AN CHÚIRT UACHTARACH
THE SUPREME COURT

Record No. 2018/146

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

IN THE MATTER OF THE CONSTITUTION OF IRELAND

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

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

THE MINISTER FOR SOCIAL PROTECTION, THE ATTORNEY GENERAL, AND IRELAND

RESPONDENTS/APPELLANTS

AND

RECORD NO. 2018/145

BETWEEN/

EMMA

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

AND

MS. Y

APPLICANTS/RESPONDENTS

Judgment of O'Donnell J. delivered the 21st day of November 2019.

1. I agree with the judgment to be delivered by Dunne J. I wish, however, to make some observations on the application of Article 40.1 of the Constitution because, although the decision today restores the outcome arrived at by an experienced High Court judge, we are differing somewhat from that judgment on the legal analysis, and because we are reversing a thoughtful judgment of the Court of Appeal which relies in part on a passage in a judgment I delivered in *Murphy v. Ireland* [2014] IESC 19 ("*Murphy*"). I adopt the statement of facts set out in the judgment of Dunne J. and agree with her analysis of the European Convention on Human Rights and the European Union, and have nothing to add

in that regard. However, the case raises difficult issues of the application of the equality guarantee of the Irish Constitution, and for that reason may merit further consideration.

2. While the *O* and *A* cases have important distinctions on their facts, it is nevertheless useful to consider them together. For the purposes of this judgment, I propose to adopt the approach taken in the judgment of Dunne J. and refer to each principal plaintiff by an anonymised name, without intending any discourtesy.

3. In Emma's case, her mother, who is from Nigeria, entered the State in 2013 and applied for asylum in November 2014. She formed a relationship with a man who was a naturalised Irish citizen. Emma was born in December 2014, and accordingly is an Irish citizen from birth, with an unqualified entitlement to reside in Ireland. The relationship between her parents broke down, and Emma is now in the sole custody of her mother. Shortly after Emma's birth, her mother received a letter from the Child Benefit Section of the Department of Social Protection, inviting her to apply for child benefit in respect of Emma, which she did later that year, in October 2015. This application was refused in November 2015, on the grounds that the applicant, Emma's mother, did not have a right to reside in the State and could not accordingly be considered a qualifying parent under s. 246 of the Social Welfare Consolidation Act 2005 (as amended) ("the 2005 Act"). In January 2016, the Minister for Justice and Equality recognised Emma's mother's right to reside here on the basis of *Zambrano* rights, and the Minister for Social Protection granted her an entitlement to child benefit as and from that date (January 2016). This case therefore concerns Emma's mother's claim for child benefit in respect of Emma for the period from the first application in October 2015 until benefit was granted as and from January 2016.

4. In the *A* case, Michael's parents were two Afghan nationals who arrived in the State in 2008, and resided in the direct provision system. They have four children, one of whom was born in Pakistan and three in Ireland. Having originally presented as citizens of Pakistan, their Afghan citizenship was eventually established and, as the Court of Appeal judgment put it, somewhat belatedly an application was made for asylum in 2013. In January 2015, the youngest son, Michael, was declared a refugee, and it followed that the remaining members of the family were entitled to family reunification and, accordingly, permission to remain was granted in September 2015. An application had been made by Michael's mother for child benefit in respect of all four children in February 2015 (at which point Michael had been declared a refugee and the remaining members of his family were awaiting a decision on their application for family reunification). That application was refused in April 2015, again in reliance on s. 246 of the 2005 Act on the basis that the applicant, Michael's mother, had no right of residence and accordingly was not habitually resident in the State at that point. Once again, once family reunification was granted, a further application was made and granted with effect from the date of the family reunification decision in September 2015. These proceedings, accordingly, concern the period between the first unsuccessful application in February 2015, and the date of the family reunification decision of September 2015, from which date benefit has been

payable. It is apparent that, while the periods involved are short and the amounts relatively small, these are test cases, and raise an issue which arises in many cases.

5. The approach of the Department of Social Protection was consistent in both cases. Benefit was refused when the applicant for the benefit, in each case the parent, did not have a right to reside in the State, but was granted once the applicant had such a legal right to reside and a valid application was made. In each case, for reasons I will shortly set out at more length, this approach was in clear compliance with the statutory provisions. The issue in this case, accordingly, is the validity of those statutory provisions which was challenged by reference to the European Convention on Human Rights, the law of the European Union, and in particular, and successfully in the Court of Appeal, on the basis of the constitutional guarantee of equality under Article 40.1.

6. In the High Court, White J., while expressing concern about the absolute nature of s. 246(8) and considering that the restriction was not ideal, nevertheless concluded that it was not constitutionally infirm, as in each case the applicant had the right to reside in direct provision and have their needs met by the direct provision system. Habitual residency was a condition applied equally to Irish citizens and non-Irish citizens, and the equality guarantee of the Constitution did not require identical treatment for all persons without recognition of differences of circumstances.

7. In the Court of Appeal Hogan J. (Peart and Irvine JJ. concurring), reversed the decision in respect of Emma who was, of course, an Irish citizen from birth, but upheld this aspect of the decision in respect of Michael, who, although born in Ireland, did not have an automatic right to Irish citizenship. As Hogan J. put it pithily at para. 47 of his judgment:- "[*t*]he difference, therefore, between the decision of Emma on the one hand, and Michael on the other so far as the constitutional issue is concerned can be summed up by one word, namely, citizenship". He considered that the provisions of s. 246 effected an unjustifiable discrimination between citizen children, and were therefore invalid. However, having regard to the complexity of the statutory provision, and its far-reaching effect, the court was prepared to make a limited declaration that "[*i*]nsofar, therefore, as s. 246(6) and s. 246(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 reasons of the immigration status of the parent claiming such benefit, these provisions must be adjudged to be unconstitutional", but also provided that such declaration should be suspended until the 1st of February, 2019. That order has been extended pending the determination of this case.

8. Before considering the reasoning of the Court of Appeal in more detail, it is necessary, I think, to understand the statutory provisions relating to child benefit. This benefit, like many of the schemes introduced as part of the post-war welfare state, is of universal application, and not means tested. The underlying theory justifying any system of universal benefit such as health or education or, in this case, child benefit, is, as I understand it, that although a state-provided benefit is of particular benefit to persons of limited means, those benefits are not being provided as charity, but rather as a basic

entitlement. However, in the case of child benefit, it is important to recognise that there is no sense, either legal or factual, that the benefit can be said to belong to the child. It is paid to a qualifying adult in respect of a qualifying child. Again, as Hogan J. put it at para. 17 of his 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 interests, 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."

9. The 2005 Act provides for payment of child benefit to a qualified person in respect of a qualified child. Thus s. 220 of the Act 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) 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 para. (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 at the date of the making of the application for child benefit." (Emphasis added).

10. Habitual residence, which is referred to in s. 220(3), is a feature of the Social Welfare Code more generally. The court was informed that there are at least 12 benefits which are available where habitual residence, as set out in s. 246 of the 2005 Act, is a precondition to payment, namely, child benefit payment, jobseeker's allowance, State pension (non-

contributory), blind pension, one-parent family, carer's allowance, domiciliary care allowance, back-to-work family dividend, guardian non-contributory payment, supplementary welfare allowance, and widow's/widower's/surviving civil partner's non-contributory pension. While habitual residence is a matter to be considered in the factual circumstances of any case by reference to criteria set out in s. 246(4), for present purposes, the most important provision is s. 246(5) which provides that a person who does not have a right to reside in the State shall not for the purposes of the 2005 Act "be regarded as being habitually resident in the State". It is, however, necessary to set out the section in more detail to understand how the legal issue in this case arises.

11. S. 246(1) provides that a requirement of habitual residence means that a person must be habitually resident at the date of making of the application and remain so after the making of that application in order for any entitlement to subsist. Under s. 246(4), a deciding officer in determining habitual residence shall take into consideration all the circumstances of the case including subparagraphs: (a) 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 State'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. Thereafter subss. 5 introduced a requirement that the person concerned have *a right to reside* in the State. That is elaborated on in the following subsections. Thus, s. 246(6) provides:-

> "The following person shall, for the purposes of subsection (5), be taken to have a right to reside in the State:
>
> (a) an Irish citizen under the Irish Nationality and Citizenships Acts 1956-2004;
>
> (b) a person who has the right under the European Communities (Free Movement of Persons) Regulations 2015 (SI No. 548/2015) to enter and reside in the State or is deemed under those Regulations to be lawfully resident in the State;
>
> (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;
>
> (ca) 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) a person who has been given, or is deemed under the Act of 2015 to have been given, a permission to enter and reside in the State under section 56 of that Act, where the permission concerned is in force;
>
> (da) a person who has been given, or is deemed under the Act of 2015 to have given, a permission to reside in the State under section 57 of that Act, or where the permission concerned is in force;

(e) a person who is a programme refugee within the meaning of section 59 of the Act of 2015, or is deemed to be programme refugee under subsection (4) of that section.

(f) a person who has been given, or is deemed under the Act of 2015 to have been given a permission to reside in the State under section 54 of that Act, where the permission concerned is in force;

(h) a person whose presence in the State is in accordance with the 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;

(i) a person who has been given permission to reside in the State under section 60(6) of the Act of 2015 where the permission concerned is in force."

12. Pausing there, it is apparent that, in addition to Irish citizens and those having an entitlement to free movement within the European Union, the Act also contemplates that persons in respect of whom permissions have been granted under the international protection regime will be taken to have a right to reside in the State, and consequently will be capable of qualifying as habitually resident, if they satisfy the requirements of subss. (1) to (4).

13. The converse position is then set out in subss. (7). A list of persons is set out who shall not be regarded as being habitually resident in the State for the purposes of this Act. For present purposes, those persons are generally applicants for international protection where the decision has not yet been made. Subs. 8 completes this aspect of the statutory scheme. It provides that where a person is given a permission, such as set out in subs. 6, which would establish a right to reside in the State, "he or she shall not be regarded as being habitually resident in the State for any period before the date on which the declaration or permission concerned was given or granted as the case may be, and, in the case of a declaration or permission deemed to be given, for any period before the date on which the declaration or permission concerned was originally given".

14. The provisions of s. 246 set out a careful scheme which distinguishes between a right to reside, and habitual residence. The scheme can be understood by taking an example of refugee status. A person granted refugee status, for example, is taken to have a right to reside in the State pursuant to s. 246(7)(c), and therefore is capable of being habitually resident within the terms of subss. (1) to (4). However, the mere making of an application does not mean that a person can be regarded as habitually resident and where, in due course, a permission has been granted, that does not have a retrospective effect so that he or she is not to be regarded as having been habitually resident prior to the date of the declaration. Applying that scheme to this case, it is apparent that both Emma's mother and Michael's mother ultimately received permissions which meant that they were to be taken to have a right to reside in the State, and accordingly had an entitlement to be treated as habitually resident from the period of the date the permission was granted, but not before. In the case of Emma's family, the decision of the Court of

Appeal meant, however, that the apparent exclusion from habitual residence from the period prior to the declaration of permission was invalid. In the case of Michael's mother, such exclusion was not invalid having regard to the Constitution.

15. The judgment of the Court of Appeal posed the question for resolution at the outset of the judgment in the following way:-

> "1. Can the Oireachtas legitimately withhold the payment of child benefit to an Irish citizen child resident in the State and otherwise satisfying all the relevant statutory conditions because of the immigration status of the parent claiming that benefit?"

The conclusion was that while payment of benefit to (or perhaps more correctly in respect of) Michael could be withheld, such payment could not be withheld to (or in respect of) Emma. The essential reasoning was that, as a citizen, Emma had an unqualified right to reside here. She owed a duty of loyalty and fidelity to the State, which in turn owed her a duty to treat her, as a human person, equally before the law under Article 40.1 of the Constitution. The judgment quoted from and relied upon the judgment I delivered in *Murphy*, only a portion of which it is necessary to reproduce here:-

> "It is however, increasingly understood that it [Article 40.1] is intended to refer to those immutable characteristics of human beings, or choices made in relation to their status, which are central to their identity and sense of self and which on occasions have given rise, whether in Ireland or elsewhere, to prejudice, discrimination or stereotyping. As Walsh J. observed in *Quinn's Supermarket Ltd. v Attorney General* [1972] I.R.1:
>
> > "[Article 40.1] is a guarantee related to their dignity as human beings and a guarantee against any inequalities grounded upon an assumption, or indeed a belief, that some individual or individuals, or classes of individuals, by reason of their human attributes or their ethnic or racial, social or religious background, are to be treated as the inferior or superior of other individuals in the community." (pp. 13-14)

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."

16. While acknowledging that a good deal of latitude must be admitted for the purpose of Article 40.1 scrutiny, the judgment of Hogan J. observed that Emma was being treated differently from her peers, that is other Irish citizen children, in the sense that benefit was paid in respect of other such children. As an Irish citizen, it was considered that Emma had "a strong claim to be treated in the same fashion as her young fellow citizens… especially… in the case of a basic universal payment designed ultimately for the benefit of children". There was, however, a possible justification for withholding such payments being the State's desire to deter opportunistic claims and generally to reduce "the attractiveness of the State as a destination for what is sometimes described as welfare tourism". That was a valid objective, but it was not sufficient here because of the indirect nature of the restriction. It was said that a payment designed for the benefit of a citizen child was being withheld in order to deter opportunistic claims which its parents might make, "in that respect therefore, 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*". The sins of the parents were being visited, impermissibly, on the children. The judgment concluded in this respect that "[t]his in itself 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". With great respect to this careful judgment, I cannot agree with the analysis, or the result to which it leads.

17. First, it is important to keep the forefront of attention here the fact that the claim which succeeded in the Court of Appeal was one which might be described as a claim of indirect discrimination. That is not indirect indiscrimination in the sense in which that term is commonly used in the law, where it is alleged that the application of an apparently neutral provision bears disproportionately upon a particular protected group. Here, it is used in the sense that the rights holder is not the direct or proximate object of the legislative provision challenged, but rather is affected, if at all, indirectly. In this case, the argument is that the person entitled to assert the right to quality before the law under Article 40.1, Emma, is affected by the legislative provision, but through the definition of "qualified person" in respect of claimants for social welfare benefit generally, and child benefit in particular. While this indirect impact was explicitly acknowledged at para. 17 of the judgment, and quoted at para. 8 above, there is, I think, some merit in the argument advanced on behalf of the appellant Minister that the focus slips significantly, and decisively, and that the analysis is converted into one in which the legislation is scrutinised, and found wanting, as if it directly sought to remove a benefit or impose a detriment upon a citizen child because of the immigration status of her parent, and where, moreover, the status of the parent is therefore considered not relevant to the benefit sought to be conferred or the detriment imposed. The question for resolution is posed at a number of points in the judgment as whether the Oireachtas "can deprive a citizen child of an entitlement" or withhold the payment of child benefit *to* an Irish citizen

child because of the immigration status of the parent claiming the benefit. This is, I respectfully suggest, the wrong question and blurs an important, and indeed critical, distinction which is relevant to this case. The issue for determination can, I think, be framed more accurately as a question of whether the Oireachtas can exclude a claimant for benefit on grounds of immigration status, even though the child in respect of whom the benefit is claimed is an Irish citizen and may profit from the grant of the benefit, and suffer if it is refused. The very fact that this is a more complex and less clear-cut question suggests that the analysis of the equality claim is more nuanced and difficult. However, that is a difficulty with which it is necessary to engage.

18. The starting point is that the direct object of the provisions (in common with other provisions in the social welfare code) is to determine that a person whose immigration status has not been positively resolved cannot be treated as having a right to reside, and capable of being habitually resident, and therefore a qualified person for the purpose of a claim to any benefit. In its own terms, that is not asserted to be, and in my view is not, a discrimination forbidden by Article 40.1. No distinction is made on any impermissible ground, or any issue or on any distinction, which should attract the close scrutiny of the court. The Act does not limit benefit to citizen claimants. The distinctions it does make are between those habitually resident, and those who are not, and at a further level, between those with a right to reside here, and those who do not have, or who have not yet acquired, such a right. Such distinctions are rational, and moreover are obviously directed towards both the purpose for which benefit is made available to those habitually resident, and limitations upon it, which are clearly within the decision-making power of the Oireachtas. Nor can it be suggested that the definition of those who have and have not a right to reside is itself impermissibly discriminatory either on its terms or in its effect. The starting point, therefore, must be that the terms of the legislation itself do not in their direct application breach Article 40.1.

19. It follows from this analysis that any claim here must be of indirect and, as it were, secondary discrimination. An otherwise permissible provision pursuing a valid objective within the decision-making power of the Oireachtas may nevertheless be found to be invalid if it interferes impermissibly with a right protected by the Constitution, even if that was not the direct objective of the legislation, but can nevertheless be said to be within its contemplation, or even a consequence of the legislation which is not too remote. Given the fact that the legislation specifically contemplates child benefit being paid in respect of a “qualified child” and that the intended object of the benefit is clearly to assist parents with the costs of child rearing, I agree that Emma and Michael in this case are fully entitled to challenge the operation of s. 246 insomuch as it affects them even indirectly. However, in analysing the claim it cannot be forgotten that it is indirect and secondary, and moreover that the direct impact of the legislation is not discriminatory. Furthermore, in my view, the absence of any evidence that the indirect effect was the object of this legislation, or that it was motivated by any prejudice or stereotyping in that regard may mean that it would require something substantial, either in terms of the impact of the provision or the class of person affected, to lead to a finding of invalidity by reason of indirect effect, where the direct object was both permissible and non-discriminatory. In

almost every case there will be a direct impact of legislation on some people, but there will often be ripple effects and indirect consequences on others. It may be that a substantial discriminatory impact would need to be established before such impacts, which might otherwise be the inevitable and perhaps unavoidable remote consequences of legislation, are found to invalidate it. However, it is not necessary to decide that issue here. It is, however, important that the claim, when properly analysed, is a claim of an indirect secondary discriminatory impact of a provision both neutral and non-discriminatory on its face, and not discriminatory in its direct impact.

20. As set out in *Murphy*, the guarantee of equality before the law as human persons involves particular protection against legislation for differentiations based on immutable human characteristics, or features intrinsic to the human personality and sense of self. Citizenship is a basic status, and potentially therefore raises issues if it is the basis of legislative differentiation, particularly if it also touches upon questions of race or ethnic origin. However, citizenship is unusual because it is a discrimination that the Constitution itself contemplates, and indeed is arguably based upon. Citizenship is central to the conception of sovereignty. Indeed, on one reading of the Constitution it can be said that citizenship is the very basis of the rights protected by it. For example, Article 40.1 itself asserts that *all citizens* shall as human persons be held equal before the law. Even on a broader view of the Constitution, it is plain that it is entirely permissible to distinguish between citizens and non-citizens for some fundamental purposes of the State, such as, for example, voting.

21. It is, however, important that any analysis is both precise and focussed. It is not sufficient to contend that citizenship alone is the ground of differentiation in this case, and any such distinction must fall foul of Art. 40.1. In most cases where citizenship is discussed as a potentially impermissible discrimination, it arises in the context of an unjustifiable discrimination between citizens and non-citizens. Fundamental rights perform an important part of the constitutional balance in the State precisely because they are guarantees designed to protect the minority (whether temporary or permanent) from certain decisions of the majority. There is an inbuilt risk, which entrenched fundamental rights are meant to counter, that a majority will, whether intentionally or unwittingly, tend to favour itself at the expense of a minority. This is a consideration which is certainly capable of application when legislation distinguishes between citizens and non-citizens, especially when the legislation bears more heavily upon non-citizens. Any such provision would therefore fall to be scrutinised carefully under Article 40.1.

22. However, that is not the distinction made, or alleged, in this case. It is not contended that there is a discrimination being made between citizens and non-citizens. Indeed, if the outcome of the case in the Court of Appeal were embodied in legislation, it would, paradoxically, positively permit just such a form of discrimination between a citizen, in this case Emma, and a non-citizen, Michael, and their respective families. Here, however the discrimination alleged in the legislation is one *between* citizens. It is argued that Emma is being treated differently from a comparator citizen child with a qualified person parent, or other person entitled to make a claim. This involves a quite different analysis.

There is no *a priori* reason to scrutinise carefully such a distinction. It has been said that all legislation discriminates, and it could be said that most legislation certainly distinguishes between citizens. The reasons which might cause a court to scrutinise, carefully, a legislative distinction between citizens and non-citizens do not arise in this case, and as observed in the decision of the Court of Appeal, a good deal of latitude is normally afforded to the Oireachtas in making such distinctions, in the absence of some intrinsic or essential characteristics such as gender, race, ethnic origin or marital status, for example, being used as the basis of the distinction.

23. This leads, in my view, to the precise issue in focus in this case, and which perhaps gave rise to the understandable concerns expressed or discernible in the judgment of the Court of Appeal. Emma in this case is being treated differently, or being affected differently, by the impact of the legislation when compared with a comparator citizen child. The basis of that distinction is the immigration status of her parent. Put in these most general terms at least, it is understandable that such a difference of treatment would attract the sceptical and demanding scrutiny applied by the Court of Appeal. If it were to be suggested that there could be different legislative classes of citizens or citizen's rights, based on parentage alone, that would itself be offensive to the concept of citizenship and the essential equality of treatment inherent in it. Citizens, under the Irish Constitution, are not subjects, and the social order envisaged by the Constitution does not contemplate caste, classes, or titles. Bluntschli's statement in *Arms and the Man* about his position in Switzerland can be accurately applied to the position of the individual under the Irish Constitution: "[m]y rank is the highest known… I am a free citizen". Anything which is suggestive of classes of citizenship, particularly something dependent upon parentage, would require close scrutiny and substantial justification.

24. It is not, however, sufficient to identify the comparator as a citizen child, and argue that he or she is treated differently from, and better than, Emma in this case, by reference to the respective immigration status of their parents. In the first place, and most obviously, the fact remains that the claim in this case is one of indirect discriminatory effect. A direct discrimination is made by the Act between, as it were, Emma's mother, and the mother of the comparator citizen child who is a qualified person for the purposes of the 2005 Act. As already discussed, that is, however, a perfectly permissible distinction based upon rational grounds, and a legitimate State objective. Therefore, while Emma is the *same* as the comparator child for the purposes of citizenship, she is *different* from the comparator in respect of the claimant through whom she hopes to benefit. The difference of treatment here is rationally related to, and indeed consequent upon, that difference, and therefore is not an impermissible discrimination contrary to Article 40.1. Instead, it can be seen as a performance of the requirement, to treat like persons alike in relation to that aspect in which they are alike, and differently in relation to those qualities or features in respect of which they are different.

25. This, I think, is sufficient to decide this case, but it is possible and perhaps desirable to go further. On analysis of the section in detail, it becomes apparent that it is insufficiently precise to argue that the differentiation is, here, being made merely on the basis of

immigration status. It would perhaps be more accurate to say that the basis of the discrimination is the *particular* immigration status of the claimant of her benefit in the case. The legislation permits a wide range of people to be "qualified persons" for the purposes of the Act, and thus have a right to reside here, and, in turn, to be capable of satisfying the requirements of habitual residence. The category is not limited to citizens or those having a right to reside in Ireland by virtue of exercising rights under E.U. law. Instead, the Act treats as qualified persons a range of persons with differing immigration status, including persons with refugee status, those entitled to subsidiary protection, those given leave to remain, programme refugees, and those granted permissions under s. 54, s. 55, and s. 56 of the International Protection Act 2015, as well as other persons specified in s. 246(6) of the 2005 Act. None of these categories are dependent upon citizenship or its absence. The distinction made in the Act accordingly relates to the particular immigration status of the person making the claim for the benefit and contended to be a qualified person and not to the citizenship of that person or any child. A rational distinction is made between those applying for such status and those whose applications have been successful, and the legislature has also decided that such an entitlement shall only arise on a successful determination of the application, and is not backdated to the date of first application, or indeed arrival in the State. It is possible to argue that the policy could have been different, and more generous, or its application more nuanced, as indeed suggested by the learned High Court judge, but it is not possible, in my view at least, to contend that it impermissibly discriminates, still less discriminates on the ground of citizenship. Insomuch as Emma is in the same position as another citizen child, she is treated the same. Insomuch as she is different, and that difference is relevant, then she is treated differently. Viewed in this way, it becomes apparent that there would indeed be grounds for challenging any legislative provision which implemented the decision of the Court of Appeal, since it would appear to single out for favourable treatment, from the class of persons who have sought an entitlement to remain in Ireland and seeking child benefit, those persons making claims in respect of children who happened to be citizens. Similarly, insomuch as the matter is viewed from the point of view of indirect impact on children, in any such legislation, such distinction would single out for favourable treatment those cases where the children happened to be Irish citizens.

26. Claims made by reference to Article 40.1 of the Constitution pose undoubted difficulties of analysis. Equality before the law is, however, guaranteed by Article 40.1 of the Constitution and is, along with the liberty protected by the balance of that Article, an important pillar of the fundamental rights provision, and indeed a theme of the Constitution as a whole. It is important, therefore, that analysis of claims under Article 40.1 avoids the twin hazards of oversimplified justification for any legislative differentiation which would insulate almost any legislation from challenge on the one hand, and an overly rigid structure of analysis and a demanding scrutiny from which no provision can escape, on the other. In that regard, it is noteworthy in this case that a principal ground upon which the provision was first sought to be defended was that the benefits and treatment accorded to families in the direct provision system was, at least in broad terms, equivalent to the benefits that might be obtained under the social welfare

system and which the impugned provisions of the 2005 Act excluded such applications from. It is the case that Article 40.1 does not necessarily require identical treatment of persons who are otherwise similar. However, if it were accepted that the persons, for example, in the direct provision system, and awaiting a determination of immigration status, were, for these purposes to be treated the same as persons entitled to make claims for social welfare benefits, and therefore entitled to be treated equally with them, I would consider it would require much more detailed analysis of the impact and effect of the direct provision regime and the social welfare benefits contended to be equivalent before it would be possible to come to any conclusion on that point.