



EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIFTH SECTION

CASE OF X AND OTHERS v. IRELAND

(Applications nos. 23851/20 and 24360/20)

JUDGMENT

Art 14 (+ Art 1 P1) • Discrimination • Peaceful enjoyment of possessions • Non-discriminatory denial of universal statutory child benefit to two mothers, lawfully present in the State, for non-fulfilment of domestic law habitual residence criterion • Child benefit in issue a proprietary interest falling within ambit of Art 1 P1 • Applicants, in view of legal and factual elements of their situation at the material time, not in a relevantly similar position to persons having legal resident status
Art 14 (+ Art 8) • *Ratione materiae* • Application of criteria set down in *Beeler v. Switzerland* [GC] • Intended purpose of child benefit in issue “not to promote family life and affect the way in which it was organised” such as to fall within ambit of Art 8 • Benefit not affecting, at least partially, applicants’ organisation of key aspects of their daily life • Court unable to conclude that the benefit, given Supreme Court’s assessment of its statutory basis, nature and purpose, represented a modality of the applicants’ exercising of their right to respect for family life

STRASBOURG

22 June 2023

FINAL

06/11/2023

*This judgment has become final under Article 44 § 2 of the Convention.
It may be subject to editorial revision.*

In the case of X and Others v. Ireland,

The European Court of Human Rights (Fifth Section), sitting as a Chamber composed of:

Lado Chanturia, *President*,
Síofra O’Leary,
Mārtiņš Mits,
Stéphanie Mourou-Vikström,
María Elósegui,
Kateřina Šimáčková,
Mykola Gnatovskyy, *judges*,

and Victor Soloveytschik, *Section Registrar*,

Having regard to:

the applications against Ireland lodged with the Court on 16 June 2020 under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by X and E (application no. 23851/20) and Y and M (application no. 24360/20);

the decision to give notice to the Irish Government (“the Government”) of the complaints concerning discrimination in relation to entitlement to family benefit;

the decision not to have the applicants’ names disclosed;

the parties’ observations;

Having deliberated in private on 30 May 2023,

Delivers the following judgment, which was adopted on that date:

INTRODUCTION

1. The issue in the present case is whether the requirement in domestic law, as a condition of eligibility for child benefit, that the parent be lawfully resident discriminates against claimants who are lawfully present in the State but have not yet been granted, or recognised as having, a right to reside there. The applicants rely on Article 8 of the Convention and Article 1 of Protocol No. 1 to the Convention, read in conjunction with Article 14.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

A. Application no. 23851/20

2. The applicants are a mother, X, and her daughter, E. They are represented before the Court by Ms Cristina Stamatescu, a solicitor practising in Dublin.

3. X is a national of Nigeria, born there in 1987. She arrived in Ireland in November 2013. A year later, she applied for asylum. Her application was rejected by decisions in June and August 2015.

4. E was born on 23 December 2014. As her father is an Irish citizen, she too is an Irish citizen since birth. Mother and daughter came under Ireland's system of direct provision of accommodation and material support to asylum seekers ("direct provision").

5. On 11 September 2015, X applied to the Minister for Justice and Equality ("the Minister") for the right to reside in Ireland on the basis of her being the mother of an Irish citizen child. While this application was pending, X also applied, on 16 October 2015, for child benefit in respect of E. Her application was rejected on 2 November 2015 on the ground that she did not satisfy the condition of habitual residence in Ireland, given that she had not yet been granted the right to reside in the country. E's father was not eligible to receive the child benefit, since E did not reside with him. X sought judicial review of the refusal of benefit.

6. The Minister granted X the right to reside on 6 January 2016. She was thereupon deemed eligible for child benefit in relation to E and has been in receipt of it since then. In light of this, her action before the High Court was limited to the period extending from the birth of E to the granting of the right to reside, i.e., just over twelve months.

B. Application no. 24360/20

7. The applicants are a mother, Y, and her son, M. They are represented before the Court by Mr Conor Ó Briain, a solicitor practising in Dublin.

8. Y is a national of Afghanistan. She arrived in Ireland in May 2008 with her husband and their first child. The family applied for asylum. While their claim was being examined, they were placed in the direct provision system (until December 2008, and then again from June 2010 onwards). In Ireland, Y gave birth to three more children, the youngest of whom is M, born in April 2013.

9. Initially, the family pretended to hold Pakistani nationality, using false identity documents. Their claim for asylum was rejected and orders were issued in March 2012 for their removal to the United Kingdom. They subsequently established their true nationality and, on this basis, applied again for asylum. This was granted in relation to M, by a decision of the Refugee Appeals Tribunal of 9 December 2014, communicated to the family on 8 January 2015. The other members of the family immediately requested family reunification with M, under section 18 of the Refugee Act, 1996.

10. While this matter was pending, Y applied on 19 February 2015 for child benefit in respect of her four children. This application was refused on 2 April 2015, as Y did not fulfil the habitual residence condition. The family sought judicial review of that decision. Family reunification was granted on

11 September 2015, following which Y made a second application for child benefit. This was granted on 16 October 2015, with effect from the date on which Y had been granted permission to reside in Ireland (11 September 2015). In light of this, the claim before the High Court was limited to the period between the granting of asylum to M and the granting of family reunification, which lasted eight months.

C. The domestic proceedings

1. Ruling of the High Court

11. The High Court (White J) dealt with both sets of proceedings in the same judgment, which it handed down on 17 January 2017. While the plaintiffs had argued that child benefit was the right of the child, the High Court held that, given the wording of the relevant statutory provisions (see further below) the right was vested in the “qualified person”, who was entitled to receive the benefit in respect of a “qualified child”.

12. In the proceedings brought by X, the argument was made that she had a right on the basis of the *Zambrano* case-law of the Court of Justice of the European Union (judgment of 8 March 2011, *Ruiz Zambrano*, C-34/09, EU:C:2011:124) to receive child benefit as from the date of E’s birth. The High Court rejected this, observing that as E had never been at risk, during the relevant period, of being compelled to leave the territory of the European Union along with X, this case-law did not avail them.

13. In the proceedings brought by Y and her family, it was argued that as the granting of asylum entails the official recognition of the grantee’s already existing status as a refugee, and as in the domestic system the family members of refugees were permitted to enter and remain in the State almost automatically, it followed that entitlement to family benefit in their case should be recognised as having commenced on 8 January 2015, namely the date on which asylum was granted to M. In this regard they referred to the 1951 UN Refugee Convention and to Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted (the “Qualification Directive”, OJ 2004 L 304/12). The High Court rejected this submission, holding that the legal rights that accrue to refugees and their families operate only as from the date on which their status was formally recognised or granted.

14. The High Court then considered the argument that the habitual residence condition was discriminatory. It noted that this condition was a common feature of social welfare benefits in Ireland, and that it had been established in case-law that an individual waiting for a decision on asylum is not considered to be habitually resident in the State. This was neither arbitrary nor unfair. The court acknowledged that as far as M was concerned, the

situation had been anomalous. Being a very young child when granted asylum, his parents would, as a matter of course – absent any serious security implications – be granted family reunification rights. Therefore, for the short period of time in question, M’s position had been different to that of a child with a parent having a right of residence in the State. However, this was not constitutionally infirm as M was residing with his mother in direct provision and his needs were met by the State in this way. Though not ideal, it was objectively justified since the authorities were entitled to maintain the habitual residence condition for social welfare benefits. There was no discrimination in relation to M. The condition of habitual residence applied generally to Irish nationals as well as to all other nationals. The right to equality under the Constitution did not require identical treatment without recognition of different circumstances.

15. As for the situation of X and E, the court observed that the former could not have been treated as habitually resident while she awaited the Minister’s decision on family reunification. Regarding E, though, the situation had been anomalous until her mother was granted the right to reside in the country. Yet, as with X and M, they had been supported for this period by direct provision financed by the State.

16. Lastly, having considered the statutory and constitutional position, the High Court considered the matter briefly from the perspective of the Convention. It observed that it was only in relation to the children, E and M, that the situation had been anomalous in that they did not receive the benefit of the allowance until their mothers qualified for it. However, in view of the support given under direct provision, and in the absence of any culpable delay on the part of the authorities, their Convention rights had not been breached. Had there been culpable delay on the part of the authorities, a different conclusion might well have been reached.

17. The applicants appealed.

2. Ruling of the Court of Appeal

18. The Court of Appeal delivered its judgment (Hogan J) on 5 June 2018.

19. Concerning X and E, the court identified as the central issue the question whether the legislature could deprive an Irish citizen child, resident in the State, of child benefit by reason of the immigration status of the adult claimant. It recalled that it was exclusively for the elected branches of government to decide on the nature and level of social benefits. However, where the legislature had chosen to create a universal payment for the benefit of children who were both citizens and residents of the State, exclusions that were not based on either the financial or educational needs of the child would generally call for a high degree of justification. This was especially true when citizens who are also residents were in substance excluded by statute. As a citizen, E had an unqualified right to reside in the State and was entitled under the Constitution to be treated equally before the law.

20. The court observed that the fundamental issue was whether, in seeking to draw significant or appreciable differentiations between citizens, the legislature could justify such differential treatment. It acknowledged that a “good deal of latitude” should be permitted where the legislature differentiated between classes of persons for reasons of social policy, provided always that the differentiation was intrinsically proportionate and reasonable. The first question was whether E had been treated equally with her peers, i.e., other citizen children. It was plain that she had not; virtually all other citizen children resident in the State could avail of child benefit through their parent or guardian. While she had benefitted from other forms of State support via the direct provision system, the court noted the universal character of the benefit. It was payable regardless of the recipients’ means, and, for low-income families, combined with other social transfers. It denoted the State’s interest in making an important contribution to the welfare of all resident children, regardless of parental circumstances. As a resident citizen, E had a strong claim to be treated equally with the other members of this category, especially with respect to a basic universal payment designed ultimately for the benefit of children.

21. The second question was whether the exclusion of an Irish citizen child from the benefit was objectively justified on the ground that at the relevant time the qualifying parent did not have the right to reside in the State. The court considered that the exclusion served important public policy and immigration goals, such as to deter opportunistic asylum claims and generally discourage “welfare tourism”. However, in contrast to previously decided cases, here the statutory exclusion sought to deter the conduct of the parent but at the expense of a payment designed for the benefit of the child. In itself this pointed to an inherent unfairness and lack of proportionality. This finding was reinforced by this Court’s judgment in *Niedzwiecki v. Germany*, no. 58453/00, 25 October 2005. The Court of Appeal concluded that there was no objective justification for what was in effect the statutory exclusion of E from eligibility for child benefit for the period in question, in breach of the guarantee of equality set out in Article 40 .1 of the Constitution.

22. The court then considered the form of the remedy it should grant. It decided to generally suspend the effect of its finding of unconstitutionality until 1 February 2019, so as to permit sufficient time for the legislature to consider how exactly it should amend the provisions in question. Redress should be afforded immediately to X and E, however.

23. Concerning Y and M, the court noted that the critical difference between the two cases was that M, who was not an Irish citizen, had not had any right to reside in Ireland until he was granted asylum. The State could not be generally expected to make social security payments to persons with no right to reside there. Since M’s right to reside in the State derived from statute, the legislature was generally free to apply conditions that would be constitutionally unacceptable if applied to resident Irish citizens.

24. The court then considered Article 28 of the Qualification Directive, which requires EU Member States to make social assistance payments, such as child benefit, to person granted international protection status. That was an obligation that arose only from the date on which such status was granted. The court reasoned that, as child benefit was designed for the benefit of the child, the date in question had to be the day on which M had been granted asylum. It held that Article 28 of the Qualification Directive did not permit the payment to be withheld for the reason that the person applying for the benefit did not yet have a right to reside in the State.

25. The State appealed.

3. *Ruling of the Supreme Court*

26. The Supreme Court gave its judgment (Dunne J giving the principal judgment) on 21 November 2019.

27. Regarding the nature of child benefit, the court observed:

“52. ... [C]hild benefit is payable in respect of a qualified child to a qualified person, namely, a person with whom the qualified child normally resides provided that that person is habitually resident in the State. The qualified person in receipt of child benefit is entitled to use child benefit for whatever purpose they consider appropriate and are not obliged to spend it exclusively on the qualified child or for the benefit of the qualified child directly or indirectly as the case may be. No doubt, the majority of people use child benefit for the benefit of their children but this may be done by pooling the sum of money available by way of child benefit with other family resources for the benefit of the family as a whole. Nevertheless, child benefit, when payable, is not something that is required to be used solely and exclusively for the benefit of the child concerned. The child concerned or a person acting on behalf of the child is not entitled to dictate to the recipient of child benefit how that sum of money is used. The child is not entitled to receive the payment of child benefit.”

It considered that the approach of the Court of Appeal, which had treated child benefit as being the entitlement of the child rather than the parent, was misconceived.

28. The judgment continues:

“68. ... The restriction of payment to those who are habitually resident is neutral in the sense that it applies to all applicants for child benefit equally. Thus, the State has contended that the provisions of the Act of 2005 do not discriminate against [E]. The requirement in relation to habitual residence is addressed to the qualified person only. The legislation at issue relates to a benefit payable to the qualified person and not the qualified child. That being so, it does not appear to me to be appropriate to compare the position of [E], a citizen child, with the position of any other citizen child. ... [T]he principle of equality requires that like persons should be treated alike. As the payment of child benefit is to a qualified person, the like person for this purpose should be another qualified person, not the child whose existence may give rise to the payment. ...”

29. The Supreme Court then distinguished the cases before it from the *Niedzwiecki* case, noting that the discrimination in the latter was between

persons with different types of residence status. Here, the impugned distinction was between those who were habitually resident in the State and those who could not meet this condition because they had not yet been granted the right to reside there. The judgment continues:

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

30. The following conclusion was drawn regarding the case of X and E:

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

31. The Supreme Court also addressed the arguments based on the *Zambrano* case-law of the CJEU. It found it evident that entitlement to a right of residence on this basis had to be the subject of an application to the relevant authorities of the Member State concerned, which must have an opportunity to consider such an application, given that under EU law it may be denied for duly established reasons of public policy or public security. It essentially endorsed the position taken by the High Court on this point:

“99. ... In order to demonstrate that her right to reside has been interfered with, it has to be established that the failure to make child benefit payments on a backdated basis

to the date of [E's] birth was such as to deny her, [E], the enjoyment of her rights as a citizen of the [European] Union to reside in this Member State. In other words, it would be necessary to show that she was being deprived of her right to reside in the State because the financial circumstances of her mother by the denial of child benefit was such as to require her to leave. The fact that her rights may derive as and from the date of her birth does not alter the fact that in this case, the simple fact of the matter is that [E] was not obliged to leave the Member State or Union territory by virtue of the failure to backdate the payment. In those circumstances I am satisfied that the failure to backdate the payment of child benefit to the date of her birth is not a breach of [E's] rights as a citizen of the E.U."

32. Regarding the other set of proceedings, the Supreme Court observed that the approach of the Court of Appeal was mistaken in holding that Y was entitled to receive child benefit as from the date M had been granted asylum. Again, it was because the claimant under the 2005 Act was not the child but the parent. This was made clear by the fact that following the granting of asylum to M, Y had applied for leave to reside in the State on grounds of family reunification with her son. This involved a ministerial decision, and the Minister must be entitled to make inquiries as to whether it would be appropriate to grant the application, since it was open to the Minister to refuse the application under certain circumstances (e.g., if the person posed a threat to national security).

"83. ... It is obvious that there will be some time-lag between the date of application for permission to reside and a decision being made on such an application given the necessity for the Minister to satisfy him or herself that it is appropriate to give permission in any given case. That being so, it is difficult to see how there could be any obligation to pay child benefit before such decision has been reached. I cannot see any basis upon which the delay necessitated by a consideration of the application for a right to reside with either the citizen child in the case of [E] or the refugee child in the case of [M] could be a breach of Article 40.1 of the Constitution in the case of the citizen child or Article 28 of the Qualifications Directive in respect of the refugee child or a child granted international protection."

33. With respect to the claim of Y and M the Supreme Court concluded:

"102. ... There is nothing in Article 28 of the Qualification Directive to suggest that the payment of child benefit should be backdated to the date upon which [M] was granted refugee status. The payment is made from the date upon which the decision was made to grant his mother, the qualified person entitled to receive the payment, the right to reside in the State. That decision, as in any other case, necessitated a consideration of the facts and circumstances of the case and there was no suggestion of any undue delay in that regard. Accordingly, the State was not obliged to make a payment of child benefit to [Y] in respect of [M] until such time as she was given permission to reside in the State and Article 28 does not mandate any payment before that date."

34. A second judgment was given by O'Donnell J. While he agreed with the judgment of Dunne J, he dwelt further on the application of the constitutional guarantee of equality (Article 40.1 of the Constitution). He observed that with respect to E, the alleged discrimination was indirect, in the sense that she was not the direct object of the impugned legislative provision but was affected indirectly by it. The Court of Appeal had approached the

matter differently. It had examined the legislation as if it directly sought to remove a benefit from a citizen child because of the immigration status of her mother and treated that status as not relevant to the benefit in question. It had identified as the key question whether the legislature could deprive a citizen child of an entitlement or withhold payment of the benefit to a citizen child on account of the immigration status of the claiming parent.

“17. ... 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 [legislature] 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.”

35. He then observed that the direct object of the relevant provisions was to establish that a person whose immigration status had not been positively resolved could not be treated as having a right to reside and was therefore not capable of being habitually resident, with the consequence that they did not qualify for child benefit. This in itself did not fall foul of Article 40.1 of the Constitution. There was no distinction made on any ground that was impermissible or called for close scrutiny by the courts. Child benefit was not restricted to Irish citizens. The distinctions made with respect to status and quality of residence were rational and obviously directed to the purpose of the benefit, and clearly within the legislature’s decision-making power. The definitions of who had and did not have a right to reside were not impermissibly discriminatory in their terms or effects. The starting point therefore had to be that the terms of the legislation itself did not in their direct application breach Article 40.1.

36. The claim advanced in this case could therefore only be one of indirect, or secondary, discrimination. A statutory provision could be declared constitutionally invalid on this basis if it interfered impermissibly with an individual’s rights even though that was not the direct objective of the legislation. The two child plaintiffs were entitled to challenge the operation of the statutory provision in question (section 246(5) of the Social Welfare Consolidation Act 2005 – see under Part II.B below) inasmuch as it affected them indirectly. However, in analysing that claim it could not be forgotten that the alleged discrimination was indirect and secondary, and that the direct impact of the legislation was not discriminatory. In the absence of any evidence that the indirect effect was the object of the legislation, or that it was motivated by prejudice or stereotyping, 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. The claim in this case, properly analysed, was one of the indirect secondary discriminatory

impact of a provision both neutral and non-discriminatory on its face, and not discriminatory in its direct impact.

37. He noted that the alleged discrimination made was not between citizens and non-citizens, but between citizens. It was contended that E had been treated differently from any other citizen child with a parent who was a “qualified person” for the purposes of the 2005 Act. There was no *a priori* reason to scrutinise carefully such a distinction. A good deal of latitude was normally afforded to the legislature in making distinctions that did not involve any intrinsic or essential characteristic.

38. It was not sufficient to identify as a comparator another citizen child and then complain that such a child enjoyed better treatment on account of their parent’s different immigrant status, for the fact remained that the claim was one of indirect discriminatory effect. The direct distinction was made between the parents and was a perfectly permissible one based on rational grounds as well as a legitimate State objective. The judgment continues (emphasis in the original):

“24. ... Therefore, while [E] 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.”

39. It was not sufficiently precise to describe the difference in treatment as being based on immigration status. Rather, it was based on the particular immigration status of the person claiming child benefit. Under the 2005 Act, a wide range of people who had a right to reside in Ireland – not just Irish and EU citizens – could qualify for child benefit. There was a rational distinction between those seeking the right to reside and those who had obtained it. The legislature had also decided that entitlement would arise with prospective effect only. While it could have opted for a more generous approach, it could not be said that it had impermissibly discriminated, still less that it had done so on the ground of citizenship. Had the Court of Appeal’s position been implemented by legislation, that would have been open to challenge precisely because it would have distinguished among child benefit claimants by giving preferential treatment to those making a claim in relation to a child holding Irish citizenship.

II. RELEVANT LEGAL FRAMEWORK AND PRACTICE

A. Right to equal treatment

40. Article 40.1 of the Constitution provides:

“All citizens shall, as human persons, be held equal before the law.

This shall not be held to mean that the State shall not in its enactments have due regard to differences of capacity, physical and moral, and of social function.”

B. Child benefit

41. In the domestic proceedings, a statement was provided by an official of the Department of Social Protection about the aim of the benefit, set out in this way in the judgment of the High Court:

“8. Child benefit is a payment offered by the State to eligible persons designed to meet some of the expenditure associated with the additional costs incurred in bringing up a child... Currently child benefit is paid to around 610,000 families in respect of some 1.16m children with an estimated expenditure of around €1.9b in 2014.

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

42. Eligibility for child benefit is regulated by the Social Welfare Consolidation Act, 2005, as amended.

43. Section 219 defines a “qualified child” for the purpose of the benefit by reference principally to age and ordinary residence in the State.

44. Section 220 (1) provides that a person with whom a qualified child normally resides “shall be qualified for child benefit in respect of that child”. A recipient of the benefit is known as a “qualified person”. Under sub-section (3), a qualified person must be habitually resident in the State at the date of applying for child benefit.

45. Section 246 contains provisions with respect to habitual residence. It provides at sub-section (5):

“a person who does not have a right to reside in the State shall not, for the purposes of this Act, be regarded as being habitually resident in the State.”

46. Section 246 (6) lists the categories of persons who are to be taken as having a right to reside in the State for the purpose of child benefit. In addition to Irish nationals and nationals of other European Union Member States, the list includes persons granted asylum as well as their family members granted permission to enter and reside with them.

47. Section 246(7) specifies certain categories of person that are not to be considered as being habitually resident in the State for the purpose of child

benefit. The list includes those waiting a decision on an asylum application, and those awaiting a decision on family reunification.

48. Section 246(8) provides, as relevant, that a person granted asylum or permission to enter the State for the purpose of family reunification shall not be regarded as having been habitually resident in the State beforehand.

C. Direct provision

49. In Ireland, State support to those awaiting a decision on an application for asylum or international protection, and who are unable to maintain themselves financially, is available through the direct provision system. Under this system, the State arranges for basic needs to be met directly, providing accommodation, meals, access to free health care, enrolment of children in schools, etc. According to evidence taken by the High Court in this case, the average annual cost of this support to the State at the relevant time was estimated at 12,000 euros per person. In addition to direct support, persons in the system also receive a weekly payment intended to meet incidental expenses. At the relevant time, the rate was 19.10 euros for an adult and 9.60 euros per child. Other discretionary payments could be made to cover exceptional needs, e.g., the purchase of baby equipment, or additional expenses related to child-rearing such as nappies or school uniforms.

D. European Union law

1. Judgment of the CJEU in Ruiz Zambrano

50. In its judgment (C-34/09. EU:C:2011:124), the CJEU held that Article 20 of the Treaty on the Functioning of the European Union, which concerns citizenship, is to be interpreted as meaning that it precludes a Member State from refusing a third country national upon whom his minor children, who are European Union citizens, are dependent, a right of residence in the Member State of residence and nationality of those children, and from refusing to grant a work permit to that third country national, in so far as such decisions deprive those children of the genuine enjoyment of the substance of the rights attaching to the status of European Union citizen.

51. The CJEU reasoned that citizenship of the Union is intended to be the fundamental status of nationals of the Member States. Such a refusal would lead to a situation in which those children, citizens of the Union, would have to leave the territory of the Union in order to accompany their parents. Similarly, if a work permit were not granted to such a person, he would risk not having sufficient resources to provide for himself and his family, which would also result in the children, citizens of the Union, having to leave the territory of the Union. In those circumstances, those citizens of the Union would, in fact, be unable to exercise the substance of the rights conferred on them by virtue of their status as citizens of the Union.

2. *The Qualification Directive*

52. The aforementioned Qualification Directive provides as relevant:

Article 1

Subject matter and scope

“The purpose of this Directive is to lay down minimum standards for the qualification of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted.”

Article 28

Social welfare

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

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

E. European Social Charter

53. The right to equal treatment in social security is provided for in Article 12 of the European Social Charter, which provides as relevant:

“Article 12 – The right to social security

With a view to ensuring the effective exercise of the right to social security, the Parties undertake:

...

4. to take steps, by the conclusion of appropriate bilateral and multilateral agreements or by other means, and subject to the conditions laid down in such agreements, in order to ensure:

a. equal treatment with their own nationals of the nationals of other Parties in respect of social security rights, including the retention of benefits arising out of social security legislation, whatever movements the persons protected may undertake between the territories of the Parties; ...”

The Appendix to the Charter, which forms an integral part of it, provides in relation to Article 12 § 4:

“The words “and subject to the conditions laid down in such agreements” in the introduction to this paragraph are taken to imply *inter alia* that with regard to benefits which are available independently of any insurance contribution, a Party may require the completion of a prescribed period of residence before granting such benefits to nationals of other Parties.”

THE LAW

I. JOINDER OF THE APPLICATIONS

54. Having regard to the similar subject matter of the applications, the Court finds it appropriate to examine them jointly in a single judgment.

II. ALLEGED VIOLATION OF ARTICLE 14 OF THE CONVENTION

55. The applicants complained of a violation of Article 14 of the Convention read in conjunction with Article 8 as well as with Article 1 of Protocol No. 1. These provide, as relevant:

Article 14

“The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.”

Article 8

“1. Everyone has the right to respect for his private and family life, his home and his correspondence.”

Article 1 of Protocol No. 1

“Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.”

A. Admissibility

1. Whether time-limit respected

56. The Government initially submitted that the applicants had failed to respect the time-limit laid down in Article 35 § 1 of the Convention. While the domestic proceedings had ended with the ruling of the Supreme Court on 19 November 2019, the applicants’ forms had not reached the Court’s Registry until 17 June 2020. Subsequently, acknowledging that the time-limit for lodging an application had been exceptionally extended in March and April 2020 by a total of three months due to the Covid-19 pandemic, the Government submitted that it was for the Court to determine whether the applications were admissible in this respect.

57. The applicants contended that the correct starting date for the purposes of Article 35 § 1 of the Convention was not the date of delivery of the Supreme Court’s judgment but the date on which it was perfected, which was 18 March 2020. However, even if it should be the date the Supreme Court

judgment was delivered, the applications could not be regarded as out of time in light of the exceptional measures referred to above.

58. The Court observes that it is the date of delivery of the Supreme Court's judgment that marks the start of the time-limit for filing an application under the Convention (see in this respect *Nash v. Ireland* (dec.), [CTE], no. 1882/18, 17 March 2020, § 73). The time-limit therefore started to run on 19 November 2019 and would normally have elapsed on 19 May 2020. These applications were therefore covered by the exceptional extensions of the time-limit announced as a result of the Covid-19 pandemic (see in this respect *Saakashvili v. Georgia* (dec.), applications nos. [6232/20](#) and [22394/20](#), § 57, 1 March 2022). As the applications were received at the Registry of the Court on 17 June 2020, it follows that they must be regarded as complying with the time-limit then prescribed by Article 35 § 1 of the Convention. To the extent that the Government can be understood to maintain a preliminary objection, it must be rejected.

2. Article 35 § 3(b) of the Convention

59. Article 35 § 3(b) of the Convention provides:

“3. The Court shall declare inadmissible any individual application submitted under Article 34 if it considers that:

...

(b) the applicant has not suffered a significant disadvantage, unless respect for human rights as defined in the Convention and the Protocols thereto requires an examination of the application on the merits.”

60. The Government submitted that the applicants had not suffered a significant disadvantage. They pointed out that following the ruling of the Court of Appeal in favour of the applicants, the authorities had decided, despite the appeal to the Supreme Court and without admitting liability, to pay to the applicants the full sums which they would have received had they been able to fulfil the habitual residence requirement. They explained that as child benefit is payable only from the month following the birth of the qualified child, this meant a payment of 1,620 euros to X in respect of E (instead of the 1,780 euros claimed) and a payment of 945 euros to Y in respect of M (instead of the 1,080 euros claimed). Therefore, despite the fact that their claims were ultimately dismissed by the Supreme Court, the applicants had not in fact incurred any monetary disadvantage whatsoever. Furthermore, any disadvantage had been largely offset by the fact that during the periods in question the applicants had had their essential needs met by the State via direct provision. In light of the careful consideration of the applicants' claims at three levels of jurisdiction, it could not be said that respect for human rights required that the applications be examined on their merits.

61. The applicants maintained that they had suffered a significant disadvantage. The fact that the bulk of the amounts claimed had been paid to them did not amount to a vindication of their rights, as there had been no admission of liability and as their entitlement to backdated child benefit was still denied by the authorities. In the subjective perception of the applicants, the subject-matter of their cases was one of considerable significance. They disputed the relevance of the direct provision system in this respect. They regarded that system not as an additional benefit but no more than the bare minimum that the respondent State was required to provide under its international and EU obligations, and referred to the domestic authorities' own negative assessment of it and plans to radically reform it. In any event, given the universal character of child benefit, which was payable without reference to the recipients' income or resources, direct provision could not be viewed as an alternative form of social transfer. They further argued that their applications raised important questions about the exact nature of child benefit and entitlement to it and underlined the importance of non-discrimination in the field of social security.

62. Moreover, in the applicant's view, respect for human rights required an examination of the merits of their applications, in view of the broader implications for the domestic legal system. They considered that their applications had the potential to serve as test cases that could lead to a change in domestic law and referred to similar cases that were before the domestic courts and that had been adjourned pending the Court's examination of the present cases.

63. In applying this provision of the Convention, the Court has stated that the criterion of no significant disadvantage, which is inspired by the general principle *de minimis non curat praetor*, hinges on the idea that a violation of a right, however real from a purely legal point of view, should attain a minimum level of severity to warrant consideration by an international court. The assessment of this minimum level is, in the nature of things, relative and depends on all the circumstances of the case. The severity of a violation should be assessed taking account of both the applicant's subjective perceptions and what is objectively at stake in a particular case. However, even should the Court find that the applicant has suffered no significant disadvantage, it may not declare an application inadmissible if respect for human rights, as defined in the Convention and the Protocols thereto, requires an examination on the merits, or (prior to the entry into force of Protocol No. 15) if the matter has not been "duly considered" by a domestic tribunal. Following the entry into force of Protocol No. 15, on 1 August 2021, the latter criterion is no longer required, and the Court may declare an application inadmissible on the ground of non-significant disadvantage, even if it has not been duly considered by a domestic tribunal (see *Šeks v. Croatia*, no. 39325/20, § 47, 3 February 2022 and the further references cited therein).

64. The Court observes that the applicants' essential objective, both in the domestic proceedings and in their applications, was to challenge the basis on which they were deemed ineligible for child benefit so as to obtain retrospective payment of that allowance in respect of the relevant periods (see paragraphs 6 and 10 above). Their claims are thus of a pecuniary nature. The fact, which the applicants omitted to mention in their application forms, that the amounts in question were paid in 2018 (paid in full, according to the Government's explanation) means, in the Court's view, that it can be said that the applicants have not suffered a significant disadvantage. This view is further confirmed by the fact that the applicants were not exposed to financial hardship at the material time, as they were in receipt of State support via the system of direct provision.

65. The Court must next determine whether respect for human rights requires an examination of the merits of these applications. It recalls that this would apply where a case raises questions of a general character affecting the observance of the Convention, for instance whether there is a need to clarify the States' obligation under the Convention or to induce the respondent State to resolve a structural deficiency (see *C.P. v. the United Kingdom*, (dec.) no. [300/11](#), § 49, 6 September 2016). There are two considerations that plead in favour of examining these applications. First, in the domestic proceedings references were made to this Court's *Niedzwiecki* judgment (cited above). As that judgment could be regarded as having been superseded by *Beeler v. Switzerland* [GC], no. 78630/12, 11 October 2022, the Court considers that its examination of this case may serve to further clarify the requirements of the Convention regarding this particular area of social welfare. Second, a number of similar applications are currently pending before the Court, awaiting the resolution of the present case. According to the applicants, similar applications have been adjourned at the domestic level pending this Court's ruling on the issues raised. As respect for human rights should be understood as encompassing the good administration of justice by the Court, this is an additional reason to proceed with the examination of these applications. The Government's preliminary objection is therefore rejected.

3. *Applicability of Article 14*

66. The parties made their submissions on the basis that Article 14 was applicable, read in conjunction with both Article 8 of the Convention and Article 1 of Protocol No. 1. However, the issue of the applicability of a Convention provision is one that goes to the jurisdiction of the Court *ratione materiae* and should be addressed at the admissibility stage unless there is a particular reason to join it to the merits (see *P.C. v. Ireland*, no. 26922/19, § 52, 1 September 2022). Seeing no reason in this case to join the issue of applicability to the merits of the complaint, the Court will address it at this stage.

(a) Article 14 read in conjunction with Article 1 of Protocol No. 1

67. As recalled in the *Beeler* judgment (cited above), in the vast majority of cases where the Court has ruled on alleged discrimination in the sphere of entitlement to social welfare benefits, it has concentrated its analysis on Article 1 of Protocol No. 1. That Article places no restriction on the Contracting State's freedom to decide whether or not to have in place any form of social-security scheme, or to choose the type or amount of benefits to provide under any such scheme. However, if a Contracting State has in force legislation providing for the payment as of right of a welfare benefit or a pension, that legislation must be regarded as generating a proprietary interest falling within the ambit of Article 1 of Protocol No. 1 for persons satisfying its requirements, and it must be compatible with Article 14 of the Convention (*Beeler*, cited above, §§ 54-58, with further references).

68. The Court observes that, given its statutory basis and universal character, child benefit is undoubtedly paid as of right to habitually resident parents who fulfil the eligibility criteria. It therefore must be taken as generating a proprietary interest such that it comes within the ambit of Article 1 of Protocol No. 1.

69. It further recalls that, where an applicant complains that he or she has been denied a particular benefit on a discriminatory ground covered by Article 14, the relevant test is whether, but for the condition of entitlement about which the applicant complains, he or she would have had an enforceable right to receive the benefit in question (see *Stec and Others v. the United Kingdom* (dec.) [GC], nos. 65731/01 and 65900/01, § 55, ECHR 2005-X). Both applicants contend that they were discriminated against on the basis of the specific nature of their residence status, in that until such time as they were formally granted the right to reside in Ireland it was impossible for them to be treated as habitually resident there. The Court has previously recognised such a ground – residence/immigration status – as coming under the term “other status” within the meaning of Article 14 (see *Ponomaryovi v. Bulgaria*, no. 5335/05, § 50, ECHR 2011). Consequently, Article 14, read in conjunction with Article 1 of Protocol No. 1, is applicable in the present case.

70. The Court further observes that since, as is clear from the Supreme Court's judgment, it is the parent who is entitled to receive benefit, rather than the child, it is only the applicants X and Y who can rely on Article 14 in conjunction with Article 1 of Protocol No. 1. The child applicants, E and M, cannot point to any proprietary interest in their own right. Therefore, in their regard the complaint of discrimination is incompatible *ratione personae* within the meaning of Article 35 § 3(a) and so must be rejected in accordance with Article 35 § 4 of the Convention.

(b) Article 14 read in conjunction with Article 8

71. The applicants argued that the matter in dispute – eligibility for child benefit – should be treated as within the scope of the “family life” aspect of that provision. As authority for this proposition, they relied in particular on *Niedzwiecki v. Germany*, cited above. As already noted above, this judgment was considered in some detail by both the Court of Appeal and the Supreme Court.

72. However, the Court’s Grand Chamber recently revisited this particular area of case-law in its judgment in *Beeler v. Switzerland* [GC], no. 78630/12, 11 October 2022:

“66. An analysis of the case-law summarised above indicates that the Court has not always been entirely consistent in defining the factors leading it to find that complaints concerning social welfare benefits fell within the ambit of Article 8 of the Convention.

67. The Court notes at the outset that all financial benefits generally have a certain effect on the way in which the family life of the person concerned is managed, although that fact alone is not sufficient to bring them within the ambit of Article 8. Otherwise, all welfare benefits would fall within the ambit of that Article, an approach which would be excessive.

68. It is therefore necessary for the Court to clarify the relevant criteria in order to specify, or indeed to circumscribe, what falls within the ambit of Article 8 in the sphere of welfare benefits.

69. It can also be seen from the case-law summarised above that in the field of social welfare benefits, the sphere of protection of Article 1 of Protocol No. 1 and that of Article 8 of the Convention intersect and overlap, although the interests secured under those Articles are different. In determining which complaints fall within the ambit of Article 8, the Court must redress the inconsistencies noted under Article 8, particularly when read in conjunction with Article 14 of the Convention (...).

It follows that the Court can no longer simply accept either a legal presumption to the effect that in providing the benefit in question, the State is displaying its support and respect for family life (see the case-law cited in paragraph 65 above [*which includes the Niedzwiecki case*]), or a hypothetical causal link whereby it ascertains whether the grant of a particular benefit is ‘liable to affect the way in which family life is organised’.”

It laid out the following approach to be followed (emphasis in the original):

“71. In the context of *Konstantin Markin*, the applicability of Article 14 of the Convention in conjunction with Article 8 stemmed from the fact that the parental leave and the corresponding allowance had “necessarily affect[ed] the way in which [family life was] organised” (compare and contrast the approach followed in the cases referred to in paragraphs 64 and 65 above), both measures having been aimed at enabling one of the parents to remain at home to look after the children (in this case, infants). Thus, a close link between the allowance associated with parental leave and the enjoyment of family life was considered necessary.

72. Accordingly, for Article 14 of the Convention to be applicable in this specific context, the subject matter of the alleged disadvantage must constitute one of the modalities of exercising the right to respect for family life as guaranteed by Article 8 of the Convention, in the sense that the measures seek to promote family life and

necessarily affect the way in which it is organised. The Court considers that a range of factors are relevant for determining the nature of the benefit in question and that they should be examined as a whole. These will include, in particular: the aim of the benefit, as determined by the Court in the light of the legislation concerned; the criteria for awarding, calculating and terminating the benefit as set forth in the relevant statutory provisions; the effects on the way in which family life is organised, as envisaged by the legislation; and the practical repercussions of the benefit, given the applicant's individual circumstances and family life throughout the period during which the benefit is paid."

73. As regards the aim of the child benefit under domestic law, the Court notes from evidence that was placed before the domestic courts (see paragraph 41 above) that it is essentially a financial contribution by the State to parents, or persons *in loco parentis*, to meet some of the costs of child-raising. Part of a wider system of social support benefitting families with children, it is a universal benefit, in the sense that it is paid at the same rate to all recipients, regardless of their means. Other, more targeted family benefits are also available to those fulfilling the specific conditions of eligibility (see the examples mentioned at paragraph 41 above). The Court further notes the comments of the Supreme Court (see paragraph 27 above), finding that the adult recipient may freely dispose of the benefit, there being no requirement that it be used solely and exclusively, directly or indirectly, for the benefit of the qualified child.

74. Judged by the criteria set down in *Beeler*, the Court cannot conclude that this payment falls within the scope of Article 8 of the Convention. It cannot be said that, beyond having *an effect* on family life, its intended purpose is to "promote family life and necessarily affect the way in which it is organised". While there is little basis to compare the facts of this case with those of the *Beeler* case, in which the significance for that applicant's family life of the benefit in question (survivor's pension) that was paid to him over a lengthy period could be assessed, the Court does not consider that child benefit would or could have been of such significance that the applicants would – as in *Beeler* – have organised the key aspects of their daily life, at least partially, on the strength of it (*Beeler*, cited above, §§ 77-80). Moreover, regard has to be had to the actual circumstances that the applicants were in during the period in question, which was, it must be emphasised, a relatively short one (just over a year for X and E, and eight months for Y and M). Although not eligible to claim child benefit during the respective periods, both mothers were accommodated with their children and received material support from the State until their immigration status was positively determined, at which point they became eligible for and began to receive the benefit in question. While no doubt a very welcome contribution towards the costs of child-raising, the Court cannot conclude that child benefit, given the assessment by the Supreme Court of its statutory basis, nature and purpose, represented for the applicants one of the modalities of exercising the right to respect for family life as guaranteed by Article 8 of the Convention (compare

with the Court's application of the *Beeler* criteria to a different type of social security benefit in *Berisha v. Switzerland* (dec.), no. 4723/13, §§ 40-45, 24 January 2023).

75. It follows that the matter complained of by the applicants does not come within the ambit of Article 8 of the Convention. To this extent, their complaint under Article 14 is incompatible *ratione materiae* with this provision within the meaning of Article 35 § 3(a) and so must be rejected in accordance with Article 35 § 4 of the Convention.

B. Merits

1. *The parties' submissions*

(a) The applicants

76. With respect to X, it was argued that the facts of her case showed that the habitual residence test was not applied equally to all child benefit claimants, since it was contingent on the claimant parent's right to reside in the State. Claimants with Irish citizenship automatically enjoyed this right, whereas for X, who was *de facto* resident in Ireland, a positive decision from the Minister was required, even though it was clear that she had the right to reside with her daughter from birth onwards on the basis of the *Zambrano* case-law. She had therefore experienced differential treatment compared to other claimants with stable residency based on citizenship or on some form of permission to reside in the State.

77. With respect to Y, it was argued that she too had been subjected to differential treatment on account of her unstable residency status at the time. This was particularly important given that her own application for international protection had been refused although M's had been granted.

78. The applicants thus contended that the case of *Niedzwiecki v. Germany*, which concerned Article 8 read in conjunction with Article 14 of the Convention, was highly relevant to their own circumstances. In that case the Court had found that the distinction made in German law between different groups based on the stability of their residence was contrary to Article 14; the impugned distinction in the present case was also based on stability of residence. While domestic law required them to have been formally granted the right to reside in the State, each applicant had been lawfully present in the State at the time of applying for child benefit. X considered that in light of the *Zambrano* case-law she had had an "unstable" right of residence at the relevant time. Both applicants maintained that although their lawful presence in the State during the time that their respective applications were being considered by the Minister did not equate to a right to reside within the meaning of the 2005 Act, it should, for the purposes of Article 14, be treated as a form of residence permission, comparable to the other, recognised forms.

79. The applicants maintained that difference in treatment in terms of eligibility for child benefit did not pursue any legitimate aim. It could not be justified by a concern for public finances, given the very small number of persons affected compared to the overall number in receipt of the benefit (610,000 recipients in respect of 1.16 million children). Nor could the differential treatment be justified by the respondent State's objective of controlling migration and making different provision for those awaiting permission to reside in the country. Neither X nor Y typified the phenomenon of persons entering the country illegally and seeking to exploit its social welfare system. Both had initially been *bona fide* applicants for international protection, and each had been granted residence on account of the legal status of their respective children.

80. The applicants further submitted that the impugned restriction could not be regarded as proportionate. The fact that they were eventually deemed to qualify for child benefit did not alleviate the discrimination they had experienced. Nor did the fact that they had received material support via the direct provision system, as this was simply a form of discretionary aid, whereas child benefit was an entitlement.

81. While accepting that the respondent State had a margin of appreciation regarding the creation of social welfare benefits, the applicants argued that this could not justify the adoption of laws or practices contrary to the prohibition of discrimination.

(b) The Government

82. The Government pointed out that all claimants of child benefit were subject to the requirement of habitual residence in the State, Irish citizens included. Therefore, X and Y had not been subjected to differential treatment in this respect, compared to other claimants of the benefit. The fact that the requirement had led to a different outcome for them, pending resolution of their claim of a right to reside in the State, was not constitutive of discrimination.

83. In the Government's view, the *Niedzwiecki* case had to be distinguished from the present one, as the matter at issue there was a difference in treatment between non-nationals with and without stable residence in Germany, who were in an analogous position with respect to child benefit. As held by the Supreme Court in the domestic proceedings, a different distinction was at issue here, one between those who were entitled to reside in Ireland, on whatever basis, and those who were not. These two groups were not in an analogous situation. Replying to the applicants' argument that X and Y were lawfully present in State and that this should be viewed as a form of residence status, the Government emphasised that factual residency alone was not sufficient to qualify for child benefit. They rejected X's argument based on the *Zambrano* case-law, arguing that it did not generally imply the automatic granting of resident rights. Rather it had to be

shown that the refusal of such rights would deprive an EU citizen child of genuine enjoyment of the substance of the rights attached to that status, and Ireland was entitled to have a system in place to give proper consideration to applications for the right to reside made on this basis. They noted that X had not in fact made such an application until September 2015, which had been granted in January 2016, leading to her eligibility for child benefit. As for Y, the refusal of child benefit until she was granted the right to reside in Ireland was in no way contrary to the relevant international or EU law.

84. Even were it to be assumed that there had been a difference in treatment, the Government argued that this was objectively and reasonably justified and was proportionate. It was justified for a State to make habitual residence a condition of entitlement for benefits in order to preserve the limited resources available for funding its social welfare system. In this way, financial support from the State was limited to those who lived there and contributed to its economic and social life. The link between residence and eligibility was a firmly embedded feature in modern social security systems, as had been recognised in the Court's case-law.

85. The State was also entitled to require that claimants have the right to reside there, given its broader power, also recognised in the Court's case-law, to control migration. It followed that Ireland was entitled to decide how to provide for those awaiting a decision on their application to reside in the State. Once this had been granted, eligibility for child benefit followed, granted on an equal footing with all other eligible claimants, as shown by the facts of both applications. The domestic courts had recognised that the residence requirement served an important public policy by deterring unfounded asylum claims and uncontrolled immigration. These aims were pursued by s. 246(5) of the 2005 Act. As those seeking residence might indeed be successful in their application, and then qualify for child benefit, this showed that there was a reasonable relationship of proportionality between the means – the residence condition – and the abovementioned aims. Furthermore, the impact on the applicants of their non-eligibility for child benefit had been significantly reduced by the support provided to them in the direct provision system and the availability of payments to cover exceptional needs. Accordingly, any difference of treatment was objectively and reasonably justified and did not run counter to Article 14.

86. The Government further submitted that in view of the subject-matter of the case, which had very significant implications for the limited resources of the State, it would be appropriate to allow a wide margin of appreciation. This was particularly so in view of the fact that residency requirements were a common feature of social welfare systems in Europe and were important for preserving their funding basis. They rejected the applicant's suggestion that their claims would represent a negligible increase in the overall cost of the child benefit scheme. On the contrary, their claim of discrimination, if upheld, could have very significant and far-reaching financial consequences for the

State. Furthermore, if it were not permissible under the Convention for States to limit social welfare benefits to those lawfully and habitually resident, this could encourage uncontrolled migration leading to an ever-greater burden on public finances.

2. *The Court's assessment*

87. The Court notes by way of preliminary observation that while the parties submitted observations in relation to Article 14 taken in conjunction with both Article 8 and Article 1 of Protocol No. 1, it is only the complaint regarding the latter provision that has been deemed admissible (see paragraphs 69 and 75 above). As indicated above (see paragraph 68), child benefit is payable pursuant to the relevant provisions of domestic law and generates a proprietary interest such as to bring it within the scope of Article 1 of Protocol No. 1 as regards the parents to whom the benefit is payable.

88. The complaint of X and Y is that, given their status and circumstances at the material time, to deny them child benefit on the basis that they did not then have a right to reside in the State was discriminatory.

89. The Court refers to the general principles relating to Article 14, as recently reiterated in *P.C. v. Ireland*, [cited above](#), §§ 66-72 and the authorities cited therein.

90. In accordance with that case-law, it must first establish whether X and Y were in an analogous or relevantly similar position to persons who had the right to reside and were therefore capable of being habitually resident in the State within the meaning of the 2005 Act and thus eligible for child benefit.

91. X made the argument that, by virtue of the *Zambrano* case-law of the CJEU, from the day her daughter was born she had a right derived from primary EU law to reside in Ireland, placing her in an essentially similar position to other categories who enjoyed a right to reside on other legal grounds.

92. The Court emphasises that, under the terms of Article 19 and Article 32 § 1 of the Convention, it is not competent to apply, or examine alleged violations of EU rules unless and in so far as they may have infringed rights and freedoms protected by the Convention. More generally, it is primarily for the national authorities, notably the courts, to interpret and apply domestic law, if necessary in conformity with EU law, the Court's role being confined to ascertaining whether the effects of such adjudication are compatible with the Convention (see *Jeunesse v. the Netherlands* [GC], no. 12738/10, § 110, 3 October 2014).

93. The Court can therefore only note that X's claim to a pre-existing or subsisting right of residence on this basis was considered at length by the Supreme Court. The latter clarified that, as a matter of EU law, a parent's entitlement to residence in a Member State, on *Zambrano* grounds, could be subject to an application to the relevant authority, which must have the

opportunity to consider such application. It found no basis in relevant EU law for the proposition that upon granting a right to reside in such circumstances all residence-related benefits must be awarded retrospectively (i.e., backdated to the date on which the basis for claiming a right of residence materialised). It further held that the precise nature of the claim involved – backdated child benefit – was not such as to bring the case within the scope of the *Zambrano* case-law, there having been no risk of the denial of that claim leading to the child losing the benefits of her citizenship of the European Union. The Court sees nothing in that reasoning that could be taken as infringing any right or freedom of X’s under the Convention or producing any effect incompatible with it.

94. As recently stated by the Grand Chamber (*Advisory opinion on the difference in treatment between landowners’ associations “having a recognised existence on the date of the creation of an approved municipal hunters’ association” and landowners’ associations set up after that date* [GC], request no. P16-2021-002, French *Conseil d’État*, § 64, 13 July 2022):

“The national authorities, and particularly the domestic courts, are in principle best placed to assess, on the basis of the information provided by the appellant and other evidence submitted by the parties in the context of adversarial proceedings in the case, whether or not several persons or several categories of persons are in [analogous or relevantly similar] situations.”

In light of the Supreme Court’s assessment of her legal situation at the material time (see paragraphs 30 and 39 above), the Court can conclude that X did not then hold a status akin to that of legal residence, and so she was not in a relevantly similar position, in terms of legal status, to her chosen comparators, i.e., parents with a legal right to reside in Ireland. As for Y, the Supreme Court noted that prior to the Minister’s decision on her application for family reunification with her son, she did not have residence rights in the State (see paragraph 33 above). It follows that she too was not in a relevantly similar position to the same chosen comparators. Accordingly, this case must be distinguished from the *Niedzwiecki* case, where it was implicitly accepted that the applicant was in an analogous position to his chosen comparators, and that the impugned difference in treatment related to that (i.e., to the type of residence permit held – see § 33 of that judgment).

95. The question then arises whether the applicants can claim, on some other basis, to be in a relevantly similar position to persons enjoying a right of residence in Ireland, taking into account the legal and factual elements that characterise their circumstances in the particular context. As the Court has stated “[t]hese elements must be assessed in the light of the subject matter and purpose of the measure which makes the distinction in question and the context in which this measure is imposed” (Request no. P16-2021-002, cited above, § 67; see also *Fábián v. Hungary* [GC], no. 78117/13, § 121, 5 September 2017). As the Grand Chamber has further stated (Request P16-2021-002, cited above, § 69):

“In assessing the comparability of situations, it is appropriate to consider them in their totality and to avoid singling out marginal aspects, which would lead to an artificial analysis.”

96. The subject-matter at issue in this case is entitlement to a universal (i.e., non-means tested) statutory social welfare benefit payable to all parents who satisfy the eligibility criteria, including the criterion of residence, which has a legal element (right to reside) and a factual element (habitual residence).

97. In its case-law the Court has noted that “the essentially national character of the social security system is itself recognised in the relevant international instruments” (*Carson and Others v. the United Kingdom* [GC], no. 42184/05, § 85, ECHR 2010). While the issue in that particular case was quite different, namely whether it was discriminatory to exclude from the uprating of the State pension those pensioners who were resident in third countries that had not concluded social security agreements with the United Kingdom, the point made about the essentially national character of social security systems is of broader application. This is also reflected in the fact that, under the European Social Charter States, may require not just residence but also a prescribed period of residence (see paragraph 53 above) before granting non-contributory benefits to those entitled to equal treatment in relation to social security.

98. As for the purpose of the impugned measure, this can be described as defining the category of persons who may claim child benefit. While the applicants complain of the exclusionary effect for them, during the period in question, of the criterion of lawful residence, the Court observes that this criterion is a necessary corollary of the essentially national character of social security systems, as outlined above. Moreover, it can be said that this criterion has an inclusionary effect inasmuch as it broadens entitlement to child benefit so as to include not just Irish nationals or those benefitting from specific forms of residence (such as EU nationals exercising freedom of movement), but the entire resident population. Both Supreme Court judgments emphasised the neutral and non-discriminatory nature of the criterion of lawful residence, and its effect of making a wide range of people resident in the State on various bases equally eligible for the benefit sought (see paragraphs 28-30 and 36-38 above).

99. Turning to the context, the Court observes that the general context of this case is that of immigration policy. In this respect, the Court has often affirmed that a State is entitled, as a matter of well-established international law and subject to its treaty obligations, to control the entry of non-nationals into its territory and their residence there (see among many authorities *Jeunesse*, cited above, § 100). In addition to this general context, the applicants’ particular context should also be considered. Each of them claimed child benefit at a time when their personal immigration status had yet to be determined, and when their essential material needs were being met through the system of direct provision. Their immigration status changed with

the grant of residence rights within a relatively short time – a matter of months in each case. Leaving aside the payment in their particular cases of the benefit claimed following the judgment of the Court of Appeal, which was subsequently overturned, with this change of legal status came immediate entitlement to child benefit, which they began to receive from that point in time onwards.

100. In view of the above, the Court is unable to find that the legal and factual elements characterising the applicants' situation at the time they first applied for child benefit, considered in their totality and in context, were such as to place them in a relevantly similar situation to persons who already had the status of legal resident in Ireland. As stated above (see paragraph 67 above), the conditions for receipt of a social welfare benefit that comes within the ambit of Article 1 of Protocol No. 1 must be compatible with Article 14 of the Convention. That presupposes, however, that the requirement of comparability is met by the claimant, which it has not been by the present applicants.

101. The Court concludes that in the circumstances of this case no issue of difference of treatment arises under Article 14. There has therefore been no violation of that provision.

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Decides* to join the applications;
2. *Declares* the complaint concerning Article 14 of the Convention read in conjunction with Article 1 of Protocol No. 1 admissible in relation to applicants X and Y and the remainder of the applications inadmissible;
3. *Holds* that there has been no violation of Article 14 of the Convention read in conjunction with Article 1 of Protocol No. 1.

Done in English, and notified in writing on 22 June 2023, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Victor Soloveytschik
Registrar

Lado Chanturia
President