The right to reside and entitlement to social welfare in the case of refugees and Zambrano carers

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This article examines the right of refugees and persons with Zambrano status to social welfare payments subject to the habitual residence condition (HRC) under Irish law. It examines the legal principles involved under the Geneva Convention (arts 23 and 24) and under EU law as they apply in Irish law. It make reference to a number of recent decisions by the Irish courts on this issue;¹ and also to the (rather more coherent) analysis of related issues in a number of recent UK rulings.² The note considers a number of topics: (i) whether refugees are entitled to backdated social welfare benefits prior to the declaration of refugee status; (ii) whether Zambrano carers are entitled to social welfare benefits; and (iii) whether the habitual residence condition is discriminatory.

The law

Refugee status

Our understanding of refugee status is derived from the UN Convention relating to the Status of Refugees of 1951 (the Geneva Convention). This is implemented in Irish law by the Refugee Act 1996 (as amended). It is well-settled in international law that refugee status arises at the time of the events giving rise to that status and that a subsequent declaration of refugee status by the relevant national authorities is a recognition of an existing status and not the ‘granting’ of a new status.

Thus, the UN High Commission on Refugees has stated that

a person is a refugee within the meaning of the 1951 Convention as soon as he fulfils the criteria contained in the definition. This would necessarily occur prior to the time at which his refugee status is formally determined. Recognition of his refugee status does not therefore make him a refugee but declares him to be one. He does not become a refugee because of recognition, but is recognised

¹ Agha & Osina ga v Minister for Social Protection [2017] IEHC 6; D.N. -v- Chief Appeals Officer [2017] IEHC 52. In the latter case (which concerned subsidiary protection), White J followed his ruling in Agha & Osinuga but held that there had been inordinate delay in considering the subsidiary protection application in D.N. (relying on the conclusions of Advocate General Bot in Case C-277/11, M.M. v. Minister for Justice, Equality and Law Reform EU:C:2012:253 at [113]-[115]). He concluded the delay had been in breach of the applicants’ rights under EU law, and the Constitution and ordered compensation to be paid (presumably by the Minister for Justice and Equality who was responsible for the delay). As it does not concern social welfare law, this aspect of the case is not considered further here.

because he is a refugee.  

The Refugee Act 1996 does not specifically refer to the issue but this position has been confirmed by the Irish High Court in D. (a minor) v Refugee Applications Commissioner where Cooke J stated that

The determination of an asylum application does not have as its purpose or outcome the discretionary grant or refusal of refugee status . . . . . An asylum seeker is a refugee as and when the circumstances defined in the Geneva Convention arise and apply. The determination of the asylum application is purely declaratory of a pre-existing status.

Therefore, the key question on this issue should be, as the Upper Tribunal put it in Blakesley, ‘whether that status can stretch back so as to access other legal entitlements’ which ‘has to depend upon the terms of international legal instruments under which those entitlements are conferred and their enforceability’.  

**Geneva Convention and rights to welfare**

Article 23 of the Geneva Convention (which concerns ‘public relief’) specifically provides that

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.

Article 24 (which concerns labour laws and social security) states

1. The Contracting States shall accord to refugees lawfully staying in their territory the same treatment as is accorded to nationals in respect of the following matters:

    ....

    (b) Social security (legal provisions in respect of employment injury, occupational diseases, maternity, sickness, disability, old age, death, unemployment, family responsibilities and any other contingency which, according to national laws or regulations, is covered by a social security scheme), subject to the following limitations:

    (i) There may be appropriate arrangements for the maintenance of acquired rights and rights in course of acquisition;

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And see recital 14 of the EU Qualification Directive: ‘The recognition of refugee status is a declaratory act.’

4 D. (a minor) v Refugee Applications Commissioner [2011] IEHC 33 at [58].

5 HB v Secretary of State for Work and Pensions [2013] UKUT 433 at [28] (the initial ruling in Blakesley). The High Court in Agha did not explicitly discuss the issue as to when a refugee becomes a refugee.
(ii) National laws or regulations of the country of residence may prescribe special arrangements concerning benefits or portions of benefits which are payable wholly out of public funds, and concerning allowances paid to persons who do not fulfil the contribution conditions prescribed for the award of a normal pension.

Section 3 of the Refugee Act, 1996 - presumably with a view to implementing these provisions - provides

(1) ... a refugee in relation to whom a declaration is in force shall be entitled to the same rights and privileges as those conferred by law on persons generally who are not Irish citizens (as distinct from such rights or privileges conferred on any particular person or group of such persons).

(2) (a) Without prejudice to the generality of subsection (1), a refugee in relation to whom a declaration is in force—

... 

(ii) 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 ... 6

Zambrano status

The meaning of Zambrano status is helpfully set out by Lady Justice Arden in Sanneh:

The key feature of Zambrano carers is that they are a group created by EU law and having rights under EU law. They are called ‘Zambrano carers’ after the decision of the Court of Justice of the European Union in Case-34/09 Zambrano.7 That established that, if a member state of the EU refused to grant a right of residence to a [third country national] TCN with dependent EU citizen children in the member state of which those children are nationals and in which those children reside, and that refusal would mean that the children would be deprived of ‘the genuine enjoyment of the substance’ of their EU citizenship rights by having to move out of the EU, the member state could not take measures that have the effect of refusing a right of residence in those circumstances. ... The rights of the Zambrano carer are derived from the EU citizenship rights of the child for whom she cares.8

Unlike Ireland, the UK has now enacted legislation concerning access to benefits for such carers. In short, they are not entitled to general non-contributory benefits such as income support, child benefit and housing benefit but may be eligible for discretionary local authority support under the Children’s Act, 1989. The issue in H.C. was whether this was compatible with EU law.

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6 S. 3(2)(b) provides that ‘In paragraph (a) “social welfare benefits” includes any payment or services provided for in or under the Social Welfare Acts, the Health Acts, 1947 to 1994, and the Housing Acts, 1966 to 1992.’
7 EU:C:2011:124.
8 Sanneh at [3].
**EU law**

It is also necessary to refer to EU legislation on asylum seekers, refugees and international protection. The European Union has adopted a number of such directives including the Reception Directive, the (inaptly named) Qualification Directive, the Procedures Directive,9 Council Regulation 343/2003 (commonly known as Dublin II), and the Eurodac Regulation.10 However, Ireland did not opt-in to the Reception Directive which does not, therefore, apply in this jurisdiction. As the Court of Appeals (perhaps somewhat optimistically) said in *Blakesley*, these instruments

required the member states of the European Union to adopt a common approach to the allocation of asylum claims between member states, the processing of such claims, the treatment of asylum seekers and the treatment of refugees.11

The Reception Directive sets out minimum standards for the reception and treatment of asylum seekers.12 Although, it does not apply here it is worth noting its approach in order to see the contrast with the Qualification Directive which does so apply. In particular art. 17 sets out rules on material reception conditions and health care. Article 17(5) provides that

Where Member States provide material reception conditions in the form of financial allowances or vouchers, the amount thereof shall be determined on the basis of the level(s) established by the Member State concerned either by law or by the practice to ensure adequate standards of living for nationals. Member States may grant *less favourable* treatment to applicants compared with nationals in this respect ... .

The Qualification Directive sets out common criteria for determining who qualifies as a refugee.13 It also sets out the level of benefits which should be available to

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11 *Blakesley* at [49]. Or, at least seek to ensure some element of commonality and co-ordination.


persons who do qualify as refugees or beneficiaries of subsidiary protection. Article 28 of the Qualification Directive states that

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.

Recitals 33 and 34 provide that

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

With regard to social assistance and health care, the modalities and detail of the provision of core benefits to beneficiaries of subsidiary protection status should be determined by national law. The possibility of limiting the benefits for beneficiaries of subsidiary protection status to core benefits is to be understood in the sense that this notion covers at least minimum income support, assistance in case of illness, pregnancy and parental assistance, in so far as they are granted to nationals according to the legislation of the Member State concerned.

### Habitual residence and the right to reside

Finally, we look at relevant national law. A habitual residence condition (HRC) was introduced for many social welfare payments in Ireland in 1994 and in 2009 a right to reside (RtR) test was introduced as part of the HRC. While these two concepts are logically distinct, it is important to emphasise that the RtR forms part of the overall habitual residence condition so that a person cannot be habitually resident in Ireland if she does not have a right to reside there (as defined in the Social Welfare Acts). In the Social Welfare (Consolidation) Act, 2005 as amended (the Act), the individual chapters concerning entitlement to specific benefits to which the HRC applies will contain a clause requiring that, to be entitled to the specific payment, a person must be habitually resident in Ireland.

The definition of habitual residence is set out in s. 246. S. 246 (5) of the Act now states that ‘a person who does not have a right to reside in the State shall not, for protection, and for the content of the protection granted (recast). However, Ireland and the UK have opted out of this new Directive (or more correctly not opted-in).

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Note that White J’s statement in Agha that ‘Habitual residence is a prerequisite for all social welfare entitlements in Ireland irrespective of the status of the applicant’ (at [65]) is incorrect.

In that one might be habitually resident in a country (in the ordinary sense of the words) without having a right to reside and vice-versa.

See, for example, s. 220(3) on child benefit.
the purposes of [the] Act, be regarded as being habitually resident in the State.’ S. 246(6) goes on to list various categories of persons – including Irish citizens, a person who has a right to enter and reside in the State under various EU laws, and refugees in respect of whom a declaration of refugee status is in force – who are to be taken to have a right to reside in the State. Clearly this is not a complete list and, in particular, the Court of Justice has established that persons have a right to reside in EU law in a number of situations not listed in s. 246(6).\(^\text{17}\) However, as long as such persons have a right to reside it is arguable that they should not be excluded by s. 246(5).

Conversely, s. 246(7) provides that various persons shall not be regarded as being habitually resident in the State for the purpose of the Act. Note that this applies to habitual residence in general and does not relate only to rights of residence. These include asylum seekers in respect of whom a declaration of refugee status has not (yet) been granted (s. 246(7)(a)).\(^\text{18}\)

Finally, s. 246(8) provides that, in a number of circumstances, persons are not be considered as habitually resident prior to certain dates. In particular, a person who is given a declaration that he or she is a refugee under section 17 of the Refugee Act of 1996 is, nonetheless, not to be regarded as being habitually resident in the State for any period before the date on which the declaration was given.

The HRC also applies to Irish citizens so there is no necessary inconsistency between s. 246 of the Act and s. 3(2) of the Refugee Act (which requires equality of treatment with Irish citizens) and, in any case, one would assume that the interpretative maxim of *generalia specialibus non derogant* applies, i.e. the provisions of a general statute must yield to those of a special one.

Unlike UK law, Irish social welfare law makes no specific reference to *Zambrano* carers.

**Legal issue 1: The entitlements of refugees to social welfare**

Once a person is declared to be a refugee by the Irish authorities that person has a right to reside in Ireland (unless and until such status is revoked) and would, therefore, be entitled to social welfare payments (subject to satisfying the other qualification conditions). Therefore, the main point at issue is the backdating of

\(^{17}\) The scope of the right to reside under EU law has been developed through the case law of the CJEU and is not always easy to define. See, for example, Case C-200/02 *Zhu and Chen* [2004] ECR 1-9925; and, of course, Case C-34/09 *Ruiz Zambrano* ECLI:EU:C:2011:124. The complexities of EU law concerning the scope of the right to reside are well illustrated in the Irish decision of *O.A v Minister Justice, Equality & Defence* [2014] IEHC 384 in which Barr J held that the Kenyan mother of an EU child had the right to reside and work in Ireland as the primary carer of the child on the basis of EU law. See also Case C-507/12, *San Prix* ECLI:EU:C:2014:2007 in which the CJEU ruled that a woman who gives up work, or seeking work, because of the physical constraints of the late stages of pregnancy and the aftermath of childbirth retains the status of ‘worker’, and, therefore a right to reside, provided she returns to work or finds another job within a reasonable period after the birth of her child.

\(^{18}\) This reverses a decision by the chief appeals officer to the effect that an asylum seeker could be considered to be habitually resident. See the discussion in Bob Clark’s note on the Social Welfare and Pensions (No.2) Act 2009 in the *Irish Current Law Statutes Annotated*. 
social welfare benefits for the period during which the person was resident in Ireland but had not yet been recognised as a refugee.

It is clear that, in Irish law, s. 246(8) (which provides that a refugee shall not be regarded as being habitually resident in the State for any period before the date on which the declaration was given) prevents any entitlement to a relevant social welfare payment arising.\textsuperscript{19} Even if the Refugee Act, 1996 must be interpreted (in the light of the interpretation of the Geneva Convention) as meaning that a refugee is a refugee prior to the declaration of that status, this cannot effect the interpretation of the clear provisions of social welfare law.

The Geneva Convention is incorporated into Irish law, as noted above, by the Refugee Act, 1996. Arguably s. 3(2) (and the relevant provisions of the Social Welfare Acts) may result in an imperfect implementation of articles 23 and 24 of the Geneva Convention but, even if this is the case, the Irish law is clear and is not overridden by an interpretation of an international agreement.\textsuperscript{20}

However, the question arises as to whether this is affected by EU law, specifically the Qualification Directive, which is binding in Irish law (at least insofar as the specific provisions have direct effect). The argument would be that the Directive, as interpreted in the light of the Geneva Convention, requires equal access to social security and social assistance;\textsuperscript{21} the relevant provision of the Directive has direct effect in Irish law; and, therefore, back payment of social welfare payments is required by EU law.

It is, therefore, necessary to consider a number of legal questions. First, does the Geneva Convention require backdating of benefits? Second, if so, is this given direct effect in national law by way of the EU Qualification Directive or, alternatively, does the wording of the EU Directive itself require backdating of benefits (which includes the issue as to whether Art 28 of the Qualification Directive is sufficiently precise to have direct effect)?

\textit{Does the Geneva Convention require backdating of benefits?}

The first question was considered by the English Court of Appeal in \textit{Blakesley} and its approach was followed (in a certain way) by White J in \textit{Agha}. Lord Jackson for the Court in \textit{Blakesley} pointed out that Article 23 of the Geneva Convention (which was

\textsuperscript{19} Even in the absence of this specific provision, it seems unlikely that an asylum seeker would be considered to have a right to reside in Ireland as opposed to being entitled to ‘lawfully stay’ in Ireland - an issue discussed below. It is submitted that the view taken by the English Court of Appeal that lawful presence is not sufficient to constitute a ‘right to reside’ is correct: \textit{Abdirahman v Secretary of State for Work and Pensions} [2007] EWCA Civ 657.

\textsuperscript{20} \textit{Kavanagh v Governor of Mountjoy Prison} [2002] IESC 13. This is also the case in UK law. The issue is not expressly discussed by the Court of Appeal but see \textit{HB v Secretary of State for Work and Pensions} [2013] UKUT 433 at [29].

\textsuperscript{21} This is either because (i) the terms of the Directive itself so require; or (ii) the Geneva Convention so requires (arts. 23 and 24) and the Qualification Directive is part of a policy ‘based on the full and inclusive application’ of the Geneva Convention: see recital (2) to that Directive.
applicable in that case) refers to ‘refugees lawfully staying in their territory’.\textsuperscript{22} He noted that this was in contrast to some other provisions of the Convention which simply refer to refugees without any reference to the lawfulness of their stay (e.g. Art 22 concerning education). The UK Supreme Court had previously ruled that ‘lawfully’, in this context, means lawful according to the domestic law of the contracting state, and that, under UK domestic law, a refugee was only lawfully in, or staying in, the UK once she had been granted leave to enter or remain here.\textsuperscript{23} Ms. Blakesley had not been granted such leave until she had been recognised as a refugee.\textsuperscript{24}

Lord Jackson held that under UK law, an asylum seeker’s presence in the UK was ‘tolerated’ but she would not be considered to be ‘lawfully staying’ in the UK unless and until her refugee status was recognised.\textsuperscript{25} He did not see any reason why the Convention should require the backdating of the lawfulness of stay and, in particular, did not see not see ‘how it serves the broad humanitarian aims of the Geneva Convention to pay to the appellant a large lump sum representing historic accumulated income support’.\textsuperscript{26} The general approach of the Court of Appeal would appear to be correct. Therefore, the issue in Irish law is whether an asylum seeker is ‘lawfully staying’ in the State prior to the declaration of refugee status.\textsuperscript{27}

It should be emphasised that this issue was clear in UK law and was not in dispute in Blakesley (as noted above) so it was not necessary for the Court of Appeal to consider the broader argument that article 23 and 24 only apply to refugees recognised as such. The issue does not appear to have been directly considered by the Irish courts but in \textit{N.H.v.}, McDermot J. stated that, in the context of similar wording in Chapter 3 of the Geneva Convention (concerning employment), the term ‘refugee lawfully staying’ applied only after the declaration of such status. He stated

\ldots Chapter 3 of the Geneva Convention of 1951, in respect of ‘gainful employment’ \ldots provides at Article 17 that the contracting state shall accord to refugees lawfully staying in their territory the right to engage in wage earning employment and also the rights under Articles 18 and 19 to engage in ‘self employment’ and the ‘liberal professions’. The Convention does not contain any provision regarding access to the labour market during the asylum process, nor did the state assume any obligation in that regard under the Convention.\textsuperscript{28}

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\textsuperscript{22} At [32]-[33].
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\textsuperscript{23} \textit{R(ST) v Secretary of State for the Home Department} [2012] UKSC 12.
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\textsuperscript{24} \textit{H.B.} at [33].
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\textsuperscript{25} At [41]. This was a narrower holding than appears to have been argued for by the Secretary of State who took the view that the term ‘refugees lawfully staying in their territory’ only applied to person recognised as refugees (at [27]). The implications of the Secretary’s approach would appear to be that even if an asylum seeker was lawfully staying in the UK, Article 23 would not apply. The Court did not find it necessary to comment on this approach.
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\textsuperscript{26} At [42].
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\textsuperscript{27} It would of course be open to the legislature to amend this to bring Irish law into line with the UK.
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\textsuperscript{28} \textit{N.H.v. & Anor -v- The Minister for Justice and Equality} [2015] IEHC 246 at [17].
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This statement was approved by Hogan J (dissenting) on appeal although he would have found such a restriction to be unconstitutional. However, it is not clear that the question of the meaning of the term ‘refugee lawfully staying’ in Irish law was directly addressed in that case and the statements are clearly _obiter._

The issue of whether an asylum seeker is ‘lawfully staying’ in Ireland also does not yet appear to have been specifically considered by the Irish courts. S.9 of the Refugee Act, 1996 states that an asylum seeker ‘shall be given leave to enter the State’ and ‘shall be entitled to remain in the State’ until her asylum application is transferred to another country, withdrawn or rejected. This would appear to indicate that an asylum seeker’s stay in Ireland is lawful.

In _Agha_, White J unfortunately confused rather than clarified the issue. He referred to the case of _B.K. v Minister for Justice Equality and Law Reform_ which he said had ‘obliquely’ addressed the issue. That case concerned a refugee who claimed that time spent in Ireland as an asylum seeker should be considered as residence for the purposes of an application for citizenship under the Irish Nationality and Citizenship Acts 1956-2004 (INCA). The case thus concerned _residence_ under the Irish Nationality and Citizenship Acts (which includes specific provisions restricting the concept of residence to a person ‘entitled to reside in the State without any restriction on his or her period of residence) and not the lawfulness of an asylum seeker’s stay in the State.

Feeney J in that case did state that

> The provisions of the [Refugee] Act are such that a person who is found to be a refugee does not have the benefits of refugee status backdated under the Act ...

However, even if Feeney J meant this to be a general statement of the law rather than simply in relation to the facts of the specific case (which is unclear from the context), he was clearly speaking _obiter._

Thus while decisions both here and in the UK leave open the possibility that the Geneva Convention _may_ require backdating of benefits if a refugee has been ‘lawfully staying’ in the country during her period as an asylum seeker, it would appear that the tendency of the Irish courts (albeit _obiter_ or, most recently, _per incuriam_) has been to reject this argument. Even if this argument was accepted, it would not directly benefit a refugee as the Geneva Convention has no direct effect in Irish law.

**Is backdating required by the EU Qualification Directive?**

We turn, therefore, to the second question: viz. is backdating of benefits required by the EU Qualification Directive. In particular, assuming for the sake of argument that

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31 See s. 5A(2)(d) of the INCA. _CHECK_

32 _B.K._ at [10].
backdating is required by the Geneva Convention, is this given direct effect in national law by way of the EU Qualification Directive or, alternatively, does the wording of the EU Directive itself require backdating of benefits (which includes the issue as to whether Art 28 of the Qualification Directive is sufficiently precise to have direct effect)?

As one will recall, art 28.1 of the Directive states that

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.

Even assuming that backdating is required by the Geneva Convention, it seems very unlikely that article 28 of the Directive can be interpreted as giving effect to arts. 23 or 24 of the Convention. Had the EU legislature wished to do so, it surely could have found a clearer form of words than art 28. One would have to rely on (legally) vague statements in the recitals to that Directive that the European Council had ‘agreed to work towards establishing a Common European Asylum System, based on the full and inclusive application of the Geneva Convention’ or that the Convention ‘provide[s] the cornerstone of the international legal regime for the protection of refugees’. 33

Second, as the Court of Appeal ruled in Blakesley, it seems clear from its wording that art. 28 of the Directive is intended to apply only after the declaration of refugee status (‘beneficiaries of’, ‘granted’). 34 In that case, Lord Jackson expressed the view, albeit clearly obiter, that, in any case, he did not believe that art. 28 would have direct effect. 35 However, more recently, Judge Markus in the Upper Tribunal, following full consideration of the issue, came to the opposite conclusion on the basis that it was unconditional and sufficiently precise. 36 It seems unlikely that the Irish courts will find it necessary to consider this issue in the current context.

Conclusions on legal issue 1

In summary it seems unlikely that the Irish courts will uphold a claim by a refugee (or, a fortiori, a beneficiary of subsidiary protection) for backdating of benefits. 37 Even if it is arguable that the Geneva Convention leaves this possibility open, the weight of (very limited) authority - including Agha - suggests that the Irish courts would be reluctant to accept this argument. In any case, the Convention is not legally binding in Irish law, and we conclude that the Qualification Directive does not give it any

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33 Recitals 2 and 3.
34 See Blakesely at [58].
35 At [60].
37 As noted above, this issue was considered in D.N. -v- Chief Appeals Officer [2017] IEHC 52. It is not discussed separately here as there is nothing to suggest that the status of beneficiaries of subsidiary protection would be any stronger than that of a refugee.
direct effect and that art. 28 of the Directive itself does not apply prior to the declaration of refugee status.

Legal issue 2: The entitlements of Zambrano carers to social welfare

As we have noted, Irish social welfare law - unlike the UK - does not specifically refer to Zambrano carers or clarify their entitlements. Therefore, it is necessary to consider the issue from first principles. This issue was recently considered by the High Court in Osinuga (a case joined with Agha) but the analysis in this case is, if possible, even less clear than that in Agha. 38 Although the law is different, the consideration by the UK Supreme Court in H.C. is more informative. That case involved an Algerian mother of British children. The relevant question identified in that case was, in the case of a person identified as having Zambrano status, does EU law require more than ‘bare protection’ against having to leave the Union. It was accepted, in H.C. that the limited support provided by the local authority under the Children Act, 1989 provided the practical support necessary to protect the children against being obliged to leave the EU.

The Irish courts have previously considered cases in which a person has been found to have residence rights under EU law. 39 However, it is unfortunately unclear whether White J considered that Ms. Osgagie (Ms. Osinuga’s mother) had a right to reside under EU law or not. On the one hand, the Minister for Justice appears to have accepted that she did have such a right and in January 2016 granted leave to remain in the State by reason of her daughter’s status as an EU citizen. 40 On the other hand, White J states that

During the time period in question from 23rd December 2014 to January 2016, there was never any risk that [Ms. Osinuga] would be compelled to leave the E.U. 41

The only logical manner in which these two statements can be reconciled is that something happened in January 2016 which threatened Ms. Osinuga’s remaining in the State and that, as a result, the Minister immediately granted leave to remain. This seems rather unlikely and no indication of such a change of circumstances appears from the judgement. Alternatively, one of the two is incorrect and either (i) the Minister incorrectly granted leave to remain even though there was no basis for doing so; or (ii) Ms. Osinuga was at risk of being compelled to leave the State in the relevant period. Further speculation is probably pointless and, for the purposes of this article, we will focus on the situations where a person has such a right to reside under EU law.

38 White J stated (at [18]) that ‘As the legal submissions in both cases are broadly similar and relate to the same legal issue it is appropriate to consider the legal principles in both cases in tandem.’


40 Agha at [42].

41 At [47].
Does EU law require more than ‘bare protection’?

The Court of Appeal, in Sanneh, had rejected the Secretary of State’s argument that Zambrano rights did not extend to social assistance. The Court of Appeal held that if the EU citizenship right of the EU citizen child cared for by the Zambrano carer is to be effective, then, in my judgment, member states must make social assistance available to Zambrano carers when it is essential to do so to enable them to support themselves in order to be the carer for the EU citizen children in their care within the EU.  

The Court did, however, largely accept the arguments that the content of any such right was quite limited. The Court held that all that was required was that carers ‘must not be left without the resources which are essential for them to live in this jurisdiction’.  

Before the Supreme Court, the argument focussed on the extent of the right to social assistance. The Supreme Court concluded that the rulings of the CJEU in Zambrano and subsequent cases had focussed on ‘the risk of being obliged to leave the territory of the Union’ and not on ‘the nature of financial support (if any) required, nor as to the extent of any right to benefits’. Lord Carnwath, writing for the Supreme Court, appeared to derive from that not that the issue had not arisen at CJEU level but that the question of the scope of benefit rights was an issue of domestic law and ‘the only issue is their compatibility with EU law’.

Application to Irish law

None of these issues were considered in Agha and Osinuga. If we were to accept, for the purposes of discussion, that the UK approach should also be adopted in Ireland it would mean that a Zambrano carer (who, of course has a right to reside in Ireland) would also be entitled to social assistance, at a level to be defined by national law. Since Irish law has not established any specific approach, the general rules of social welfare law apply (as set out above). This would mean that a Zambrano carer should, in general, qualify for benefits as she has by definition a right to reside in Ireland. However, a carer who is an asylum seeker is still caught by s. 246(7) which states that she is deemed not to be habitually resident and she does not, therefore, qualify. Whether this might amount to unlawful discrimination is considered below.

Conclusions as to issue 2

If we accept the current UK approach as persuasive, this would mean that Zambrano carers are currently entitled to social assistance under the common rules set out in

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42 At [26] and see [87]-[91].
43 At [90].
44 H.C. at [9].
45 At [21]. As we discuss below, the Court held that there was no breach of EU discrimination law.
Irish social welfare law. In general, such carers have a right to reside and should, therefore, qualify for benefits (subject, of course, to the other qualifying conditions) but asylum seekers are deemed not to be habitually resident and will not qualify for most social welfare payments. Such persons would, instead, be provided with support under the scheme of Direct Provision (DP). Again if we accept the UK ruling, we would need to assess whether the Direct Provision scheme is sufficient to provide the resources which are essential for Zambrano carers to live in this jurisdiction. Notwithstanding the limitations of the scheme, it would seem likely that the Irish courts would conclude that such a test was met. Therefore, the conclusion (if nothing else) in Osinuga, i.e. that there is no entitlement to child benefit, would appear correct.

Legal issue 3 - is the RtR discriminatory?

Finally, it has been argued that the RtR is discriminatory under a range of provisions including EU law (such as Article 18TFEU, Regulation 883/2004, the Qualification Directive, the EU Charter of Rights (art. 21)), the European Convention on Human Rights (art. 14) and the Irish Constitution.

EU law

The Irish courts have ruled, in cases not involving refugees, that the RtR is not in breach of EU law. While the Irish Court of Appeal has recently referred a question as to the compatibility of the RtR with EU law to the CJEU, the answer to this question would appear to be in little doubt in the light of a series of recent rulings by the CJEU in Dano and subsequent cases. In these cases, the CJEU has consistently upheld residence conditions concerning social assistance and child benefit. In H.C, the UK Supreme Court also pointed out that TNCs (such as Zambrano carers) could not rely on Art 18TFEU.

The Supreme Court in that case also pointed out that article 51, by which the principles of the Charter apply to member states 'only when they are implementing

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46 The High Court described DP as follows: “Direct provision” generally refers to the (cashless) provision of material support by the State to protection applicants to meet their basic needs. This support comprises accommodation, food, education for those under eighteen, healthcare and a small weekly allowance (known as Direct Provision Allowance or DPA).’ C.A.-v- Minister for Justice and Equality [2014] IEHC 532 at [11.3] See Thornton, L. ‘Spotlight on Direct Provision’ in Children’s Rights Alliance, Making Rights Real for Children: A Children’s Rights Audit of Irish Law (Dublin: CRA, 2015), pp. 124-130.


48 I use the term discriminatory to mean unlawful discrimination.


51 Case C-333/13 Dano EU:C:2014:2358,

52 At [22].
Union Law’. The Court held that the test was not whether the claimants were personally within the scope of EU law in some way but rather whether the act was directed to the ‘implementation’ of EU law. In a somewhat circular argument, the Court concluded that

Once it is determined that EU law does not require more for the children of a Zambrano carer than practical support sufficient to avoid their being obliged to leave the Union, that also sets the limits of what is involved in its implementation. Although it is open to the state to provide more generous support (‘gold-plating’, as it is sometimes called), that is the exercise of a choice under national law, not EU law.

In C.A., Mac Eochaídh J considered whether the Charter applied to a challenge to the Direct Provision scheme and concluded that it did not. He stated

the manner in which Ireland provides material support to protection applicants is not any form of implementation of Union law and therefore, in accordance with Article 51 of the Charter, that Charter does not govern Ireland’s actions in this area. The manner in which material support is provided is well within the sphere of national autonomy. Though the obligation to provide support for destitute protection applicants is related to the EU obligation that such persons be allowed to seek protection ..., this does not mean that the provision of material support to protection applicants implements EU law. The provision of the support certainly facilitates Ireland’s implementation of the Qualifications Directive in that it allows persons to stay in Ireland until their request for protection is determined but the provision of support is not thereby the implementation of EU law.

Therefore, he held that the combined effect of Protocol 21 TFEU and Article 51 of the Charter meant that asylum seekers and other protection applicants were not entitled to rely on Charter rights in relation to their reception conditions.

*European Convention on Human Rights*

In relation to art 14 of the ECHR, the Court of Appeal in Blakesley rejected a claim that the failure to backdate entitlements for refugees was in breach of that provision

53 At [23].
54 At [28].
55 Ibid.
56 C.A at [11.9]. See also Bakare v Minister for Justice and Equality [2016] IECA 292 at[31]: State was not implementing EU law in refusing residence permission to a TCN who claimed Zambrano rights.
57 At [11.10]. Articles 3 and 4 of Protocol 21 to the Lisbon Treaty permit Ireland to opt to participate in any particular measure adopted by the Council pursuant to Title V of TFEU including the Common European Asylum System. Ireland used the opt-in mechanism to participate in the Qualification Directive, the Procedures Directive, the Dublin II Regulation and the EURODAC Regulation. However, Ireland did not use the opt-in mechanism in relation to the Reception Conditions Directive (and as we have seen the recast Qualification Directive).
either on the basis that asylum seekers are not analogous to British citizens\(^{58}\) or on the basis that any difference was objectively justified by the fact that the entitlement of asylum seekers to welfare support derives from international instruments, which do not apply to British citizens. In this sphere, the Court concluded, ‘it is for the legislature and the executive to determine how national resources should be allocated.’\(^{59}\) A more appropriate justification might have been the fact that, as found by the Court in that case, the difference in treatment was consistent with international law.\(^{60}\)

In **H.C.**, the Supreme Court shortly held that

> In so far as Mrs HC’s differential treatment arises from her status as a third country national, she can have no complaint. So far as concerns her *Zambrano* status, that is a creation of European law, and such differences of treatment as there are, as compared to other categories of resident, do no more than reflect the law by which the status is created.\(^{61}\)

**Irish constitution**

Finally, in *Agha* White J. shortly dismissed any constitutional arguments concerning equality and given the weakness of the art 40.1 jurisprudence, one cannot criticise his approach on this issue.\(^{62}\)

**Zambrano** asylum seekers

One issue, raised above but not considered in *Osinuga*, is whether a situation whereby *Zambrano* carers are entitled to general social welfare benefits, but *Zambrano* carers who are asylum seekers are not, could be justified.\(^{63}\) At first glance, this seems somewhat anomalous. On further consideration, however, this is just one aspect of differential treatment of asylum seekers which has only recently been seriously questioned in the Irish courts.\(^{64}\) The rationale for this difference would presumably be the same rationale for the provision of DP generally.\(^{65}\)

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\(^{58}\) At [65]. The correct comparison arguably should be between refugees and persons entitled to benefits under UK law.

\(^{59}\) At [66].

\(^{60}\) If an Irish court was to conclude, albeit this seems rather unlikely, that a denial of benefits to refugees was not consistent with the Geneva Convention this might raise issues as to justification in this jurisdiction.

\(^{61}\) **H.C.** at [31]. *Agha* at [66] et seq. also held that any difference in treatment was justified.

\(^{62}\) At [61]-[62].

\(^{63}\) I emphasise that this is my conclusion as to what the law should be rather than a description of current practice. It is not clear from *Osinuga* as to what view the State takes.

\(^{64}\) *N.H.V v- Minister for Justice & Equality* [2017] IESC 35.

\(^{65}\) Admittedly this rationale is not entirely elucidated in either the **C.A.** ruling or the Report of the Working Group on the Protection Process (Dublin, 2015). The context for the introduction of DP is set out (briefly) in **C.A.** at [1.6]-[1.7].
Conclusions at to legal issue 3

As we can see, discrimination challenges were treated as rather secondary in the cases considered in this article. Given the inadequacy of the consideration of the main issues in Agha and Osinuga, it is difficult to come to clear conclusions on what might be the justification for differences in treatment. However, the general reluctance of the Irish courts to impinge on the State’s treatment of refugees and related groups in relation to welfare and other entitlements is rather clear. In general, insofar as the treatment of refugees and other non-nationals is in line with Ireland’s international and EU obligations it seems likely that the Irish courts would find that any difference in treatment is objectively justified.

Conclusion

In conclusion this area raises a complex range of national, international and EU law issues. It highlights the inadequacy of the current structures for clarifying the law in this area. Unfortunately the Social Welfare Appeals Office has, to date, been limited in the role which it has been able to play in interpreting the law (e.g. no system of publication of selected decisions). Given the very small number of cases which go to hearing in the higher courts, it is unsurprising that most judges have a limited knowledge of social welfare law. These cases highlight yet again the need for a more effective system for clarifying such legal issues than that which currently exists or for improvements in the current system to make it fit-for-purpose.

In terms of the substance of the issues raised in these cases, it does seem likely that refugees and beneficiaries of subsidiary protection are not entitled, under the law as it stands, to backdating of payments. However, Zambrano carers (other than asylum seekers) should be entitled to benefits on the basis of their right to reside (and subject of course to meeting other qualification conditions). However, the recent cases suggest that specific legislation may be required to clarify the rights of such persons and their children.

66 In addition to Agha see, for example, C.A. -v- Minister for Justice and Equality [2014] IEHC 532. See now N.H.V -v- Minister for Justice & Equality [2017] IESC 35 though one may suspect that this is an aberration given, as Hogan J. recently pointed out it ‘is probably the first time in 25 years or so that the Supreme Court has invalidated a major item of social legislation or social policy’.

67 Ironically the one occasion on which it did do so in this areas led to an immediate reversal of the law in 2009. The Office does publish case studies in its annual report but from a legal perspective most of these are frankly useless in terms of clarifying legal issues.

68 Though this does not fully explain (let alone justify) the sub-standard nature of a significant number of decisions in this area, e.g. Solovastru -v- Minister for Social Protection [2011] IEHC 532; Tarola v Minister for Social Protection [2016] IEHC 206.