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Equality before the law and entitlement to social welfare in Ireland in the case of refugees and Zambrano carers

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The Irish Court of Appeal (CA) has recently ruled that, in the case of an Irish citizen child, the requirement that to be entitled to universal child benefit the parent must have a right to reside in Ireland is unconstitutional, contrary to Art 40.1 (equality) of the Irish Constitution.[1] This is the first case (to date) in which a provision of the Irish social welfare code has been held to be unconstitutional. It also contrasts with the approach of the UK Supreme Court (UKSC) in which the UKSC held that there was no breach of EU equality legislation or of the ECHR in a similar approach in that jurisdiction.[2] This is potentially one of the most important constitutional cases concerning social welfare (and indeed the constitutional approach to equality) in decades. Whether it will survive a likely Supreme Court appeal remains to be seen.

The facts

The ruling involved two joined cases which raised somewhat different issues. The background facts are rather complicated but can be reduced to the simplified version which seemed relevant to the CA. The Aghas (of Afghan nationality) arrived in Ireland in 2008 and applied for refugee status (rather belatedly as Hogan J said with considerable understatement) in 2013 for the husband and wife and their four children (three born in Ireland). The delay appears to have been related to false identity papers, deportation orders and members of the family having been in hiding for some periods although the details are not fully apparent from the judgements. Refugee status was granted in respect of the youngest child (Daniel) in January . Mrs. Agha then applied for child benefit for all the children. The family also applied for reunification on the basis of Daniel's refugee status which was granted in September 2015. Child benefit (CB) had been initially refused on the basis that the parents did not have a right to reside in Ireland (and therefore were not considered to be habitually resident there). However, CB was subsequent awarded to all children from September 2015 (the date when they were authorised to remain in the country).

In the second case. Ms. Osagie, a Nigerian national, arrived in Ireland in November 2013 and applied for asylum a year later which was refused.In October 2014, she had a child (Victoria) with a Mr. Osinuga (an Irish citizen). Victoria is also an Irish citizen. The relationship with Mr. Osinuga is apparently not ongoing and Victoria and her mother were in direct provision (DP). In October 2015, Ms. Osagie applied for child benefit but this was initially refused on the basis that she did not have a rtr. In January 2016, the Minister for Justice and Equality granted the second applicant

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[1] *Agha (a minor) -v- Minister for Social Protection Osinuga (a minor) -v- Minister for Social Protection* [2018] IECA 155.

[2] *R (HC) v Secretary of State for Work and Pensions* [2017] UKSC 73. See M. Cousins 'The Social Security Right of Zambrano Carers Under EU and UK Law: R.(on the application of HC) v Secretary of State for Work and Pensions' (2018) 25 J.S.S.L., Issue 2, 118-125. The UK does not, of course, have a written constitution or any national constitutional equality provisions.

leave to remain on the basis of her care of Victoria (i.e. as a *Zambrano* carer).[3] The child benefit claim was then granted with effect from January 2016.

Issues and law

The issue in the Agha case was whether there was an entitlement to child benefit from the date of the application for CB in 2013 or (in the alternative) whether there was a right to CB for Daniel from the finding of refugee status in 2015. In the Osinuga case, the issue was whether CB should be backdated to Victoria's date of birth in December 2014.

In relation to child benefit, Hogan J. explained that

> Child benefit is a universal payment paid to the qualifying parent which is not subject to a means test. It must, of course, be accepted that child benefit is not in any sense hypothecated by law for the benefit of the child or otherwise held on trust by the parent for her interest, so that the parent is in principle free to do with these moneys as he or she may think fit. It is nonetheless a payment made by the State to parents to assist in defraying the additional expenses associated with child-rearing. In practice, these monies are used by the majority of parents to help with the necessaries of life such as food, clothing, child care and the educational expenses of their children. In the case of the economically less well circumstanced such as the present appellants, child benefit payments are often vital to ensure that children receive adequate clothing and nourishment.[4]

Article 40.1 of the Irish Constitution provides that

> 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.

Turning to the relevant provisions concerning refugees and other migrants and social welfare law, section 3(2) of the Refugee Act 1996 provides that a refugee shall be entitled:

> … to receive, upon and subject to the terms and conditions applicable to Irish citizens, the same medical care and services and the same social welfare benefits as those to which Irish citizens are entitled… .[5]

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[3] *Zambrano* carers are a group created by EU law and having rights under EU law arising from the decision of the CJEU in Case-34/09 *Zambrano.* This held that, if a member state of the EU refused to grant a right of residence to a[third country national 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.

[4] *Agha* at [17].

[5] See now, s. 53(b) of the International Protection Act, 2015 which repeals and replaces the 1996 Act.

This appears to be in implementation of Articles 23 and 24 of the Geneva Convention on Refugees which provide that the Contracting States shall accord to refugees lawfully staying in their territory the same treatment with respect to 'public relief and assistance' and 'social security' as is accorded to their nationals.

In a similar vein, Article 28 of the EU Qualification Directive[6] 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. 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.

Nonetheless, the Social Welfare (Consolidation) Act, 2005 provides that in order to be entitled to child benefit, the claimant (normally the parent) must be habitually resident in Ireland.[7] In order to be habitually resident, the person must have a right to reside in Ireland.[8] Persons applying for asylum and residency are explicitly excluded from those who may be considered to be habitually resident.[9]

The cases, at first instance, involved (at least potentially) a complex range of issues including the scope of rights under the Geneva Convention on refugees, the scope of EU law on the entitlement of refugees, the rights of *Zambrano* carers, non-discrimination under the ECHR and the right to equality under the Irish Constitution. The High Court had rejected the claim on all grounds but unfortunately White J's ruling at first instance does not greatly clarify or elucidate on these issues.[10] Hogan J. writing for the Court of Appeal confined his ruling to what appeared to him to be the key issues, thereby adopting a much clearer approach.

The ruling

Osinuga

Hogan J. turned first to the Osinuga appeal. Focusing on the constitutional issue, he identified the key issue as being

> whether the Oireachtas can also deprive an Irish citizen child who is resident in the State of child benefit by reason of the immigration status of the adult claimant?

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[6] Directive 2004/83/EC of the European Parliament and of the Council 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.

[7] S. 220(3) of the 2005 Act.

[8] s. 246(5) of the 2005 Act.

[9] S. 246(7).

[10] *Agha (a minor) -v- Minister for Social Protection*, [2017] IEHC 6. For my own (arguably also unsuccessful effort) to clarify the issues see https://works.bepress.com/mel_cousins/106/

The CA accepted that the amount or nature of social benefits is entirely a matter for the Oireachtas However, it took the view that where, as in this case, the Oireachtas made universal payments for the benefit of children, 'exclusions of the kind at issue which are not based on either the financial or educational needs of the child would generally call for a high degree of justification'.[11] Hogan J. pointed out that Victoria was and Irish citizen and had an unqualified right to reside here. Hogan J correctly concluded that Victoria was being treated differently to her peers by being denied child benefit by reason of the immigration status of the parent claiming that benefit.[12]

In analysing whether discrimination had occurred, the Court rejected the notion that discrimination must be 'invidious' pointing out that (even) the Supreme Court had accepted that the law had moved on from that stage.[13] Hogan J concluded, therefore, that

> The fundamental question, therefore, is whether the Oireachtas in seeking to draw significant or appreciable differentiations between citizens can justify this differing treatment. It is also true, of course, that a good deal of latitude must be admitted for the purposes of Article 40.1 scrutiny where the Oireachtas differentiates between classes of persons for reasons of social policy, provided always that the differentiation is intrinsically proportionate and reasonable.[14]

In this case, the rationale for the refusal was that the qualifying parent did not have an entitlement to reside in the State and that her immigration status was thereby uncertain. The Court accepted that 'the exclusion of persons with such an uncertain status serves important public policy and immigration goals by, e.g., serving to deter opportunistic asylum claims and generally by reducing the attractiveness of the State as a destination for what is sometimes described as welfare tourism.'[15]

However, the Court pointed out that in the present case, the restrictions were

> at best indirect and bar the making of a payment designed for the benefit of the citizen child in order to deter opportunistic asylum claims which its parents might make. In that respect, therefore, the statutory exclusion seeks in effect *to deter the conduct of the parent* but at the expense of a payment *designed for the benefit of the child*.[16]

Hogan J. concluded that this in itself pointed to 'an inherent unfairness and lack of proportionality in the legislative scheme of exclusion from what is otherwise a

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[11] At [27].

[12] At [30]. He discounted the usual argument that the State is providing a range of other fiscal benefits (at [32]).

[13] Citing O'Donnell J. in *Murphy v. Ireland* [2014] IESC 19.

[14] At [29] citing Denham C.J. in *MD v. Ireland* [2012] IESC 10.

[15] At [34 citing himself: *NHV v. Minister for Justice* [2016] IECA 86.

[16] At [36] emphasis in original.

universal benefit scheme otherwise payable in respect of all children resident in the State'.[17]

By way of support for this view, the Court referred to the decision of the European Court of Human Rights in *Niedziecki v. Germany*.[18] This case concerned the compatibility of the German Child Benefit Act with the ECHR. The German legislation provided that child benefit was not payable to children resident in Germany whose non-citizen parents did not enjoy what was described as a 'stable residence permit' entitling them to live in Germany. According to the German courts, the object of this legislation was to ensure that child benefit was payable only to 'aliens who were likely to stay in Germany on a permanent basis.' The ECtHR held that the denial of benefits amounted to a breach of Article 8 ECHR read in conjunction with Article 14 ECHR.The ECtHR agreed with the German Federal Constitutional Court that there were not sufficient reasons justifying the different treatment with regard to child benefits of aliens who were in possession of a stable residence permit on one hand and those who were not, on the other. Hogan J (perhaps rather contentiously) found 'it difficult to see how *Niedzwiecki* does not govern – at least by analogy – the present case'[19].

Overall the Court concluded that the State could not objectively justify the statutory exclusion of Victoria from eligibility for child benefit prior to the grant of residency status to her mother in January 2016, and held that this was a breach of Article 40.1 of the Constitution. Give the conclusion on the Constitutional point, the Court did not find it necessary to consider the question of possible rights under EU law, although of course, this might be relevant if an alternative conclusion was arrived at under Irish law.[20]

Agha

Turning to *Agha* , the Court noted a significant factual difference in that, unlike Victoria Osinuga who, as an Irish citizen had an unlimited right to reside in the State, the Agha children were not Irish citizens and did not have a right to reside here until Daniel was recognised as a refugee in January 2015 and, in the case of the other Agha children, prior to the family reunification decision in September 2015..[21] Hogan J saw this distinction as 'critical' to the outcome. He held that 'the State cannot generally be expected to make social security payments to persons with no right to reside in the State'.[22] Therefore, it was not unconstitutional to deny such payments to the Aghas prior to the date on which their respective entitlements to reside in Ireland was legally established.

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[17] At [36].

[18] (2006) 42 EHRR 33.

[19] At [43].

[20] For a discussion of this issue under UK law, see *R (HC) v Secretary of State for Work and Pensions* [2017] UKSC 73.

[21] At [45].

[22] At [46].

The applicants had argued that Daniel should have been entitled to child benefit from the date of recognition of his refugee status in January 2015. Hogan J also rejected this argument stating that, subject to EU law, the Oireachtas was entitled to decide that his parents were not entitled to child benefit in respect of him because they did not then have appropriate immigration status until the positive family reunification decision arrived in the following September. He stated

> The difference, therefore, between the position of Victoria on the one hand and Daniel on the other so far as the constitutional issue is concerned can be summed up by one word, namely, citizenship. Victoria's status as a citizen resident in the State means that the objective justification for her exclusion by statute in respect of payment otherwise generally payable to all residents required to be a compelling one. This simply is not the case with Daniel given that his right to reside here derives exclusively from statute.[23]

Hogan J then turned to whether the exclusion of the Aghas from child benefit was contrary to EU law. It was argued by the applicants that Article 23 of the Geneva Convention obliges the State to pay child benefit from the date of an application for asylum and that this requirement had been transposed into national law by EU law. It was also contended in the alternative that the parents were entitled to claim child benefit in respect of Daniel as and from the date his refugee status was recognised, i.e., January 2015.

Hogan J did not find it necessary to examine the precise meaning of Article 23 of the Geneva Convention and its reference to 'refugees lawfully staying in their territories' because the appellants' rights were to be found in Article 28 of the Qualification Directive.[24] He concluded that Article 28 made it perfectly clear that Member States are required to make social assistance payments (such as child benefit) only to those who have been *granted* refugee (or other) status. This implied that 'such an obligation arises *only* from the date such status has been *granted* and not otherwise'.[25] Therefore, the right to reside requirements in s. 246 of the 2005 Act were not contrary to EU law by confining the payment of child benefit to the date upon which that status was granted.[26] However, he concluded that child benefit should, under EU law, have been granted to Daniel Agha from January 2015 and Article 28 of the Qualification Directive does not permit that payment to be withheld

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[23] At [47].

[24] At [55]. For a discussion of this issue in UK law see *Blakesley v. Secretary of State for Work and Pensions* [2015] EWCA Civ. 141. Hogan J does not discuss the status of the Geneva Convention per se. The Geneva Convention is incorporated into Irish law, as noted above, by the Refugee Act, 1996. Arguably s. 3(2) of that Act (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 (as set out in the Social Welfare Acts) and is not overridden by an interpretation of an international agreement.

[25] At [55].

[26] At [56].

because the person applying for the benefit on behalf of Daniel (*i.e*., Ms. Agha) did not herself have a right to reside.[27]

In terms of a remedy, in the *Osinuga* case, the Court followed the approach of a number of recent Supreme Court and Court of Appeal cases by suspending the declaration of unconstitutionality (in cases other than that before the court) to 1 February 2019 to allow the state to bring forward constitutional legislation.[28] In the *Agha* case, the Court concluded that general principle of EU law required that s. 246(6) and s. 246(7) of the 2005 Act must be disapplied in this type of case as being contrary to Article 28 of the Qualification Directive where it would otherwise prevent child benefit being paid in respect of a non-citizen child resident in the State from the date of his or her recognition as a refugee.[29]

Discussion

This case shows a marked change in approach to the interpretation of Art. 40.1 of the Irish Constitution, particularly in relation to social welfare issues. While, as Hogan J. points out, the Supreme Court (at least rhetorically) has moved somewhat from its earlier minimalist interpretation of Art. 40.1, this has not led to many findings of unconstitutionality (and none in the social welfare area).[30] Indeed, in a number of recent cases, the High Court has applied a rather light touch in its consideration of whether social welfare provisions were incompatible with Art 40.1.[31]

In contrast, Hogan J applied a rather robust approach to the justification required for the clear difference in treatment in this case. He begun his consideration by stating that in the case of a universal payment, such as child benefit, 'exclusions of the kind at issue which are not based on either the financial or educational needs of the child would generally call for a *high degree* of justification' (my emphasis).[32] He later refers to the need for 'compelling' justification.[33] This is certainly an arguable position but it is one for which one would struggle to find Irish precedent. Not does Hogan J. discuss the Supreme Court's earlier recognition in *Lowth v. Minister for*

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[27] This is a necessary consequence of the finding of unconstitutionality in *Osinuga* in that an Irish national child would now have an entitlement to child benefit even though her mother did not have a right to reside.

[28] At [59]-[64].

[29] At [65]-[68].

[30] See, for exmaple, *J.D. -v- Residential Institutions Redress Committee* [2009] IESC 59 in whihc the Court overturned a rare finding of a breach of Art. 40.1.

[31] *P.C. -v- Minister for Social Protection* [2016] IEHC 315; *Agha (a minor) -v- Minister for Social Protection*, [2017] IEHC 6; *Donnelly -v- Minister for Social Protection* [2018] IEHC 421 (a ruling delivered after *Agha*).

[32] At [27].

[33] At [47].

Social Welfare of '[t]he particular difficulty of establishing the unconstitutionality of legislation dealing with economic matters'.[34]

To date, Irish law has provided weak protection for equality in areas such as social welfare (outside issues of EU law). The Supreme Court has shown a general reluctance to engage with the European Convention on Human Rights with the result that Article 14 (non-discrimination) has gained little traction if one compares, for example, to UK law.[35] The Court of Appeal may feel that the Supreme Court will be more open to developing a stronger equality jurisprudence under the Constitution. Personally, I would have limited expectations in this regard but, given that this case is likely to be appealed, we will see. It certainly provides the opportunity to clarify the current state of Irish constitutional equality law and whether it will remain as impotent as it has prior to this decision.

[34] [1998] 4 I.R. 321, originally recognised by Kenny J. in *Ryan v. The Attorney General* [1965] I.R. 294, at p. 312.

[35] The obvious answer to Hogan J's suggestion that *Niedzwiecki v. Germany* (2006) 42 EHRR 33 'by analogy' controls the issue is that it concerns a different legal issue in a different legal system so the analogy is rather weak. The Supreme Court's obvious antipathy to the ECHR also makes it unlikely that rulings from that context can be given much weight in an Irish Constitutional case.