the concepts of 'public policy' and 'public security' must be interpreted strictly. Accordingly, the concept of 'public policy' presupposes, in any event, the existence, in addition to the disturbance of the social order which any infringement of the law involves, of a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society. As regards the concept of 'public security', it is clear from the Court's case-law that that concept covers both the internal security of a Member State and its external security, and, consequently, a threat to the functioning of institutions and essential public services and the survival of the population, as well as the risk of a serious disturbance to foreign relations or to peaceful coexistence of nations, or a threat to military interests, may affect public security. The Court has also held that the fight against crime in connection with drug trafficking as part of an organised group or against terrorism is included within the concept of 'public security' . . .

92. In that context, it must be held that, where the refusal of a right of residence is founded on the existence of a genuine, present and sufficiently serious threat to the requirements of public policy or of public security, in view of, *inter alia*, criminal offences committed by a third-country national, such a refusal is compatible with EU law even if its effect is that the Union citizen who is a family member of that third-country national is compelled to leave the territory of the European Union . . ."

98. There is, of course, no suggestion in the present case that there was any issue of public policy or of public security that could have precluded Ms. Y from claiming a right of residence in this State. The reason why I have highlighted those passages is to emphasise the fact that in the case of *K.A.* which is relied on so heavily by Ms. Y, it was clear from the Court's decision that in an application for a right of residence in circumstances where there had been an entry ban, Member States may have a justifiable reason for not granting a right of residence. In other words, it is evident that the entitlement to a right of residence has to be the subject of an application in the Member State and the Member State must have an opportunity to consider the application. There is nothing in the judgment in *K.A.* or indeed in *Zambrano* itself to suggest that the consequences of the decision to recognise the right of residence of a person such as Ms. Y are that all entitlements that flow from the right of residence must be backdated to the date upon which an application could have been made for the right of residence.

99. The core of the right recognised in *Zambrano* is the right to reside in the State. That is a right afforded to the European Union citizen, in this case, Emma. In order to demonstrate that her right to reside has been interfered with, it has to be established that the failure to make child benefit payments on a backdated basis to the date of Emma's birth was such as to deny her, Emma, the enjoyment of her rights as a citizen of the Union to reside in this Member State. In other words, it would be necessary to show that she was being deprived of her right to reside in the State because the financial circumstances of her mother by the denial of child benefit was such as to require her to leave. The fact that her rights may derive as and from the date of her birth does not alter the fact that in this case, the simple fact of the matter is that Emma was not obliged to leave the Member State or Union territory by virtue of the failure to backdate the payment. In those circumstances I am satisfied that the failure to backdate the payment of child benefit to the date of her birth is not a breach of Emma's rights as a citizen of the E.U.

100. For completeness, I should add that it was suggested that it might be necessary in this case to obtain a preliminary reference from the CJEU. I cannot see any issue of European law arising in this case necessitating a reference.

Conclusions

101. It seems to me that the Court of Appeal fell into error in concluding that Emma as an Irish citizen resident in the state had a strong claim to be treated in the same way as fellow citizens similarly resident in the State. In fact, the Court of Appeal should have considered the position of her mother, the qualified person, to whom child benefit would be payable provided that her mother, Ms. Y, met the eligibility requirements of the Act of 2005. Child benefit is payable, as has been seen, to a qualified person. The qualified person has to be habitually resident in the state. Ms. Y, having regard to the fact that she did not have refugee status or permission to reside in the State, did not have habitual residence in the State. There was no difference in treatment between Ms. Y and any other qualified person in terms of the requirement of habitual residence. Once her status was changed by reason of the permission granted to her to remain in the State on the basis that she was the mother of Emma, an Irish citizen child, Ms. Y was treated in precisely the same way as any other qualified person and no distinction was made between her and any other such person. It is important to bear in mind that one has to look at the status of the claimant for child benefit and not that of the child in respect of whom child benefit may be payable. Bearing that in mind, the Act of 2005 does not give rise to any inequality of treatment in terms of those entitled to claim child benefit.

102. In the case of Michael, it is also clear that by focusing on the position of Michael rather than on the position of his mother, the Court of Appeal fell into error. While the Court of Appeal did not conclude that the provisions of section 246 of the Act of 2005 were in breach of article 28 of the Qualification Directive, nonetheless the Court of Appeal concluded that child benefit should have been payable to Ms. X from the date upon which a declaration of refugee status was given to Michael. In other words, once again, the Court of Appeal focused on the position of the child rather than the claimant. This approach is, for the reasons already explained, not correct. Child benefit is payable to a

claimant who is a qualified person within the meaning of the Act of 2005 who has met the eligibility requirements and in particular, the requirement of habitual residence. There is nothing in Article 28 of the Qualification Directive to suggest that the payment of child benefit should be backdated to the date upon which Michael was granted refugee status. The payment is made from the date upon which the decision was made to grant his mother, the qualified person entitled to receive the payment, the right to reside in the State. That decision, as in any other case, necessitated a consideration of the facts and circumstances of the case and there was no suggestion of any undue delay in that regard. Accordingly, the State was not obliged to make a payment of child benefit to Ms. X in respect of Michael until such time as she was given permission to reside in the State and Article 28 does not mandate any payment before that date.

103. Finally, Ms Y was able to and did avail of her *Zambrano* rights to acquire a right of residence in the State. There has been no breach of Ms. Y's *Zambrano* rights. A decision had to be made by the State as to whether or not to grant Ms. Y permission to reside in the state on the basis of her *Zambrano* rights. The State was entitled to consider the facts and circumstances of her case before making the decision to grant the right to reside. Ms. Y was not compelled to leave the State in the absence of a payment of child benefit for the period at issue in these proceedings.

104. The decision in the case of *K.A.* does not assist Ms. Y for the reasons set out above and in particular, regard must be had to the fact that Ms. Y was granted the right to reside on the basis of her *Zambrano* rights. Insofar as there has been no breach of her *Zambrano* rights, it appears that the decision in *K.A.* has no bearing on the facts of this case. Even though the decision in *K.A.* was to the effect that a right of residence must be accorded to a third country national from the moment when the relationship of dependency comes into being, nevertheless that decision made it clear that the member state concerned was entitled to consider the facts and circumstances of the case before making a decision to grant or withhold a right of residence. There is nothing in the judgment of *K.A.* to suggest that a payment such as child benefit had to be backdated.

105. In the circumstances I would allow the appeals of the State.