THE COURT OF APPEAL

Neutral Citation Number: [2018] IECA 155

Record No. 2017/79

Peart J.
Irvine J.
Hogan J.

IN THE MATTER OF THE CONSTITUTION OF IRELAND

IN THE MATTER OF 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

AND

IRISH HUMAN RIGHTS AND EQUALITY COMMISSION

NOTICE PARTY

No. 2017/76

BETWEEN/

VICTORIA OSINUGA

(A MINOR SUING BY HER MOTHER AND NEXT FRIEND)

AND FAITH OSAGIE

APPLICANTS/

APPELLANTS

- AND -

THE MINISTER FOR SOCIAL PROTECTION,

IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

JUDGMENT of Mr. Justice Gerard Hogan delivered on the 5th day of June 2018

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? That essentially is the issue presented on these two appeals from the decision of the High Court (White J.) delivered on the 17th January 2017: see *Agha and Osinuga v. Minister for Social Protection* [2017] IEHC 6. It may be convenient first to narrate the background facts of both cases.

2. Given the proliferation of appellants and simply in order to avoid confusion, I propose to use the first names of the respective children in these appeals. I trust that it will be understood that no discourtesy is thereby intended.

The background facts of the Agha appeal

3. Mr. Zayed Agha and Ms. Shazia Agha are both Afghan nationals who arrived in the State in 2008. They resided within the direct provision system from May 2008 to the 1st December 2008, and from the 1st June 2010 onwards. They have four children, Rahmat born in Pakistan on the 20th May2006; Naymatullah born in Ireland on the 10th August 2008; Maria born on the 26th July 2009 in Ireland and Daniel born on the 5th April 2013 in Ireland.

4. As it happens Mr. and Ms. Agha were treated as Pakistani nationals on their first arrival in the State as they originally had Pakistani identity documents which were false. Their Afghan citizenship was subsequently established and the entire family - if somewhat belatedly - made applications for asylum in 2013. In December 2014 Refugee Appeals Tribunal issued a decision declaring their youngest son, Daniel, to be a refugee and this decision was communicated by letter of the 8th January 2015 from the Irish Naturalisation and Immigration Service.

5. The other members of the family then immediately applied for family re-unification pursuant to the provisions of s. 18 of the Refugee Act 1996. Permission to remain on the status was granted to the other family members in September 2015.

6. Ms. Agha then made an application for child benefit in respect of all of her four children on the 19th February 2015. The Minister for Social Protection replied by letter dated the 2nd April 2015 and in it she 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."

7. It is this refusal which has given rise to the present proceedings for reasons I will presently explain. Following the decision, however, to grant family reunification in September 2015, a fresh application for child benefit was then made. On this occasion the application was granted by decision dated the 16th October 2015. Child benefit was then paid with effect from the date of the grant of the family unification decision in September 2015.

8. The particular issue raised in the Agha appeal is whether child benefit was payable in respect of all four children from the date of their applications for refugee status in 2013 or, alternatively, whether such payment was payable in respect of Daniel with effect from the date of his recognition as a refugee in January 2015.

The background facts of the *Osinuga* appeal

9. So far as the Osinuga proceedings are concerned, the issue arises in the following circumstances. The second named appellant, Ms. Osagie, is a citizen of Nigeria. She entered the State in 2013 and she subsequently applied for asylum on the 21st November 2014. During the early part of 2014 she entered into a relationship with Mr. Olusegun Osinuga, a naturalised Irish citizen. The first applicant, Ms. Victoria Osinuga, was born on the 23rd December 2014 and she is an Irish citizen from birth. For convenience I propose to describe her as Victoria.

10. The relationship between Ms. Osagie and Mr. Osinuga has, however, broken down. Ms. Osagie enjoys sole custody of Victoria, with Mr. Osinuga enjoying occasional visits to spend time with her. Following the birth of Victoria on the 23rd December 2014, Ms. Osagie applied on the 9th September 2015 to the Irish National Immigration Service for recognition of *Zambrano* rights – the right to reside and work in this State premised upon parentage of an Irish and EU citizen child.

11. In late January 2015 Ms. Osagie received a letter from the Child Benefit Section of the Department of Social Protection inviting her to apply for child benefit. On the 16th October 2015 Ms. Osagie then applied to the Minister for Social Protection for child benefit in respect of Victoria. This was refused by decisions dated respectively the 2nd November 2015 and the 30th November 2015 on the ground that as Ms. Osagie did not have a right to reside in the State, she could not be regarded as a "qualifying parent" pursuant to s. 246 of the Social Welfare Consolidation Act 2005 (as amended)("the 2005 Act"). The letter stated:

> "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."

12. Ms. Osagie stated that her own financial circumstances are particularly difficult. She and her daughter Victoria both reside in the direct provision system. They receive approximately €43 per week together with food and lodgings. Victoria also suffers from a hereditary blood disease.

13. By decision dated the 6th January 2016 the Minister for Justice and Equality recognised the Ms. Osagie's right to reside premised upon *Zambrano* rights. The Minister for Social Protection also granted Ms. Osagie an entitlement to child benefit as and from the 6th January 2016. The issue which now arises is whether Ms. Osagie is entitled to child benefit with effect from the date of first application to the Minister in October 2015.

The judgment in the High Court

14. In the High Court White J. delivered a single judgment dealing with both cases. As far as the Agha appeal was concerned, White J. held that the statutory exclusion contained in s. 246 of the 2005 Act preventing the payment of child benefit prior to the grant of status to the parents was not unconstitutional:

> "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.
>
> 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."

15. So far as the Aghas were concerned, White J. held that the failure to pay backdated child benefit was not a breach of EU law or a breach of Article 23 of the Geneva Convention. White J. also added:

> "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 child of a qualified parent who had a right of residence.

> 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."

16. Both appellants have accordingly appealed to this Court against that particular decision.

The nature of child benefit

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

The relevant legislative provisions

18. Section 3(1) of the Refugee Act 1996 provides that a refugee shall be entitled:

> "…to receive, upon and subject to the terms and conditions applicable to Irish citizens, the same medical care and services and the same social welfare benefits as those to which Irish citizens are entitled…"

19. It is next necessary to consider the relevant provisions of the 2005 Act. Any application for child benefit in respect of a child must be for what the 2005 Act describes as a "qualified child", that is to say, either under 16 years of age (s. 219(1)(a)) or under 18 years of age and in full-time education (s. 219(1)(b)) or suffering from a physical or mental infirmity (s. 219(1)(b)). The other requirement is that the child must be ordinarily resident in the State: see s. 219(1)(c) of the 2015 Act.

20. Entitlement to child benefit is contingent upon the adult claimant being a "qualified person" (s. 220(1)) which in turn is conditional upon residence with the qualified child (s. 220(1)) and habitual residence (s. 220(3)). By reason, however, of the provisions of s. 246(5) of the 2005 Act a claimant cannot be deemed to be habitually resident unless he or she has a right to reside in the State. Section 246(6) of the 2005 Act (as amended) provides that:

> '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.'

21. As it happens, paragraph (f) was substituted by s. 11(1)(e)(i) of the Social Welfare and Pensions Act 2014 ("the 2014 Act").

22. Section 246(7) of the 2005 Act is a complimentary provision and it states that:

> '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 whose 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."

23. It should be noted that both pararaphs (b) and (e) respectively were inserted by the provisions of s. 11(1)(f)(i) and (ii) respectively of the 2014 Act.

24. There is, of course, no difficulty - in principle at least - with a requirement that both the child and the qualified person be resident in the State. Child benefit is paid for by the taxpayers of the State and the Oireachtas as general guardians of the Exchequer could quite reasonably require that this money is only paid to persons resident within the State, thus ensuring that transfer payments made by the State's taxpayers are paid only to inhabitants of the State, thereby contributing to the overall welfare of the State.

25. Against that background, I propose first to consider the position of the appellants in the Osinuga appeal before then considering the position in the Agha appeal

The Osinuga appeal: whether the Oireachtas can deprive a citizen of entitlement to child benefit by reason of the immigration status of her mother qua adult claimant?

26. The real question so far as the Osinuga appeal is concerned is whether the Oireachtas can also deprive an Irish citizen child who is resident in the State of child benefit by reason of the immigration status of the adult claimant? It should be stressed at the outset that in any consideration of this question the court is not required to make any judgment as to the amount or nature of social benefits which the Oireachtas elects to provide for by law. In the nature of things these are matters which are exclusively for the elected branches of government: see, e.g., *TD v. Minister for Education* [2001] 4 I.R. 259.

27. When, however, the Oireachtas elects to make universal payments of this kind for the benefit of children who are both citizens and residents of the State, exclusions of the kind at issue which are not based on either the financial or educational needs of the child would generally call for a high degree of justification. This is perhaps especially true when citizens who are also resident in the State are in substance excluded by statute. Victoria is, after all, a citizen of the State and she accordingly has an unqualified right to reside here. She owes qua citizen a duty of loyalty to the nation and fidelity to the State: see Article 9.3 of the Constitution. The State in turn owes her a duty by virtue of Article 40.1 to be treated equally before the law.

28. In approaching this question counsel for the State has urged that the legislation did not amount to any form of invidious discrimination. It is, of course, true that the legislation is not in any sense invidious in the sense of discrimination by reason of some latent prejudice or hostility. It is also true that there is an earlier generation of Article 40.1 case-law in which the test of invidiousness was often a touchstone by which the constitutionality of the impugned legislation could be tested, although even as far back as 1980 the Supreme Court was warning that the use of the term "invidious discrimination" in the context of Article 40.1 "is more likely to mislead than to help": see *Murphy v. Attorney General* [1982] I.R. 241, 286, per Kenny J.. But, as O'Donnell J. explained in *Murphy v. Ireland* [2014] IESC 12, the law has, in any event, long moved on from these cautious and hesitant early days:-

> "Article 40.1 is a guarantee of equality before the law. It is a fundamental right guaranteed by the Constitution and unlike many of the other provisions in the 1937 Constitution, has no counterpart in the 1922 Constitution. It is perhaps not insignificant that it is placed at the outset of the fundamental rights section of the Constitution. It set an egalitarian and essentially republican tone which is perhaps reinforced by the specific provisions of Article 40.2 prohibiting titles of nobility and honour. It is therefore a vital and essential component of the constitutional order. However, the guarantee of equality before the law is expressed in terms of such equality "as human persons". That phrase was problematic in the early period of constitutional interpretation and on occasion gave rise to interpretations which, applied rigorously, might have robbed the guarantee of much, if not all, of its content. It is however, increasingly understood that it 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, 13-14:
>
> "[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."
>
> 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."

29. The fundamental question, therefore, is whether the Oireachtas in seeking to draw significant or appreciable differentiations between citizens can justify this differing treatment. It is also true, of course, that a good deal of latitude must be admitted for the purposes of Article 40.1 scrutiny where the Oireachtas differentiates between classes of persons for reasons of social policy, provided always that the differentiation is intrinsically proportionate and reasonable: see, e.g., the comments to this effect of Denham C.J. in *MD v. Ireland* [2012] IESC 12, [2012] 1 I.R. 679, 716 and 719.

30. The first question to be asked, therefore, is whether by denying the child benefit by reason of the immigration status of the parent claiming that benefit it can be said that Victoria is not being treated equally with her peers. It is plain that this is so. Victoria can point to the fact all other citizen children resident in the State - virtually without exception - can avail of this benefit through their parents or guardians. This is a benefit which, especially for the less well off, helps to ensure that all children resident in the

State are well nourished and have adequate clothing and footwear and have access to basic educational prerequisites such as schoolbooks.

31. I do not, of course, overlook the fact that, as counsel for the State in the Osinuga appeal, Mr. Mulcahy S.C., emphasised, the State has provided many fiscal benefits and payments for this family given that they have lived in the direct provision system. As Ms. Tara Burns, an Assistant Principal Officer, stated on affidavit:

> "Child benefit is a payment offered by the State to eligible persons designed to meet some of the expenditure associated with the additional costs incurred in bringing up a child. Many of the additional costs associated with bringing up a child are/were not in fact incurred by the applicants herein as a consequence of residing with the direct provision system. Currently, child benefit is paid to around 610,000 families in respect of some 1.16m children with an estimated expenditure of around €1.9bn. in 2014.
>
> Child benefit is one of a number of payments the Department of Social Protection makes to families with children: these include qualified child increases, family income supplement and the back to school clothing and footwear allowances. Each of these payments is part of an overall system of child and family support payments consisting of both universal and more selective and targeted payments.
>
> In the light of the foregoing…the applicants do not require child benefit during such period that they are residing in direct provision. The needs and requirements of the applicants…were provided by the State in an alternative manner……"

32. All of this is doubtless correct, but the same can equally be said of other low income families who also benefit from a range of State supports, yet one has suggested that child benefit should not be payable to such families. At the other end of the economic scale child benefit is payable in respect of the children of the affluent and the wealthy, even though their children are likely to lead a privileged lifestyle even in the absence of such payments. It is also perhaps significant that child benefit is a universal payment made to all parents regardless of means on behalf of children resident in the State who are under a certain age. The State thereby has acknowledged its interest in making an important contribution to the welfare of all children resident in this jurisdiction, regardless of parental circumstances.

33. Given that Victoria is an Irish citizen resident in the State she has a strong claim to be treated in the same fashion as her young fellow citizens who are similarly resident in the State. This is perhaps especially true in the case of a basic universal payment designed ultimately for the benefit of children.

34. This brings us to the second and critical question: can the exclusion of Irish citizen children from access to child benefit be justified objectively on the ground that at the relevant time the qualifying parent did not have an entitlement to reside in the State and that her immigration status was thereby uncertain? It is true that the exclusion of persons with such an uncertain status serves important public policy and immigration goals by, e.g., serving to deter opportunistic asylum claims and generally by reducing the attractiveness of the State as a destination for what is sometimes described as welfare tourism. As I pointed out in my judgment in *NHV v. Minister for Justice* [2016] IECA 86, [2016] 1 I.L.R.M. 453, 500, restrictions of this kind generally serve:

> "important State goals which are based on rational considerations. The dangers presented to the organisation of society by unrestricted or unregulated migration are obvious and all free and democratic societies have seen fit to impose restrictions on such migration for reasons that are all too clear."

35. In *NHV* the restriction in question was an absolute ban on asylum seekers seeking employment. The Supreme Court ultimately held that this restriction was unconstitutional on the ground that it effected a disproportionate interference with the right to earn a livelihood: see [2017] IESC 35, [2017] 1 I.L.R.M. 105.

36. It is, however, important to stress that the restrictions at issue in that case concerned the asylum seeker *personally*. In the present case, however, the restrictions are at best indirect and bar the making of a payment designed for the benefit of the citizen child in order to deter opportunistic asylum claims which its parents might make. 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*. This 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.

The decision of the European Court of Human Rights in Niedziecki v. Germany

37. Perhaps the authority which is the closest on point is actually the decision of the European Court of Human Rights in *Niedzwiecki v. Germany* [2006] ECHR 928, (2006) 42 EHRR 33, a case concerning the compatibility of the German Child Benefit Act with the European Convention of Human Rights. What is striking about this case is that the German legislation had similarly provided that child benefit was not payable to children resident in Germany whose non-citizen parents did not enjoy what was described as "stable residence permit" entitling them to live in Germany. According to the German courts, the object of this legislation was to ensure that child benefit was payable only to "aliens who were likely to stay in Germany on a permanent basis."

38. It is also interesting to note that both the German Constitutional Court and the European Court of Human Rights had found this differing treatment to be unconstitutional (in the case of the Constitutional Court) and contrary to Article 8 and Article 14 ECHR by the European Court of Human Rights.

39. In a decision delivered on the 6th July 2004 (1 BvL 4/97, 1 BvL 5/97, 1 BvL 6/07), the German Constitutional Court ruled that the relevant provisions of the Child Benefits Act were incompatible with the right to equal treatment under Article 3 of the Basic Law. The German legislature (Bundestag) was accordingly ordered to amend the law by 1 January 1996.

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

41. By the time the matter came before the European Court of Human Rights the father's complaint was then confined to the German authorities' refusal of child benefits for the period of time between July and December 1995. The European Court nonetheless held

that this exclusion amounted to a breach of Article 8 ECHR read in conjunction with Article 14 ECHR:

> "By granting child benefits, States are able to demonstrate their respect for family life within the meaning of Article 8 of the Convention; the benefits therefore come within the scope of that provision… It follows that Article 14 – taken together with Article 8 – is applicable.
>
> According to the Court's case-law, a difference of treatment is discriminatory for the purposes of Article 14 of the Convention if it "has no objective and reasonable justification", that is if it does not pursue a "legitimate aim" or if there is not a "reasonable relationship of proportionality between the means employed and the aim sought to be realised". The Contracting States enjoy a certain margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment ….
>
> The Court is not called upon to decide generally to what extent it is justified to make distinctions, in the field of social benefits, between holders of different categories of residence permits. Rather it has to limit itself to the question whether the German law on child benefits as applied in the present case violated the applicant's rights under the Convention. In this respect the Court notes the decision of the Federal Constitutional Court concerning the same issue which was given after the proceedings which form the subject matter of the present application had been terminated …..Like the Federal Constitutional Court, the Court does not discern sufficient reasons justifying the different treatment with regard to child benefits of aliens who were in possession of a stable residence permit on one hand and those who were not, on the other. It follows that there has been a violation of Article 14 in conjunction with Article 8 of the Convention."

42. For my part, despite the urgings of counsel for the State, I find it difficult to see how *Niedzwiecki* does not govern – at least by analogy – the present case. The very fact that in similar circumstances both the German Constitutional Court and the European Court of Human Rights found similar German legislation to be unconstitutionally discriminatory and (as the case might be) in breach of the equality provisions of Article 14 ECHR is surely telling. In that respect the reasoning in *Niedzwiecki* re-inforces my earlier conclusions regarding the inherent unfairness and lack of proportionality in excluding Victoria's mother as a qualifying parent by reason of the latter's uncertain immigration status.

Conclusions regarding the Osinuga appeal

43. In these circumstances, I am driven to the conclusion that the State cannot provide an objective justification for what in substance is the statutory exclusion of Victoria from eligibility for child benefit prior to the grant of status to her mother in January 2016, so that this exclusion must be adjudged to be a breach of Article 40.1 of the Constitution. I will return presently to the remedy which should be granted in that case.

The Agha appeal

44. In the case of the Agha appeal the claim in essence is that once asylum status has been granted, this amounts to a recognition of an existing status which had crystallised upon their application for asylum in 2013. They also make the point that as Daniel was granted refugee status in January 2015, his parents are – it is said- entitled to child benefit in respect of him (and the other three children) as and from that date.

45. Perhaps the first thing to note, however, is the significant factual difference between the position of Victoria in the Osinuga appeal and the four children (including Daniel) in the Agha appeal. As Victoria is an Irish citizen she has – and always had - an unqualified right to reside in the State. That was *not* true of Daniel prior to the decision of the Refugee Appeal Tribunal in January 2015 declaring him to be a refugee and nor was it true of his siblings prior to the family reunification decision in September 2015.

46. In my view, this important factual difference is critical. Subject only to arguments which I will next address regarding the Geneva Convention and EU law, the State cannot generally be expected to make social security payments to persons with no right to reside in the State. This is why it cannot be regarded as unconstitutional to deny such payments to the Aghas prior to the date on which their respective entitlements to reside here was legally established.

47. It is true that Daniel was entitled to reside here after the RAT decision in January 2015 and that child benefit was not payable in respect of him. But the Oireachtas was nonetheless entitled – again, subject only to the EU law issue – to decide that his parents were not entitled to child benefit in respect of him because they too did not then have appropriate immigration status until the positive family reunification decision arrived in the following September. The difference, therefore, between the position of Victoria on the one hand and Daniel on the other so far as the constitutional issue is concerned can be summed up by one word, namely, citizenship. Victoria's status as a citizen resident in the State means that the objective justification for her exclusion by statute in respect of payment otherwise generally payable to all residents required to be a compelling one. This simply is not the case with Daniel given that his right to reside here derives exclusively from statute. Again, subject only to the EU law point, the Oireachtas is generally free to condition the making of social security payments to non-citizen residents which would not be constitutionally acceptable in the case of residents who are also citizens.

Whether the exclusion of the Aghas from child benefit was contrary to EU law

48. I now turn to consider the EU argument. In essence, the argument advanced by the appellants that by reason of Article 23 of the Geneva Convention the State was obliged to make such child benefit payments from the date of their application for asylum and that this requirement of Article 23 of the Convention has itself been transposed into national law by virtue of the provisions of Article 78 TFEU. It was also contended in the alternative that the parents were also entitled to claim child benefit in respect of Daniel as and from the date his refugee status was recognised, i.e., January 2015.

49. Article 23 of the Geneva Convention 1951 provides:

> "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."

50. Article 18 of the Charter of Fundamental Rights of the European Union states: "The right to asylum shall be guaranteed *with due respect for the rules of the Geneva Convention* of 28 July 1951 and the Protocol of the 31st January 1967 relating to the status of refugees and in accordance with the Treaty establishing the European Community." (emphasis added).

51. Article 78 of the TFEU provides in relevant part that:

> "1. The Union shall develop a common policy on asylum, subsidiary protection and temporary protection with a view to offering appropriate status to any third-country national requiring international protection and ensuring compliance with

the principle of non-refoulement. This policy must be in accordance with the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees, and other relevant treaties.

2. For the purposes of paragraph 1, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall adopt measures for a common European asylum system comprising:

(a) a uniform status of asylum for nationals of third countries, valid throughout the Union;

(b) a uniform status of subsidiary protection for nationals of third countries who, without obtaining European asylum, are in need of international protection;

(c) a common system of temporary protection for displaced persons in the event of a massive inflow;

(d) common procedures for the granting and withdrawing of uniform asylum or subsidiary protection status;

(e) criteria and mechanisms for determining which Member State is responsible for considering an application for asylum or subsidiary protection;

(f) standards concerning the conditions for the reception of applicants for asylum or subsidiary protection;

(g) partnership and cooperation with third countries for the purpose of managing inflows of people applying for asylum or subsidiary or temporary protection…." (emphasis supplied)

52. Article 28 of Council Directive 2004/83/EC ("the Qualification Directive") provides:

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

53. Recital 33 of that Directive is also of some importance and it states:

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

54. As this Court has recently pointed out in *MIF v. International Protection Appeals Tribunal* [2018] IECA 36 the Geneva Convention is not, *as such*, part of EU law:

> "The principles contained in the Geneva Convention are, admittedly, highly significant in European Union law, but the Convention itself does not form part of E.U. law and still less does it enjoy some supreme status within the E.U. legal order such that even a Treaty provision might in effect [be held to be] invalid when judged by reference to it.
>
> Article 18 of the Charter of Fundamental Rights of the European Union guarantees the right to asylum "*with due respect* for the rules of the Geneva Convention". (emphasis added). In other words, it clear that whereas the substance of the rights to seek asylum guaranteed by the Convention must be respected, the Charter does not envisage that the detailed requirements of the Convention must be adhered to in every single particular."

55. This passage also has relevance for the present case. It is not, I think, necessary to examine what precisely was meant by Article 23 of the Geneva Convention and its reference to "refugees lawfully staying in their territories" because, at least so far as the present case is concerned, the appellants' rights are now to be found in Article 28 of the Qualification Directive. Article 28 makes it perfectly clear that Member States are required to make social assistance payments (such as child benefit) only to those who have been granted international protection status. This in turn implies that such an obligation arises *only* from the date such status has been *granted* and not otherwise.

56. In these circumstances I find myself concluding that s. 246 of the 2005 Act is not inapplicable or otherwise contrary to the requirements of EU law by confining the payment of child benefit to the date upon which that status was granted. But what was that date?

57. In the light of the conclusions which I have already reached in relation to Victoria, it seems to me that in reality that day is the day on which Daniel was granted refugee status given that, to repeat already made, the child benefit payment is designed for the benefit of the child, even if it is made payable to the qualifying parent. This means that the State was obliged to pay child benefit in respect of Daniel so long as he resided in the State with effect from the date of his recognition as a refugee, *i.e.*, with effect from January 2015. Article 28 of the Qualification Directive does not permit that payment to be withheld because the person applying for the benefit on behalf of Daniel (*i.e.*, Ms. Agha) did not herself have immigration status.

What remedies should be provided?

58. I turn now to the remedies which should be provided in the two respective cases.

59. So far as the Osinuga case is concerned, s. 246 of the 2005 Act must be held to be unconstitutional but only insofar as it precludes the payment of a child benefit in respect of a child who is an Irish citizen and resident in the State by reason solely of the fact that the qualifying parent did not otherwise have an unconditional entitlement to reside in the State. The question then arises as to the form which any declaration of unconstitutionality might take and whether such a declaration should itself be suspended in the light of the guidance given by the Supreme Court in *NHV v. Minister for Justice and Equality* [2017] IESC 40, [2017] 1 I.L.R.M. 69.

60. In its judgment in *AB v. Clinical Director of St. Loman's Hospital* [2018] IECA 123 this Court recently addressed the question of the suspension of a declaration of unconstitutionality saying:

> "If these patients (or any of them) were suddenly released by a judicial pronouncement of the unconstitutionality of this key sub-section of the 2001 Act, this would be likely to have unfortunate consequences for their personal welfare and might well, in some circumstances at least, to pose a possible risk to the lives and safety of others.
>
> The lesson of *NHV* is that the judiciary should not have to watch on helplessly as a finding of unconstitutionality leads on

> with remorseless logic to invalidate and unravel a large variety of administrative decisions, often in a chaotic and disruptive fashion and with possibly unforeseen consequences for third parties. If that were indeed the law, then there would then be a grave danger that in the words of Geoghegan J. in *A. v. Governor of Mountjoy Prison* [2006] IESC 45, [2006] 4 I.R. 99 that "judges considering the constitutionality or otherwise of enactments would be consciously or unconsciously affected by the consequences.
>
> If post-*NHV* the immediate aftershocks of a finding of unconstitutionality can be confined and controlled by a suspension of that declaration, the Court is nonetheless obliged to afford the applicant a real remedy by providing that in due course the unconstitutional law will stand annulled. So it is here."

61. While the decision in *AB* concerned the unconstitutionality of s. 15(3) of the Mental Health Act 2001, the key point about the suspension of the declaration of unconstitutionality in that case was that it was necessary to avoid the potentially chaotic circumstances that would come about if some 100 detained persons currently in long term psychiatric detention were to be immediately released in the wake of that finding of unconstitutionality. The circumstances of the present case are admittedly nothing as dramatic and at least, on one view, do not call out for the same judicial response. In particular, there is no reason why these backdated payments cannot immediately be paid to Ms. Asaghie on behalf of Victoria.

62. At the same time, however, it cannot be overlooked that this decision will have at least some implications for a key feature of social supports for children. No one can doubt the enormous sums of money involved in the payments made under the child benefit scheme. It is appropriate, therefore, that the Oireachtas is given some breathing space to digest the potential implications of this finding of unconstitutionality and to consider what, if any, budgetary adjustments might be required. A suspension of the declaration will also give the Minister for Finance time to make any appropriate revisions in these budgetary arrangements prior to the presentation of the estimates of receipts and expenditure to Dáil Éireann in accordance with Article 17.1.1 of the Constitution.

63. There is, moreover, a further reason why this declaration should be suspended. Given the language and structure of s. 246, it would be difficult to fashion a declaration that did not result in a wider class of category of persons laying claiming to child benefit then was strictly necessary or contemplated as a result of this finding of unconstitutionality. It may be recalled that all that this Court has decided is that Irish citizen children who are resident in the State may not be deprived of child benefit by reason only of the immigration status of their parents. Yet if a declaration of unconstitutionality were to be granted in respect of the relevant provisions of s. 246, it might lead to a situation where other persons not in the same position as Victoria and Ms. Osagie and who would not have been able to mount a successful constitutional challenge in their own right might nonetheless be in a position to step through the breach in the law brought about by such an immediate and unsuspended finding of unconstitutionality and wrongly claim this social security benefit to which they had no proper legal entitlement.

64. It would therefore be appropriate that the Oireachtas be given the opportunity to bring forward new and more finely tailored legislation which will accommodate the outcome of this decision and yet enable other key public policy objectives contained in that legislation to be preserved. For all of these reasons, therefore, I would propose that any formal finding of unconstitutionality be suspended until the 1st February 2019 to all other cases, *apart* from that of Victoria and Ms. Osagie.

65. So far as the Agha case is concerned. I think it clear that Article 28 of the Qualification Directive required the State to have paid child benefit in respect of Daniel from the date of his recognition as a refugee in January 2015 and not simply from the date his mother was accorded a right to reside in the State in September 2015. Inasmuch as s. 246 of the 2005 Act contravenes the requirements of Article 28 it is one which must therefore be disapplied by national courts by reference to standard *Simmenthal* principles (Case 106/77 *Amministratzione delle Finanze dello Stato v. Simmenthal SpA* [1978] E.C.R. 629).

66. In this Court's judgment in *Danqua v. Minister for Justice* (No.2) [2017] IECA 20 we considered the effect of a finding of inapplicability under the *Simmenthal* doctrine:

> "Inasmuch, therefore, as the *Simmenthal* doctrine requires all national courts to disapply the national rule in question which has been found to be inconsistent with EU law, the Court of Justice's findings to such effect accordingly have a general *erga omnes* application. It is, of course, true that the Court of Justice does not enjoy any formal jurisdiction to annul or otherwise positively invalidate national laws or practices. The practical effect nonetheless of a decision of this nature is in many respects akin to that of a finding of unconstitutionality in our own legal system, given that national courts are called upon to disapply that national law in consequence of that finding on the ground that it is inconsistent with the superior ranking EU law. While under the *Simmenthal* doctrine the inconsistent national law is *simply suspended* by the disapplication of that law by the national courts in reliance upon the decision of the Court of Justice rather than formally annulled (as would happen with a declaration of unconstitutionality under Article 34.3.2 of the Constitution under our own legal system), the key point in both instances is nonetheless that the national rule is now no longer legally operative and, specifically, it can no longer form the basis of any administrative decision which pre-supposes that the rule in question has full force and effect."

67. The net effect, therefore, of our judgment in the Agha case is that s. 246(6) and s. 246(7) of the 2005 Act must be disapplied in this type of case as being contrary to Article 28 of the Qualification Directive where it would otherwise prevent child benefit being claimed in respect of a non-citizen child resident in the State from the date of his or her recognition as a refugee. While, as we pointed out in *Danqua*, the *Simmenthal* doctrine does not mean that the relevant statutory provisions are in any sense annulled or invalidated, it must be acknowledged that this finding may nonetheless have effects which are not altogether dissimilar to a finding of unconstitutionality under our domestic legal system.

68. It nonetheless does not seem to me that a national court - as distinct from the Court of Justice itself - has any jurisdiction to suspend a *Simmenthal*-style finding of invalidity of this kind since this would compromise the uniformity and supremacy of EU law: see, e.g., Case 309/85 *Barra v. Belgium* [1988] E.C.R. 355. It follows, therefore, that our findings with regard to Article 28 of the Directive and its interaction with s. 246(6) and s. 246(7) of the 2005 Act must stand without any question of suspension.

Conclusions

69. In summary, therefore, my principal conclusions are as follows:

70. First, the State cannot provide an objective justification for what in substance of the statutory exclusion of Victoria as an Irish citizen resident in the State from eligibility for child benefit prior to the grant of status to her mother in January 2016. Accordingly, this statutory exclusion constitutes a breach of the equality provisions of Article 40.1 of the Constitution. Insofar, therefore, as s. 246(6) and s. 246(7) of the 2005 Act prevents the payment of child benefit in respect of an Irish citizen child resident in the State solely by reason of the immigration status of the parent claiming such benefit, these provisions must be adjudged to be

unconstitutional. It is nonetheless appropriate that, save insofar as it concerns the rather small payment of backdated child benefit due in the specific case of Victoria and Ms. Osagie, that declaration should remain otherwise suspended until the 1st February 2019.

71. Second, in the case of the Agha appeal the statutory requirement that the qualifying parent must also have a legal entitlement to reside in the State cannot be regarded as unconstitutional. The key difference between this case and the Osinuga appeal is that of citizenship. As Daniel is not a citizen, his entitlement to reside in the State is purely contingent on a statutory entitlement to which the Oireachtas may attach conditions, one of which is that any parent who claims that benefit must also have an entitlement to reside in the State.

72. Third, so far as the claim based on Article 23 of the Geneva Convention is concerned, it should be observed that the Convention is not, as such, part of EU law. So far as social security payments are concerned, Article 28 of the Qualification Directive provides that there is no right to such benefits prior to the grant of refugee or subsidiary protection status. Accordingly, with the exception of Daniel, Ms. Agha had no entitlement to claim such benefits in respect of the other three children prior to the family reunification decision in September 2015.

73. Fourth, as Daniel was recognised as a refugee in January 2015, Ms. Agha is entitled to child benefit payment in respect of him as and from that date in accordance with Article 28 of the Qualification Directive. Insofar as s. 246(6) and s. 246(7) of the 2005 Act preclude this payment, these provisions must be regarded as inapplicable under the *Simmenthal* doctrine and a purely national court such as this one has no jurisdiction to suspend that finding of inapplicability as this would otherwise compromise the uniformity and supremacy of EU law.

74. I would, accordingly, allow the appeal only to the extent indicated in this judgment and I would also hear counsel as to the form of the order.