High Court of Ireland Decisions

Judgment

Title:	Agha (a minor) & ors -v- Minister for Social Protection & ors
Neutral Citation:	[2017] IEHC 6
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Judgment by:	White Michael J.
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Neutral Citation [2017] IEHC 6

THE HIGH COURT

JUDICIAL REVIEW

[2015 No. 366 J.R.]

IN THE MATTER OF THE SOCIAL WELFARE CONSOLIDATION ACT 2005 (AS AMENDED) THE CONSTITUTION, THE REFUGEE ACT 1996 (AS AMENDED), E.C. DIRECTIVE 2004/83, E.U. REGULATIONS 883/2004 AND 987/2009, THE E.U. CHARTER OF FUNDEMENTAL RIGHTS AND THE EUROPEAN CONVENTION ON HUMAN RIGHTS ACT 2003

BETWEEN

DANIEL AGHA (A MINOR), MARIA KHAN (A MINOR), NAYMATULLIH KHAN (A MINOR), RAHMAT AGHA (A MINOR), (ALL SUING THROUGH THEIR MOTHER AND NEXT FRIEND SHAZIA AGHA) ZAYED AGHA AND SHAZIA AGHA

APPLICANTS

AND

MINISTER FOR SOCIAL PROTECTION, THE ATTORNEY GENERAL AND IRELAND

RESPONDENTS

IRISH HUMAN RIGHTS AND EQUALITY COMMISSION

NOTICE PARTY

(FIRST ACTION)

AND

THE HIGH COURT

JUDICIAL REVIEW

[2015 No. 682 J.R.]

BETWEEN
VICTORIA OSINUGA (A MINOR SUING BY HER MOTHER AND NEXT FRIEND, FAITH OSAGIE) AND FAITH OSAGIE

APPLICANTS

AND

MINISTER FOR SOCIAL PROTECTION, IRELAND AND ATTORNEY GENERAL

RESPONDENTS.

(SECOND ACTION)

JUDGMENT of Mr. Justice White delivered on the 17th January, 2017

1. By order of this court on 29th June, 2015, the applicants in the first action were given leave to apply for judicial review seeking the following reliefs.

(a) An order of certiorari quashing the decision of the first named respondent dated 2nd April, 2015, refusing to grant the payment of child benefit, including arrears of payment, to the sixth named applicant for the benefit of the first to fourth named applicants.

(b) Without prejudice to the foregoing an order of certiorari quashing the decision of the first named respondent dated 2nd April, 2015, insofar as the said decision refuses to grant the payment of child benefit, including arrears of payment, to the sixth named applicant for the benefit of the first applicant.

(c) A declaration that as a recognised refugee the first named applicant is entitled to receive the benefit and support of child benefit, by way of payment to the sixth named applicant.

(d) A declaration that as a refugee since birth the first named applicant is entitled to arrears of child benefit by way of payment to the sixth named applicant, from his birth and/or when he first applied for refugee status and/or from twelve months prior to the application for child benefit made by the sixth named applicant.

(e) A declaration that the second to fourth named applicants are entitled to receive the benefit and support of child benefit, by way of payment to the sixth named applicant from the date of application for child benefit.

(f) Without prejudice to the foregoing if necessary a declaration that the first to fourth named applicants are entitled to receive payment of arrears of child benefit by way of payment to the sixth named applicant, from the date of application for child benefit to the date the sixth named applicant

is granted formal permission to remain in the State.

(g) A declaration that ss. 220 (3), 246 (5) and 246 (7) of the Social Welfare Consolidation Act, 2005 (As amended), taken individually and/or in a combination with each other, are repugnant to the Constitution and in breach of EU law.

(h) A declaration that s. 246 (8) of the Social Welfare Consolidation Act, 2005 (As amended) is repugnant to the Constitution and in breach of European law.

(i) A declaration that ss. 220 (3), 246 (5), 246 (7) and 246 (8) of the Social Welfare Consolidation Act, 2005 (as amended) taken individually and/or in combination with each other, unlawfully denied the first named applicant his rights and entitlements pursuant to ss. 3(2) (ii) and 18 (3) of the Refugee Act 1996 (as amended) and Articles 20, 23 and 28 of EC Directive 2004/83.

(j) Damages for breach of the applicants' constitutional rights.

(k) Damages for breach of the applicants' EU law rights.

(l) If necessary, a declaration pursuant to s. 5, European Convention of Human Rights Act 2003, that s. 220(3) and/or s. 246(5) and/or (7) and/or (8) of the Social Welfare Consolidation Act 2005 (as amended) taken individually or together are incompatible with the Convention.

(m) Further or other order including, if necessary, an order extending the period within which the application herein be made.

(n) Costs.

2. The application was grounded on the affidavit of the sixth applicant sworn on 25th June, 2015, together with exhibits. An originating motion dated 7th July, 2015, was issued returnable for 20th October, 2015. A statement of opposition on behalf of the defendants was filed and served on 5th November, 2015. Tina Burns, Assistant Principal Officer of the Department of Social Protection swore an affidavit on behalf of the defendants on 5th November, 2015. Eugene Banks, Principal Officer in the Department of Justice and Equality swore an affidavit on 10th November, 2015, dealing with the direct provision system for those who have applied for asylum or applied to remain resident in the Republic of Ireland. The sixth applicant swore an affidavit in reply to this on 11th January, 2016. The matter was at hearing on 10th, 11th, 12th and 31st May, 2016 and judgment was reserved.

Factual Background of First Action

3. The facts of the case are undisputed. The fifth and sixth applicants are citizens of Afghanistan who came to Ireland in May 2008 and resided within the direct provision system from May 2008 to 1st December, 2008, and from 1st June, 2010 onwards. They have four children, Rahmat born in Pakistan on 20th May, 2006; Naymatullah born in Ireland on 10th August, 2008; Maria born on 26th July, 2009 in Ireland; and Daniel born on 5th April, 2013 in Ireland.

4. On first arrival in Ireland in 2008, the fifth and sixth applicants were treated as Pakistani nationals as they originally had Pakistani identity documents which were false.

5. Subsequently, their citizenship of Afghanistan was established by way of passports and identity papers. The original decision was to transfer the family to the United Kingdom under EU rules but the fifth and sixth applicant went into hiding. Subsequently, deportation orders were signed by the Minister for Justice in March 2012, on the basis that they were Pakistani nationals.

6. However, once their Afghanistan citizenship was established, the youngest son, Daniel, the first applicant made an application for refugee status. The Refugee Appeals Tribunal on appeal from the Refugee Applications Commissioner issued a decision in writing on 9th December, 2014, declaring the first applicant to be a refugee. This was communicated by letter of 8th January, 2015, to the first applicant from the Irish Naturalisation and Immigration Service.

7. Subsequently, on 14th January, 2015, the fifth and sixth applicants together with the remaining members of their family applied pursuant to s. 18 of the Refugee Act 1996 for family reunification. That permission was granted on 11th September 2015, by letter from the Irish Naturalisation and Immigration Service when the family were permitted to remain with the first applicant, Daniel.

8. There is no allegation in this case that there was any culpable delay on dealing with the application for refugee status of the first applicant or the application to remain of the rest of the family.

9. The sixth applicant made an application for child benefits for all her children on 19th February, 2015, and the first respondent issued a written decision on 2nd April, 2015, claim reference No. 1415262E. The letter stated as follows:-

> "I refer to your claim for child benefit made on 19th February, 2015.
>
> One of the qualifying conditions for receipt of child benefit is that you must be habitually resident in this State. I have decided that you do not satisfy the condition of being habitually resident in this State for the following reason.
>
> You are awaiting a decision from the Department of Justice and Equality on your residency application and you do not, as yet, have the right to reside in the State. Section 246 of the Social Welfare Consolidation Act 2005 (as amended), explicitly states that a person who has not been granted permission to remain in the State shall not be regarded as being habitually resident."

10. In the second Action by order of this court on 7th December, 2015, the court granted the applicants leave to seek the following reliefs:-

> (i) An order of *certiorari* quashing the decisions of the first named respondent of 2nd November, 2015 and 30th November, 2015.
>
> (ii) A declaration that s. 246(5), s. 246(7)(a) and/or s. 246(7)(d) and/or s. 246(8) of the Social Welfare Consolidation Act 2005 (as amended) are contrary to, *inter alia*, Article 20 of the Treaty on the functioning of the European Union, in the premises that the second named applicant derives a right to reside in the State premised upon her parentage of the second named applicant and that the said right is merely declaratory and persist not from the date of recognition in this State but from the date of the birth of the first named applicant.

(iii) In the alternative, and without prejudice to the foregoing, a declaration that, *inter alia*, s. 246(5), s. 246(7)(a) and/or s. 246(7)(d) and s. 246(8) of the Social Welfare Consolidation Act 2005, as amended, are unconstitutional in the premises that, *inter alia*, the said sections have the effect of discriminating against the second named applicant by treating her unequally before the law with other Irish citizen children in an unjustified manner and are disproportionate, arbitrary and contrary to reason and fairness insofar as the sections wholly prohibit the payment of a Social Welfare payment intended for the first named applicant's benefit.

(iv) In the alternative, and without prejudice to the foregoing, a declaration that, inter alia, s. 246(5), s. 246(7)(a) and/or s. 246(7)(d) and s. 246(8) of the Social Welfare Consolidation Act 2005, as amended, are incompatible with the ECHR Act 2003, in the premises that, inter alia, the said sections have the effect of discriminating against the second named applicant by treating her unequally before the law with other Irish citizen children in an unjustified manner and are disproportionate, arbitrary and contrary to reason and fairness and/or interfere with the applicant's private life rights insofar as the sections wholly prohibit the payment of a Social Welfare payment intended for the first named applicant's benefit.

(v) Further or other orders.

(vi) Liberty to apply.

(vii) Costs.

11. The second Applicant swore a grounding affidavit on the 4th December 2015, grounding the application. A Notice of Motion issued on 11th December 2015 originally returnable for 26th January 2016.The statement of opposition was filed on 22nd April, 2016. Tina Burns, Assistant Principal Officer, in the Child Benefits Section of the Department of Social Protection swore a replying affidavit on 22nd April, 2016. Eugene Banks, Principal Officer, in the Department of Justice and Equality swore a replying affidavit in respect of direct provision on 6th May, 2016. Faith Osagie, the second applicant swore a further affidavit on 7th November, 2016. The matter was at hearing on 15th and 16th November, 2016 and judgment was reserved.

Factual Background to Second Action

12. The facts are not in dispute. In an affidavit sworn on 4th December, 2015, the second affidavit, Faith Osagie, the mother of the first applicant stated,

"5. I say that I am a national of Nigeria. I arrived into this State on or about November 2013. I say I have applied for asylum on 21st November, 2014. I say I have received a negative decision from the office of the Refugee Applications Commissioner refusing me refugee status, decision dated 16th June, 2015 and 27th August, 2015. I further say that the said decision has been appealed to the Refugee Appeals Tribunal on 9th October, 2015, and I am awaiting an oral hearing for my case.

6. I say that in the early part of 2014, I met with my daughter's father, Olusegun Osinuga, who is an Irish citizen. On 23rd December, 2014, our daughter, Victoria, was born. Victoria is an Irish citizen, as evidenced by a copy of her passport….

7. I say that the relationship between me and Mr. Olusegun Osinuga is not ongoing but that he occasionally sees Victoria and occasionally

provides small sums of money by way of support.

8. I say that following the birth of Victoria, I sought permission to remain in the State by virtue of my Irish born child. This application has not yet been determined….

9. I say that in late January 2015, I received a letter dated 15th January, 2015, from the Child Benefit Section inviting me to apply for child benefit. I say that I made a claim for child benefit to the first named respondent in respect of Victoria on 16th October, 2015…. By decision dated 2nd November, 2015, the first named respondent refused my application on the premise that I did not have a right to reside for the purposes of s. 246 of the Social Welfare Consolidation Act 2005, (as amended) and therefore could not be habitually resident….

13. She went on to state at para. 12:-

"12. I say that raising my daughter is very difficult given the circumstances we are living in as we are in direct provision accommodation and received less that €43 weekly together with food and lodgings. Victoria has sickle cell anaemia (HbSS) which is a severe hereditary form of anaemia."

14. In January 2016, the Minister for Justice and Equality granted the second applicant leave to remain on the basis of her parentage of the first applicant who was born on 23rd December, 2014 and she has been in receipt of child benefit payments since that date.

15. The issue which is relevant to the court's determination is an allegation by the applicants that child benefit should have been retrospectively paid from the date of birth of the first applicant on 23rd December, 2014, up to the date in January 2016, when the second applicant was granted leave to remain.

16. The first and second applicants in the second action have been in receipt of the services of the direct provision systems since the first applicant's birth in December 2014. The direct provision system has been explained in detail in the affidavit of Eugene Banks of the Department of Justice and Equality sworn on 6th May, 2016.

17. The second applicant made a claim for child benefit on 16th October, 2015, and was notified by letter of 2nd November, 2015, by the Social Welfare services of the Department of Social Protection that her claim had been unsuccessful. The reasons given in the letter are as follows:-

"One of the qualifying conditions for receipt of child benefit is that you must be habitually resident in this State. I have decided that you do not satisfy the condition of being habitually resident in this State for the following reason.

You are awaiting a decision from the Department of Justice and Equality on your residency application and you do not as yet have the right to reside in the State. Section 246 of the Social Welfare Consolidation Act 2005,(as amended,) explicitly states that a person who has not been granted permission to remain in the State shall not be regarded as being habitually resident."

18. As the legal submissions in both cases are broadly similar and relate to the same legal issue it is appropriate to consider the legal principles in both cases in tandem.

The Relevant Provisions of the Social Welfare Consolidation Act 2005

19. The relevant provisions are contained in Part 4 of the Act under child benefit.

20. Section 219 states:-

> "(1) 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) he or she is not detained in a reformatory or an industrial school and is not undergoing imprisonment or detention in legal custody."

21. Section 220 states:-

> "(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) where a qualified child is resident in an institution and contributions are made towards the cost of his or her maintenance in that institution, that child shall be regarded as normally residing with the person with whom in accordance with the rules made under paragraph (a) he or she would be determined to be normally residing if he or she were not resident in an institution but, where the person with whom the child would thus be regarded as normally residing has abandoned or deserted the child, the child shall be regarded as normally residing with the head of the household of which he or she would normally be a member if he or she were not resident in an institution.

(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."

22. Section 246 states:-

"(1) A requirement, in any of the provisions specified in subsection (3) for a person to be habitually resident in the State means that-

(a) the person must be habitually resident in the State at the date of the making of the application, and the person must remain habitually resident in the State after the making of that application in order for any entitlement to subsist,

(b) the person is a worker or a self-employed person, residing in the State pursuant to Article 7 of Directive 2004/38/EC of the European Parliament and of the Council of 29th April 20042, from —

(i) a Member State, or

(ii) a member state of the European Economic Area,

(c) the person is a family member of a person referred to in paragraph (b),

(d) where a person referred to in paragraph (b) ceases to be such a worker or such a self-employed person, the person must be habitually resident in the State immediately after the date of such cessation, and must remain habitually resident in the State in order for any entitlement to subsist, or

(e) where a person referred to in paragraph (b) ceases to be such a worker or such a self-employed person, a family member of such a person must be habitually resident in the State immediately after the date of such cessation, and the family member must remain habitually resident in the State in order for any entitlement to subsist.

…

(3) The provisions of this Act referred to in subsection (1) are sections 149, 153(c), 161A(d), 163(3), 168(5), 173(6), 182, 196(a)(ii), 196(d)(i), 192, 210(9), 220(3) and 238(b)(v).

(4) A deciding officer or a designated person when determining whether a person is habitually resident in the State for the purpose 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 in 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 persons concerned as they appear from all the circumstances.

(5) Notwithstanding subsections (1) to (4) and subject to subsection (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.

(6) The following persons shall, for the purpose of subsection (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) a person who has a right to enter and reside in the State under the European Communities (Free Movement of Persons) (No. 2) Regulations 2006 (S.I. No. 656 of 2006), the European Communities (Aliens) Regulations 1977 (S.I. No. 393 of 1977) or the European Communities (Right of Residence for Non-Economically Active Persons) Regulations 1997 (S.I. No. 57 of 1997);

(c) a person in respect of whom a declaration within the meaning of section 17 of the Act of 1996 is in force;

(d) a member of the family of a refugee, or a dependent member of the family of a refugee, in respect of whom permission has been granted to enter and reside in the State under, and in accordance with, section 18(3)(a) or, as the case may be, section 18(4)(a) of the Act of 1996;

(e) a programme refugee within the meaning of section 24 of the Act of 1996;

(f) a person to whom a permission granted to reside in the State under Regulation 23, 25 or 26 of the regulations of 2013 is in force.

(h) a person whose presence in the State is in accordance with a permission to be in the State given by or on behalf of the Minister for Justice, Equality and Law Reform under and in accordance with section 4 or 5 of the Immigration Act 2004.

(7) The following persons shall not be regarded as being habitually resident in the State for the purpose of this Act-

(a) a person who has made an application under section 8 of the Act of 1996 and where the Minister for Justice, Equality and Law Reform has not yet made a decision as to whether a declaration under section 17 of the Act of 1996 will be given in respect of such application;

(b) an applicant within the meaning of the Regulations of 2013 or any other person awaiting a grant of permission to reside in the State under Regulation 23, 25 or 26 of the Regulations of 2013,

(c) a person who has been notified under section 3(3)(a) of the Immigration Act 1999 that the Minister for Justice, Equality and Law Reform proposes to make a deportation order, whether or not that person has made representations under section 3(3)(b) of that Act, and where the Minister for Justice, Equality and Law Reform has not yet made a decision as to whether a deportation order is to be made in respect of such person;

(d) a person who has made an application under section 8 of the Act of 1996 which has been refused by the Minister for Justice, Equality and Law Reform;

(e) a person-

(i) whose application for subsidiary protection under Regulation 4 or 16 of the Regulations of 2006 has been refused, or whose permission under Regulation 4 or 16 of the Regulations of 2006 has been revoked,

(ii) whose application under Regulation 3 of the Regulations of 2013 for a subsidiary protection declaration has been refused or whose subsidiary protection declaration has been revoked, under the Regulations of 2013, or

(iii) whose application under Regulation 25 or 26 of the Regulations of 2013 has been refused, or has permission under Regulation 25 or 26 of the Regulations of 2013 has been revoked.

(f) a person in respect of whom a deportation order has been made under section 3 (1) of the Immigration Act 1999.

(8) For the purpose of this Act, where a person—

(a) is given a declaration that he or she is a refugee under section 17 of the Act of 1996,

(b) is granted permission to enter and remain in the State under section 18(3)(a) or 18(4)(a) of the Act of 1996,

(c) is granted permission to remain in the State under Regulation 4(4) of the Regulations of 2006,

(d) is granted permission to reside in the State under Regulations 23, 25 or 26 of the Regulations of 2013, or

(e) is granted permission to remain in the State under and in accordance with the Immigration Act t 2004 ,

he or she shall not be regarded as being habitually resident in the State for any period before the date on which the declaration

referred to in paragraph (a) was given or the permission referred to in paragraph (b), (c), (d) or (e), was granted.

(9) Notwithstanding that a person has, or is taken to have in accordance with subsection (6), a right to reside in the State the determination as to whether that person is habitually resident in the State shall be made in accordance with subsections (1) and (4).

(10) In this section—

'Act of 1996' means the Refugee Act 1996 ;

'Regulations of 2006' means the European Communities (Eligibility for Protection) Regulations 2006 (S.I. No. 518 of 2006).

'Regulations of 2013' means the European Union (Subsidiary Protection) Regulation 2013 (S.I. No. 426 of 2013)."

23. Before the court considers the alleged discriminatory nature of the legal provisions on habitual residence and the prescription in the legislation disallowing payment of arrears of child benefit to a person who did not have habitual residence, the court has to establish the legal principles surrounding two other issues which the applicants have argued applies.

The Nature of Child Benefit

24. The applicants contend that child benefit is a right of the child rather than the right of the parent or other qualified person claiming same. To establish what exactly is the nature of child benefit, it is appropriate that the court look no further than the legislation itself which has already been summarised by the court and is set out at Part 4 of the Social Welfare Consolidation Act 2005. Having examined Part 4, the court is satisfied that the interpretation placed on the benefit by Tina Burns Assistant Principal Officer of the first respondent in her affidavit sworn on 10th November, 2015, is the correct interpretation.

25. At para. 8, she states:-

"8. 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……..Currently child benefit is paid to around 610,000 families in respect of some 1.16m children with an estimated expenditure of around €1.9b in 2014.

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

26. 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.

Refugee Status

27. The status of the fifth and sixth applicants in the First Action was regularised in accordance with s. 18 of the Refugee Act 1996, which states:-

> "18.(3)
>
> (a) Subject to subsection (5), if, after consideration of a report of the Commissioner submitted to the Minister under subsection (2), the Minister is satisfied that the person the subject of the application is a member of the family of the refugee, the Minister shall grant permission in writing to the person to enter and reside in the State and the person shall be entitled to the rights and privileges specified in section 3 for such period as the refugee is entitled to remain in the State.
>
> (b) In paragraph (a), "member of the family", in relation to a refugee, means—
>
> (i) in case the refugee is married, his or her spouse (provided that the marriage is subsisting on the date of the refugee's application pursuant to subsection (1)),
>
> (ii) in case the refugee is, on the date of his or her application pursuant to subsection (1), under the age of 18 years and is not married, his or her parents, or a child of the refugee who, on the date of the refugee's application pursuant to subsection (1), is under the age of 18 years and is not married."

28. The applicants in the First Action have submitted that if and when an asylum seeker is granted refugee status, that is a recognition of an existing status arising from that person's arrival in the State from which he or she seeks asylum and that it follows that if granted refugee status entitlements to Social Welfare should be backdated to the date of first application for asylum. The applicants contend that as the First applicant was granted refugee status on 8th January 2015, and as s. 18 consent would follow almost automatically, child Benefit should have been backdated at least from 8th January 2015.

29. This matter has already been dealt with obliquely in the judgment of *B.K. (a minor suing by her mother and next friend, D.M.) v. Minister for Justice, Equality and Law Reform,* a judgment of the late Mr. Justice Feeney of 21st December, 2011. That judgment was dealing with the length of residency of the parent of a child born in Ireland but where the parent was an applicant for asylum and whether that time could be taken into consideration pursuant to s. 6A(1) of the Irish Nationality and Citizenship Act 1956, as amended.

30. The matter was also dealt with at some length in an English Court of Appeal decision, *Hannah Blakesley v. Secretary of State for Work and Pensions* [2015] EWCA Civ 141, reported at [2015] 1 WLR 13150.

31. The relevant provisions of the Refugee Act 1996 are s. 8(1)(a) which states:-

> "A person who arrives at the frontiers of the State seeking asylum in the State or seeking the protection of the State against persecution or requesting not to be returned or removed to a particular country or otherwise indicating an unwillingness to leave the State for fear of

persecution—

(i) shall be interviewed by an immigration officer as soon as practicable after such arrival, and

(ii) may apply to the Minister for a declaration."

32. Section 9 states:-

"(1) Subject to the subsequent provisions of this section, an applicant, being a person referred to in section 8(1)(a), shall be given leave to enter the State by the immigration officer concerned.

(2) Subject to the subsequent provisions of this section, a person to whom leave to enter the State is given under subsection (1) or an applicant, being a person referred to in section 8 (1) (c), shall be entitled to remain in the State until—

(a) the date on which his or her application is transferred to a convention country pursuant to section 22 , or

(b) the date on which his or her application is withdrawn or deemed to be withdrawn pursuant to subsection (14) (b), or

(c) the date on which notice is sent that the Minister has refused to give him or her a declaration."

33. In *B.K.*, Feeney J. at para. 10 stated:-

"…Section 9(2) of the Refugee Act 1996 must be read in the context of the other sections of the Act and in particular in the context of ss. 3, 4, 5 and 18. The provisions of the Act are such that a person who is found to be a refugee does not have the benefits of refugee status backdated under the Act and it follows that if this Court were to accept the interpretation of s. 9(2) of the Act contended for by the applicant, such interpretation would be inconsistent with the other provisions of the Act."

34. In the UK decision, *Blakesley v. Secretary of State for Work and Pensions*, Jackson L.J. first analysed Article 23 of the Geneva Convention which states:-

"Public Relief

The Contracting States shall accord to refugees lawfully staying in their territory the same treatment with respect to public relief and assistance as is accorded to their nationals."

35. At para. 32 of his judgment, Jackson L.J. compared the wording in different Articles of the Convention by stating:-

"It can be seen that articles 20, 22, 24.2, 24.3, 24.4 and 33 apply to 'refugees'. Articles 23 and 24.1 apply to 'refugees lawfully staying in their territory'. Article 32 applies to 'a refugee lawfully staying in their territory'.

36. He went on to state at para. 41:-

"41. If it was intended that all welfare benefits should be backdated for genuine refugees, article 23 would have referred to 'refugees', not 'refugees lawfully staying in their territory'. A refugee is only 'lawfully staying in' the UK once it is established that he/she is indeed a refugee. During the earlier period, although he/she is a refugee, no-one knows that this is the case. His/her presence is tolerated, because the UK cannot

take the risk of expelling someone who may turn out to be a genuine refugee. His/her presence only becomes 'lawful' under UK law when the proper authority (either the Secretary of State or on appeal a tribunal) has determined that the person is a refugee.

42. In my view this interpretation is entirely consistent with the broad humanitarian aims of the Convention. Both category 1 and category 2 asylum seekers receive accommodation and support at a basic level while their claims are being processed. As soon as that process is complete, the category 1 asylum seekers become established refugees and receive the full range of mainstream benefits. Taking the facts of the present case as an example, I do not see how it serves the broad humanitarian aims of the Geneva Convention to pay to the appellant a large lump sum representing historic accumulated income support. The appellant has received proper support, albeit under a different statutory regime, ever since she arrived in this country."

37. The court then went on to deal with Article 28 of Council Directive 2004/83/EC which states:-

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

2. By exception to the general rule laid down in paragraph 1, Member States may limit social assistance granted to beneficiaries of subsidiary protection status to core benefits which will then be provided at the same levels and under the same eligibility conditions as nationals."

38. At para. 57, the Honourable Judge stated:-

"57. I have nevertheless carefully considered both the recitals and the text of the Qualification Directive to see whether it goes beyond the requirements of the Geneva Convention in relation to the back-payment of welfare benefits. I do not think that it does. Recitals 14, 33 and 34 do not suggest any such intention. Nor do the general provisions of chapter VII.

58. In my view the phrase 'beneficiaries of … refugee protection' in article 28 means persons whose status as refugees has been established. The verb 'receive' means 'receive from then onwards'. There is no express or implied obligation to make a lump sum payment representing the difference between the earlier asylum support payments or benefits in kind and mainstream benefits. If there were such a requirement, I would expect to see further provisions in the Qualification Directive explaining at least in outline how this should be achieved. In particular, some mechanism should be specified for reconciling the different regimes in the Reception Directive and the Qualification Directive. The Directives do not contain any such mechanism."

39. He went on to state at para. 65 & 72,

"65. Secondly, there is no analogy between asylum seekers and British citizens in need of social assistance. In the case of asylum seekers it is not known whether they have any entitlement to be in this country. Therefore they all receive support under an asylum support scheme, which complies with the obligations imposed by the Geneva Convention and the Reception Directive. British citizens in need of social assistance are in a different position and they receive mainstream benefits.

…

> 72. In my view the UK is entitled to establish a support scheme for asylum seekers which is less generous than mainstream benefits, provided that it complies with the requirements of Council Directive 2003/9/EC (the Reception Directive). Successful asylum seekers receive the same welfare benefits as UK citizens as from the date when their refugee status is established. The international instruments upon which the appellant relies do not require the UK Government to make lump sum payments to successful asylum seekers representing the difference between previous asylum support and mainstream benefits."

40. 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.

41. The Republic of Ireland has opted 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. This system of direct provision for the purposes of these proceedings has been set out in detail in the affidavit of Eugene Banks, sworn on 10th November, 2015.

The Status of the Second Applicant in the Second Action

42. This applicant who is a Third County national from Nigeria was granted the right to reside in the State, by reason of her daughter being born in the State and her daughter's status as an E.U. citizen. These are known as *Zambrano* rights, after the E.U Court of Justice *case Zambrano v. Office National de l'Emploi(ONEm)* C- 34/09.

43. The applicants in their legal submissions have submitted that these rights are declaratory of a pre existing right. At para 22 the submission states:-

> "*Zambrano* rights are, indisputably, derived from EU law, primarily Article 20 TFEU, and *must* be recognised by Member States, where found to exist on a factual basis. This requires a case-by-case assessment by the appropriate authorities in individual Member States (see *M.Y. v MJELR & ors*) -in this State that task is assigned to the Minister for Justice and Equality- or by the Courts (see *Bakare*, cited above). The fact that Members States enjoy an administrative role in recognising the existence of *Zambrano* rights does not detract from the entitlement to those rights, which is derived solely from EU law, or from the compulsory nature of the granting of those rights, as determined by the jurisprudence of the Court of Justice. The effect of the rights is the ostensible dis-applying of long-standing Supreme Court authority and domestic statutory provisions which would otherwise have curtailed the rights of such persons."

44. It is therefore submitted that the *Zambrano* rights are declaratory of a pre existing right.

45. The Respondents have submitted that is not the case. Paras 26 and 27 of their submissions state:-

> "26. In the circumstances, the national measures in *Zambrano* had the

effect of requiring the citizens of the Union to leave the territory of the Union in order to accompany their parents. Such a scenario was in direct contradiction to the substance and meaning of Union citizenship. It was the failure of the Kingdom of Belgium to grant Mr Zambrano a right of residence that would have the inevitable consequence that he and his Union citizen children would be required to leave the Union territory.

27. It is clear therefore, 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 the EU citizen before such measure can be said to offend Article 20 of the TFEU.

46. Article 20 of the TFEU provides:-

"1. Citizenship of the Union is hereby established. Every person holding the nationality of a Member State shall be a citizen of the Union. Citizenship of the Union shall be additional to and not replace national citizenship.

2. Citizens of the Union shall enjoy the rights and be subject to the duties provided for in the Treaties. They shall have, inter alia:

(a) the right to move and reside freely within the territory of the Member States;

(b) the right to vote and to stand as candidates in elections to the European Parliament and in municipal elections in their Member State of residence, under the same conditions as nationals of that State;

(c) the right to enjoy, in the territory of a third country in which the Member State of which they are nationals is not represented, the protection of the diplomatic and consular authorities of any Member State on the same conditions as the nationals of that State;

(d) the right to petition the European Parliament, to apply to the European Ombudsman, and to address the institutions and advisory bodies of the Union in any of the Treaty languages and to obtain a reply in the same language.

These rights shall be exercised in accordance with the conditions and limits defined by the Treaties and by the measures adopted thereunder."

47. 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.

Is the requirement of the habitual residence

of the qualified person discriminatory

49. Habitual residence conditions are a feature of social welfare benefits generally and are not confined to the payment of child benefit.

50. There have been a number of decided cases in this jurisdiction in respect of EU citizens who have come to Ireland as self employed persons whose work dried up and who were not entitled to claim social welfare entitlements because they had no longer a right to reside in Ireland. In that context, the High Court in a number of decisions has had to consider if this provision is discriminatory in particular in applying EU law. These have been outlined in the written submissions of the respondents. In particular in *Genov & Anor v. Minister for Social Protection & Ors* [2013] IEHC 340, at p. 25 under the heading "Is the right to reside test discriminatory" 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."*

51. In respect of the applicant family in the First Action the children of the fifth and sixth applicants are in two distinct categories. The first applicant as and from 8th January, 2015, was recognised as a refugee and thus, had a right to reside and was deemed to have habitual residence.

52. The second, third and fourth applicants minor children of the fifth and sixth applicants, did not have refugee status but were ultimately granted family reunification status on 11th September, 2015, pursuant to the provisions of s. 18 of the Refugee Act 1996.

53. Insofar as the second, third and fourth applicants are concerned, the sixth applicant was never in a position to claim child benefit for these children. The sixth applicant was in direct provision from her arrival in the country. Her legal status was not finalised until 11th September, 2015, when she was granted family reunification pursuant to s. 18 of the Refugee Act 1996.

54. All of the decided case law of the High Court and Supreme Court has indicated that the presence of an asylum seeker pursuant to s. 9 of the Refugee Act 1996, does not confer a right of residence or habitual residence on the applicant. The relevant cases are, *Gonescu & Ors v Minister for Justice & Ors* [2003] IESC 49 Supreme Court Murray C.J.; *Sofroni & Ors v. Minister for Justice, Equality & Law Reform* (Unreported, High Court, 9th July 2004) Peart J; *Muresan v. Minister for Justice, Equality & Law Reform* [2004] IEHC 348, Peart J; and *Simion (S.G.) v. Minister for Justice, Equality and Law Reform* [2005] IEHC 298.

55. I cannot see how this is arbitrary or unfair.

56. The Oireachtas has determined that a prerequisite for the payment of child benefit to a qualified person is habitual residence.

57. The sixth applicant by reason of her status as a citizen of another State seeking asylum in Ireland was not habitually resident in Ireland when she made an application for child benefit on 13th February, 2015.

58. Between 8th January, 2015, and September 2015, the period for which the first applicant had refugee status, the sixth applicant the relevant putative qualified person still did not have habitual residence in Ireland. This did not come about until she was granted family reunification rights on 11th September, 2015.

59. Section 246(8) of the Act specifically restricts the designation of habitual residence for any period before the date she was granted family reunification rights, thus the first respondent had no discretion in law to backdate the benefits prior to 11th September, 2015.

60. While no anomalous situation arises in respect of the second, third and fourth applicants, it does lead to an anomalous situation for the first applicant, in that the generally regarded position was that once the first applicant was granted refugee status, his parents, as a matter of course, would be granted family reunification rights unless there was serious security implications arising in granting that. So to that extent, for the short period of time from 8th January, 2015, to 11th September, 2015, the position of the first applicant in relation to the payment of child benefit was different to that of the chid of a qualified parent who had a right of residence.

61. I do not regard this 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.

62. I cannot see how there was invidious discrimination applicable in the case of the first applicant. Habitual residence conditions apply 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. While the court has some concerns about the absolute nature of s. 246(8) of the Social Welfare Consolidation Act 2005, the court would not regard that provision of the Act as unconstitutional, as it is consistent with the regime that the State has put in place to comply with the Geneva Convention and Council Directive 2004/83/EC. I do not consider that the provisions of ss. 220(3), 246(5) 246(7) and 246(8), breach the provisions of s. 3(2)(ii) and 18(3) of the Refugee Act 1996, or Articles 20, 23, 28 of Council Directive 2004/83/EC.

63. In the second case, the second applicant, Faith Osagie, was an asylum seeker and was thus not habitually resident. There is no allegation of culpable delay on the part of the respondents. Again, an anomalous situation for the first applicant, an Irish citizen from 23rd December, 2014, to January 2016, arose. During that period of time, the first applicant continued to have the right to access direct provision.

64. The respondent had to be given some time to deal with the application of the second applicant and until her position was regularised, the second applicant was not a qualified person to claim child benefit. The respondents were entitled to maintain the integrity of the habitual residence qualification. The second applicant did not have any right during

the period of time to claim other social welfare benefits as well as child benefits. Again, I did not consider this as constitutionally infirm for the reasons already stated.

Articles 20, 23 and 28 of EU Directive 2004/83 and

Charter of Fundamental Rights of the European Union

65. The court has already considered Article 28 when reviewing the judgment in Blakesley, and concurs with that judgment in its finding that the Article does not require the backdating of social benefits. Habitual residence is a prerequisite for all social welfare entitlements in Ireland irrespective of the status of the applicant. To the extent that there was a delay and thus a restriction on the rights of the first applicant, because of the status of the sixth applicant in the first action and the second applicant in the second action, which had to be regularised, I do not consider that it breached Article 28 as I do not consider it disproportionate or intolerable interference with the rights of the first named applicant in each case because of their right of access to direct provision until such times as the status of the qualified person, the mother in each case, was regularised. I do not consider that Articles 20 or 23 were breached. I also do not consider that Article 18 of the Charter of Fundamental Rights of the European Union has been breached.

Alleged Breach of the European Convention on Human Rights and the application for a declaration pursuant to Section 5 of European Convention on Human Rights Act 2003,that sections 220(3), 246(5), 246(7) and 246(8) of the Act taken individually if together incompatible with the Convention

66. Article 8 of the European Convention on Human Rights (ECHR) states that:-

> "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 wellbeing 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."

67. Section 5(1) of the European Convention of Human Rights Act 2003, states:-

> "In any proceedings, the High Court, or the Supreme Court when exercising its appellate jurisdiction, may, having regard to the provisions of section 2 , on application to it in that behalf by a party, or of its own motion, and where no other legal remedy is adequate and available, make a declaration (referred to in this Act as 'a declaration of incompatibility') that a statutory provision or rule of law is incompatible with the State's obligations under the Convention provisions."

68. The main concern of the applicants in relation to their treatment is the inadequacy of the direct provision system of catering for asylum seekers and the habitual residence provisions of the relevant provisions of the Social Welfare Consolidation Act 2005.

69. Contracting States do enjoy a degree of latitude in curtailing those rights provided such interference as in accordance with law.

70. In the case of *Stec v. United Kingdom* [2006] ECHR 162, the European Court of Human Rights noted in relation to the margin of appreciation to be afforded to

contracting States stating at para. 52:-

> *"The scope of this margin will vary according to the circumstances, the subject-matter and the background […] As a general rule, very weighty reasons would have to be put forward before the Court could regard a difference in treatment based exclusively on the ground of sex as compatible with the Convention […]. On the other hand, a wide margin is usually allowed to the State under the Convention when it comes to general measures of economic or social strategy […]. Because of their direct knowledge of their society and its needs, the national authorities are in principle better placed than the international judge to appreciate what is in the public interest on social or economic grounds, and the Court will generally respect the legislature's policy choice unless it is "manifestly without reasonable foundation"."*

71. Again, 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 mothers residence status

72. 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.

73. In all the circumstances, the applicants are not entitled to the reliefs sought in the leave order of 29th June, 2015 and 7th December 2015 and those reliefs are refused by the court.