Neutral Citation Number: [2015] EWCA Civ 49

Case Nos: C3/2013/0466 + B5/2014/0388 +
B5/2013/2872 + C1/2014/0039

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM
(1) The Upper Tribunal
(Administrative Appeals Chamber)
Judge Jacobs
[2013] UKUT 490 (AAC)
(2) Croydon County Court
His Honour Judge Ellis
3CR02096
(3) Birmingham Civil Justice Centre
His Honour Judge McKenna
BM30027A
(4) Queen's Bench Division
(Administrative Court)
Mr Justice Supperstone
[2013] EWHC 3874 (Admin)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 10/02/2015

Before:

LADY JUSTICE ARDEN
LORD JUSTICE ELIAS
and
LORD JUSTICE BURNETT

- -

Between:

(1)	**Appellant**
Sanneh	
- and -	
Secretary of State for Work and Pensions	**Respondent**
(2)	**Appellant**
Scott	
- and -	
London Borough of Croydon	**Respondent**

(3) **Birmingham City Council** **- and -** **Merali & Ors**	**Appellant** **Respondents**
(4) **R o/a of HC** **- and -** **Secretary of State for Work and Pensions & Ors**	**Appellant** **Respondents**
Oldham Council	**Interested Party**
AIRE Centre **Intervener in all 4 appeals**	**Intervener**
Secretary of State for Communities and Local Government	**Intervener**

Intervener in (1) Sanneh
(2) Scott
(3) Merali

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(1)
Mr Stephen Knafler QC, Mr Desmond Rutledge and **Mr Ali Bandegani** (instructed by **Coventry Law Centre**) for the **Appellant in Sanneh**
Mr Jason Coppel QC and **Ms Amy Rogers** (instructed by **Treasury Solicitors**) for the **Respondent in Sanneh**

(2)
Mr Toby Vanhegan (instructed by **Croydon and Sutton Law Centre**) for the **Appellant in Scott**
Mr David Lintott (instructed by **Wragge Lawrence Graham & Co LLP**) for the **Respondent in Scott**

(3)
Mr Christopher Baker and **Mr Sam Madge-Wyld** (instructed by **Birmingham City Council Legal Services**) for the **Appellants in Merali & Ors**
Mr Lindsay Johnson (instructed by **Bhatia Best**) for the **Respondents in Merali & Ors**

(4)

Mr Richard Drabble QC and **Mr Ranjiv Khubber** (instructed by **Platt Halpern Solicitors**) for the **Appellant in HC**

Mr Jason Coppel QC and **Ms Amy Rogers** (instructed by **Treasury Solicitors** and by the **Solicitors to Her Majesty's Commissioners for Revenue and Customs**) for the **Respondents in HC**

Mr Charles Banner and **Mr Matthew Moriarty** (instructed by **Herbert Smith Freehills**) for the **Intervener (AIRE Centre)**

Mr Jason Coppel QC and **Ms Amy Rogers** (instructed by **Treasury Solicitors**) for the **Intervener (Secretary of State for Communities and Local Government)**

Hearing dates: 4-7 November 2014

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Approved Judgment

Lady Justice Arden:

1. These appeals concern the vital question whether "*Zambrano* carers", who are non-EU citizens responsible for the care of an EU citizen child, are entitled to social assistance (that is, non-contributory welfare benefits) on the same basis as EU citizens lawfully resident here. Currently, *Zambrano* carers who are in need and unable to work receive benefits on a different and less generous basis, namely that on which social assistance is granted to third country nationals ("TCNs") to whom the UK has not given unconditional leave to enter the UK or remain (i.e. leave without a restriction on access to public funds).

2. For the detailed reasons given below, I conclude that *Zambrano* carers who are in need and unable to work are not entitled to the same level of payments of social assistance as is required by EU law to be paid to EU citizens lawfully here. The UK must pay them such amount as will enable them to support themselves in order to be the carer for the EU citizen child within the EU, but, subject to that, may determine to pay social assistance to them on some different basis. That means that the current statutory provisions comply with EU law and the European Convention on Human Rights ("the Convention") and represent the limit of these appellants' current entitlement to non-contributory social benefits.

SOME KEY PRINCIPLES AND TERMS USED IN THIS JUDGMENT

3. My starting point is to explain some key principles and terms used in this judgment. 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 ("the CJEU") in Case-34/09 *Zambrano v Office national de l'emploi* [2012] QB 265. That established that, if a member state of the EU refused to grant a right of residence to a 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. I will call this rationale the "effective citizenship principle" and national measures of the kind precluded by it "prohibited national measures". The rights of the *Zambrano* carer are derived from the EU citizenship rights of the child for whom she cares.

4. The facts of *Zambrano* are instructive and may be briefly summarised. A Colombian couple living without leave in Belgium had two children who were Belgian nationals. The father had lost his job but could not obtain unemployment benefit because he had no right to reside in Belgium. The Belgian authorities sought to remove him. The CJEU held that Belgium could not remove him and was bound to give him a residence card showing that he had the right to reside so that he could work to support his family. In the circumstances, "it had to be assumed" that such a refusal would lead to the children having to leave the EU (CJEU judgment, [44]). The member state had to give "a right of residence" ([45]). The facts of *Zambrano* show that carers may be male or female, but in this judgment I will in general refer to them as feminine.

5. The effective citizenship principle means that member states may not indirectly remove the benefits of a person's status as an EU citizen. This principle is derived from Articles 20 and 21 of the Treaty on the Functioning of the European Union ("TFEU"), which provide in material part as follows:

> **"Article 20**
>
> 1. Citizenship of the European Union is hereby established. Every person holding the nationality of a Member State shall be a citizen of the Union. Citizenship of the Union shall be additional to and not replace national citizenship.
>
> 2. Citizens of the Union shall enjoy the rights and be subject to the duties provided for in the Treaties. They shall have, inter alia:
>
> a) The right to move and reside freely within the territory of the Member States….
>
> **Article 21**
>
> 1. Every citizen of the Union shall have the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in the Treaties and by the measures adopted to give them effect."

6. The effective citizenship principle therefore draws together the status of EU citizenship and the EU law principle of effectiveness. The EU law principle of effectiveness means that rights given by EU law must be protected in substance. As it is sometimes put, national law must not make it impossible or excessively difficult to exercise EU law rights.

7. The principle of effectiveness in these appeals is in conflict with another principle, that of conferral of competences. Under Article 5(1) TEU, the EU, including its institutions such as the CJEU, can only act within the limit of the competences conferred on it by the member states in the EU Treaties. A key characteristic of *Zambrano* carers is that the member state where they reside has not given them permission to reside there. This may be because they entered on a visa which has expired but not been renewed, or because they entered illegally. This point is important because member states are entitled, subject to EU law, to control the entry of non-EU citizens and, in practice, they often do so in order to protect public finances from calls for social assistance. A member state may, therefore, decide as a matter of policy to try to deter illegal immigration or unlawful presence in the member state by restricting social assistance for these persons.

8. The appellants in these appeals are all TCNs who are the primary carers of minor children in their care who are EU citizens and British nationals. They seek social assistance of various kinds on the same basis as EU citizens resident here. When EU citizens exercise their freedom of movement to come to the UK, they are entitled to social benefits under EU law as explained in more detail in paragraphs 41 to 46 below. That legislation permits "family members" of EU nationals to reside

with the EU citizen where the EU citizen exercises his right of freedom of movement to live in another member state, but this group cannot include the appellants as they are not within the definition of "family member".

9. No one has sought to challenge the appellants' need for financial support.

CURRENT BENEFIT ENTITLEMENT OF ZAMBRANO CARERS UNDER ENGLISH LAW

10. The position of *Zambrano* carers was not separately recognised in domestic social security legislation prior to 8 November 2012. It has now been recognised, but in each case with a view to limiting the rights of *Zambrano* carers and making it impossible for them to make claims for the benefits relevant to these appeals after that date. The social security legislation provides that, to be entitled to those benefits, a person must be "habitually resident" in the United Kingdom for the purposes of the relevant legislation. There is a list of persons who are not to be treated as habitually resident here even if they otherwise would be so resident. The changes made in November 2012 involve adding a new category to that list by means of an amendment to regulation 15A of the Immigration (European Economic Area) Regulations 2006, which defines 'residence' in the UK, including for social assistance purposes. That new category of resident is that of TCNs who have the right to reside in the EU if without such a right an EU citizen would be forced to leave the EU (that is, *Zambrano* carers). This list is used to exclude *Zambrano* carers from persons 'habitually resident' in the United Kingdom and to make them "persons from abroad" or "persons not in Great Britain". Using this category, secondary legislation was passed by which *Zambrano* carers were then disqualified from receiving income-related benefits, namely income support, income-based jobseekers' allowance, income-related employment and support allowance, state pension credit, housing benefit, council tax benefit, child benefit and child tax credit.

11. Three statutory instruments ("the Amendment Regulations") were passed for this purpose:

    a) the Social Security (Habitual Residence) (Amendment) Regulations 2012 (SI 2012/2587) (the "DWP Regulations") brought forward by the Department for Work and Pensions;

    b) the Allocation of Housing and Homelessness (Eligibility) (England) (Amendment) Regulations 2012 (SI 2012/2588), (the "DCLG Regulations") brought forward by the Department for Communities and Local Government; and

    c) the Child Benefit and Child Tax Credit (Miscellaneous Amendments) Regulations 2012 (SI 2012/2612) (the "HMRC Regulations") brought forward by HM Treasury.

12. TCNs without leave to remain do not in general qualify for income-related benefits. To that extent the Amendment Regulations brought the position of *Zambrano* carers into line with the position of other TCNs.

13. It is not necessary to look at each set of Regulations. The effect of the DWP Regulations is to insert into the list of rights of residence (appearing in, for example, regulation 21AA of the Income Support (General) Regulations 1987), which disqualify a person from a range of income-related benefits, including housing benefit and jobseekers' allowance, the following right of residence:

> "…a right to reside…which exists by virtue of…
>
> (e) Article 20 of the Treaty on the Functioning of the European Union (in a case where the right to reside arises because a British citizen would otherwise be deprived of the genuine enjoyment of the substance of their rights as a European Union citizen)."

14. This paragraph refers expressly to a right to reside though it does not say when the right arises. That point is or may be important for drawing comparisons between *Zambrano* carers and other benefit claimants.

15. The Explanatory Memorandum attached to each of the Amendment Regulations makes it explicit that the purpose of the amendment is to exclude *Zambrano* carers.

16. Another key principle in this appeal is the EU law principle of non-discrimination. This is contained in Article 18 TFEU and Article 21 of the EU Charter of Fundamental Rights and Freedoms ("the EU Charter"). Article 18 TFEU and Article 21 of the EU Charter provide as follows:

> "**Article 18 TFEU**
>
> Within the scope of application of the Treaties, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited.
>
> The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may adopt rules designed to prohibit such discrimination.
>
> **Article 21 of the EU Charter: non-discrimination**
>
> 1. Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited.
>
> 2. Within the scope of application of the Treaty establishing the

> European Community and of the Treaty on European Union, and without prejudice to the special provisions of those Treaties, any discrimination on grounds of nationality shall be prohibited."

17. When I refer in this judgment to the non-discrimination principle, I refer to both Article 18 TFEU and Article 21 of the EU Charter. They together constitute a fundamental principle of EU law. When I refer to the nationality non-discrimination principle, I refer to Article 18 TFEU alone. The principal forms of discrimination with which these appeals are concerned are discrimination on the grounds of nationality and immigration status. As Article 18 makes clear, even the prohibition on the grounds of nationality is not absolute but is subject to restrictions imposed in the EU Treaties or EU secondary legislation. The principal forms of discrimination are direct and indirect discrimination. Indirect discrimination occurs where there is an apparently neutral provision, criterion or practice which is liable to adversely affect a group to which that person belongs. It is a defence to indirect discrimination that the act of discrimination was objectively justified. For this purpose the aim of discrimination must be legitimate and the means must be appropriate and necessary: Direct discrimination, on the other hand, can never be justified in the circumstances relevant to this case.

APPEALS RAISE COMMON ISSUES

18. These appeals have been heard together because they raise common issues of EU law. I will deal with those issues first before I set out the facts of the individual cases and my conclusions on how they should be resolved. They concern the entitlement of *Zambrano* carers to social assistance going forward as well as past.

19. Counsel for the appellants have taken the helpful step of dividing between themselves the common issues and adopting other counsel's submissions on the other issues.

REPRESENTATION

20. The following counsel appeared on these appeals: Mr Richard Drabble QC, with Mr Ranjiv Khubber for the appellant HC, Mr Stephen Knafler QC, with Mr Desmond Rutledge and Mr Ali Bandegani, for the appellant Ms Sanneh, Mr Toby Vanhegan for the appellant Ms Scott and Mr Lindsay Johnson for the respondents in separate appeals by Birmingham City Council ("Birmingham CC") of whom the lead respondent is Ms Merali. The AIRE Centre, an intervener, for whom Mr Charles Banner and Mr Matthew Moriarty appear, supports the appellants. The AIRE Centre is a well-known charity which advises individuals on their rights under European law. Mr Jason Coppel QC and Miss Amy Rogers appeared for the Secretary of State for Work and Pensions, who is the respondent to various appeals, for the Secretary of State for Communities and Local Government, who is a respondent to HC's appeal and an intervener in other appeals, and Her Majesty's Commissioners for Revenue and Customs, who is a respondent to HC's appeal. The other respondents are London Borough of Croydon ("Croydon"), in Ms Scott's case, for whom Mr David Lintott appears. Mr Christopher Baker and Mr Sam Madge-Wyld appear for the appellant Birmingham CC. I would acknowledge my debt to all of them for their clarity and economy of argument.

21. The main focus of the oral argument on these appeals was on four general points identified by the parties and applying to some or all of the appeals.

MAIN ISSUES AND SUMMARY OF CONCLUSIONS

22. I will take the first two main issues together. They both go to the nature of a person's status as a *Zambrano* carer. The issues are (1) when does the status arise? and (2) does it confer any right to social benefits?

23. As to (1), the choice is between the date ("the Last Date") when prohibited national measures are taken (or are imminent) and the time when the carer ceases to be liable to be removed, i.e. the first date ("the First Date"), from which the *Zambrano* carer ceases to be liable to prohibited national measures. This may be on the birth of the child or a later date, for example, the date on which any leave which the carer had to be within the jurisdiction expires.

24. The timing matters for two reasons. First, if the right to reside arises on the First Date, then, prior to 8 November 2012, *Zambrano* carers met the qualifying conditions for a number of benefits as they had a right of residence and therefore were no longer subject to immigration control. Second, if the right to reside arises on the First Date, this would mean, on their case, that at all material times they should be treated in the same way as EU citizens lawfully here.

25. In my judgment, for the reasons given below, the effective citizenship principle means that EU law confers a right to reside on a *Zambrano* carer from the First Date. As Elias LJ expressed the position in argument, the *Zambrano* carer has under EU law a positive right to work and reside in the member state in which the EU citizen child is resident, and a negative right not to have prohibited measures taken against him. I agree, though this may not be an exhaustive statement of the *Zambrano* carer's EU law rights.

26. As to (2) – the right to social benefits - for the reasons given below, 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. I will call this "the basic support test". If this test is met, it cannot be said that their departure (if it occurs) was due to any prohibited national measure or to any refusal to pay social assistance which is tantamount to a prohibited national measure. In my judgment, this is the furthest that EU law goes because the status of *Zambrano* carers is only derivative: their rights are derived from the EU citizen child and their status is not founded on any personal right of residence, or right to be paid social assistance, conferred on them by any EU treaty provision or legislative measure.

27. The basic support test has three consequences. First, the level of social assistance payable to *Zambrano* carers is exclusively governed by national law: the member state might choose to pay more than the amount that the *Zambrano* carer needs to support herself but is not obliged to do so. Second, it does not have to be shown that the *Zambrano* carer would in fact have to leave the EU for the reasons which I come on to give in paragraph 90 below. Third, the EU principle of proportionality

does not apply because, for the reasons given, EU law has no competence in the level of social assistance to be paid to the *Zambrano* carer. As I have said, the EU law requirement not to take prohibited measures is met by the member state making available to *Zambrano* carers, who are in need and who (despite being, as discussed in paragraph 73 below, entitled to do so by virtue of their derivative right to reside) cannot work, social assistance of such amount as would enable them to support themselves with the EU citizen child within the EU. On the evidence available to this court, I am not in a position to determine whether the basic support test is not met.

28. Main issue (3) asks whether a *Zambrano* carer derives an entitlement to the same level of social assistance as EU citizens entitled to reside in the member state by virtue of the EU principle of non-discrimination.

29. In my judgment, the answer to main issue (3) is no. Only EU citizens can rely on the nationality non-discrimination principle. Furthermore, EU law has no application when a member state treats some people within its jurisdiction less favourably than others (so-called "reverse discrimination"). The only restrictions are those imposed by the national law, which, in the case of the UK, incorporates Article 14 of the Convention. Article 14 is not violated because the UK government has policy reasons for making distinctions between *Zambrano* carers and others, and this court cannot say that those reasons are clearly without foundation. Insofar as there is indirect discrimination, it is objectively justified for the same reasons.

30. Main issue (4) asks whether, in considering the limits on benefits for *Zambrano* carers imposed by the Amendment Regulations, the Secretary of State fulfilled the public sector equality duty contained in section 149 of the Equality Act 2010 when these limits were imposed. If not, the court could require the Secretary of State to reconsider these limits.

31. In my judgment, the Secretary of State complied with the public sector equality duty ("PSED") at the relevant time for the reasons given below. The Secretary of State's obligation under section 149 is to be measured by the context. In this case, it was an "as you were" decision. The legislative scheme had to be adjusted because the CJEU had defined *Zambrano* carers by the very right which would give them greater benefits under the domestic scheme than it was thought they should have. Thus the policy decision was to restore them to their previous position. The PSED permits the Secretary of State to perform an analysis on the basis of that limited exercise.

MAIN ISSUES IN DETAIL

32. I now turn to the general questions in detail. Before doing so, I draw attention to the scholarship on *Zambrano* carers in the judgment of Elias LJ in *Harrison v Secretary of State for the Home Department* [2013] CMLR 580. The particular point which that case decides is that the *Zambrano* principle covers only the case where the *Zambrano* carer is forced to leave the EU and not the lesser situation where the departure of a carer may adversely affect the quality of life of an EU citizen child who is left behind with another primary carer.

MAIN ISSUES (1) AND (2): WHEN DOES THE ZAMBRANO RIGHT ARISE? DOES THE ZAMBRANO CARER HAVE A RIGHT TO CLAIM SOCIAL BENEFITS UNDER EU LAW?

33. Mr Knafler QC presented the case for the *Zambrano* carers. His principal submission is that a *Zambrano* carer must logically and inevitably have a right to reside as a matter of EU law. Moreover that right applies irrespective of their immigration status in the member state. This right to reside springs from "relationship dependency". The purpose of the right to reside is to prevent the *Zambrano* carer being liable to removal.

34. Moreover, on his submission, Parliament sought to reflect the *Zambrano* right conferred by EU law when it enacted the Amendment Regulations.

35. Mr Knafler points out that a TCN who has no right to reside here commits a criminal offence under section 24(1)(a) of the Immigration Act 1971. She has a duty to leave the jurisdiction as soon as possible: see Laws LJ in *JM v SSHD* [2007] Imm.AR 293. It would therefore be wrong if by law a *Zambrano* carer had to commit a criminal offence in order to be able to look after the EU citizen child in her care because she has no right to reside until the Last Date.

36. Mr Knafler further submits that the effect of the CJEU's decision in *Zambrano* is that it is to be assumed that the *Zambrano* carer without support will be forced to leave for want of resources. On that basis, the right to reside arises immediately. The assumption would have important practical implications for those *Zambrano* carers who come from developing countries where the social assistance system is less generous than in the UK. Even if they receive inadequate social assistance here, they may well still opt to stay here in which case, if the Secretary of State is right in saying that the correct date is the Last Date, they will never become *Zambrano* carers.

37. Mr Coppel QC, for the Secretaries of State, made a series of detailed submissions designed to show (i) that the status of the *Zambrano* carer arises on the Last Date and not the First Date, and (ii) that it is national law, and not EU law, which controls the amount of social assistance to which *Zambrano* carers are entitled. The member state's obligation does not extend beyond refraining from taking prohibited national measures against the carer. If the member state is required by EU law to provide any social assistance, it is obliged only to pay an amount that is adequate to prevent departure of the EU citizen child from the EU. On his submission, the social assistance provided by the UK is adequate for this purpose.

38. Mr Coppel starts with the timing point. He submits that the *Zambrano* carer has no right to reside until prohibited national measures are imminent. He submits that the right to reside of a *Zambrano* carer arises only at the point of removal or threatened removal. Prior to that date, the carer is physically here but has no right to reside. In the immigration context, it is possible for a person to be resident here without having the right to reside required to qualify him for social assistance purposes (*Abdirahman v Secretary of State for Work and Pensions* [2007] EWCA Civ 657). On his submission, it is at the point of removal or imminent removal that EU law intervenes to prevent removal. The *Zambrano* right is, on his submission, negative

rather than positive in nature. It is an immunity from national measures which destroy the substance the citizenship right of the EU citizen child. The obligation on the member state is to produce a result (to refrain from prohibited national measures). EU law does not care what sort of right is given to the carer. It is sufficient for the Home Secretary to agree not to remove the individual. There is no question of the positive right of the child being destroyed.

39. Mr Coppel submits that the Amendment Regulations were intended to reflect the entitlement of *Zambrano* carers to social assistance under EU law. The way that the UK has dealt with *Zambrano* carers with regard to the social assistance system is to introduce (via the Amendment Regulations) amendments to social security law which go further than *Zambrano* and define the right in wider terms than that was required by the judgment. This was done for administrative reasons (presumably because the First Date makes for easier and more efficient administration of the social assistance system). It was also done to ensure that the position of *Zambrano* carers was maintained at what it was always thought to be, namely a right of residence which did not qualify the carer for benefits.

40. Mr Coppel further submits that in any event the *Zambrano* carer has no right to any social assistance as a matter of EU law. Alternatively, the member state must provide them with social assistance when necessary but this need not be on the same basis as other EU citizens. In the UK, payment of adequate social assistance is achieved through section 17 of the Children Act 1989 (which is summarised in paragraph 93 below), which is always available as a safety net.

41. On the important question of the entitlement of *Zambrano* carers to social assistance under EU law, Mr Coppel submits that the case law of the CJEU in *Zambrano* and subsequent cases does not decide that any TCN who is a *Zambrano* carer is entitled to social assistance in the same way as EU citizens or their family members or long-term residents in the EU. They have entitlements under specific EU legislative measures.

42. Mr Coppel submits that to require member states to grant social assistance to *Zambrano* carers who were not otherwise entitled to it under EU law would be inconsistent with the carefully calibrated legislative scheme in EU law for the grant of rights to reside and social benefits to EU citizens, their family members and long-term residents. The rights of these persons are carefully circumscribed by the relevant directives, including the Citizenship Directive (2004/38), the Long-Term Residence Directive (2003/109) (under which long-term residents may receive only core benefits), and the Family Reunification Directive (2003/86) (under which family members may be required to provide evidence that they can maintain themselves). I refer to the relevant directives collectively as "the EU cross border social benefits legislative scheme" or "the EU CBSBL scheme" for short.

43. Mr Coppel submits that EU law does not confer any right to social assistance on *Zambrano* carers because the EU CBSBL scheme provides an exhaustive statement of the rights to social assistance which a member state has to give to non-nationals. It is a fundamental aspect of statehood that member states should be free to decide to whom to grant entry. He submits that the CJEU can go no further than protect the citizenship rights of the child.

44. It is an important point whether the *Zambrano* carer is one of the categories of person in these Directives to whom member states must provide social assistance when required because, if Mr Coppel is right about the division of competences, a member state can only be under an EU law obligation to provide social assistance if the EU CBSBL scheme so provides.

45. The Citizenship Directive, for instance, does not contain any specific provision relevant to *Zambrano* carers and contains restrictions on the rights of even EU citizens. The scheme of the Citizenship Directive relevant to rights to social assistance may be briefly described as follows:

i) Save where the Treaties or EU secondary legislation otherwise provide, EU citizens and their family members residing in another member state enjoy equal treatment with the nationals of the host member state (Article 24(1)).

ii) EU citizens can reside in another member state for up to three months so long as they do not become an unreasonable burden on the social assistance system of the host member state (Articles 6 and 14(1)). It is for the host member state to decide whether to grant social assistance to EU citizens (other than groups such as workers, self-employed persons or their family members, including maintenance assistance for studies to such persons) during this period (Recital 21).

iii) EU citizens and their family members can reside in another member state for longer than three months if they:

a) are workers or self-employed persons in the host member state; or

b) have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host member state and have comprehensive sickness insurance cover (Article 7(1)).

iv) EU citizens and their family members who have resided legally for a continuous period of five years in the host state can become permanent residents and their right to reside is not then subject to having to show resources or not being an unreasonable burden on the social assistance system of the host state (Article 16).

46. In a nutshell, the crucial point is that the Citizenship Directive draws a distinction between economically active EU citizens (see (iii)(a)) and economically inactive citizens (see(iii)(b)). If *Zambrano* carers were EU citizens, they would fall within the latter group. Under the Citizenship Directive, to be lawfully resident here, the latter group must in the first five years of residence show sufficiency of resources and have comprehensive sickness cover (see (iii)(b)). The appellants do not meet these requirements and want to be placed throughout in the same position as economically active EU citizens under (iii)(a).

47. If the start date for *Zambrano* status is the First Date, as the appellants contend, so that a *Zambrano* carer is eligible for social assistance from that date that would put

the *Zambrano* carer (if economically inactive) in a better position than an EU citizen for the first five years in another member state.

48. Mr Coppel also makes detailed submissions on the jurisprudence in *Zambrano,* and subsequent cases. He submits that this jurisprudence confirms that the right of *Zambrano* carers does not extend under EU law to social assistance. I shall need to consider this jurisprudence in the light of the parties' submissions when I come to my conclusions below.

49. Mr Coppel's response to Mr Knafler's point on criminal liability as a result of section 24 of the Immigration Act 1971 was, initially, that this liability does not matter for EU law purposes because it does not infringe the rights of the EU citizen child. On reflection, he accepted that EU law prevents prosecution because that would frustrate the child's citizenship right. In fact no *Zambrano* carer has been prosecuted.

50. Mr Charles Banner, for the AIRE Centre, submits that the *Zambrano* right derives from Articles 20 and 21 TFEU. He submits that it is a crucial function of a *Zambrano* carer to provide support, including financial support, for the EU citizen child. Mr Banner accepts that one consequence of his submission is that a *Zambrano* carer is in a better position than an economically inactive EU citizen.

51. I now turn to my conclusions on Issues (1) and (2).

Zambrano jurisprudence

52. The decision of the CJEU in *Zambrano* establishes that Article 20 TFEU precludes a member state, where an EU citizen child is a national and resides, from refusing to grant a right to reside to a TCN who is the primary carer for that child where its refusal would lead to the carer having to leave the EU, because that refusal would deprive the child of the "genuine enjoyment of the substance of" his rights as an EU citizen.

53. Counsel did not agree as to whether Mr Zambrano was subject to an immediately enforceable order to leave Belgium or not, but that fact is not material because he was forced to leave for economic reasons so long as he did not have a right to reside carrying with it the right to work.

54. The CJEU clearly precluded the member state from refusing to grant a right to reside. However, it was not necessary for the CJEU to define when Mr Zambrano's right to reside arose and it gave no guidance on that point.

55. In Case C-256/11 *Dereci v Bundesministerium fűr Inneres* [2012] 1 CMLR 45, decided the same year, the CJEU refined their reasoning in *Zambrano*. There were some five appeals raising similar points. The facts of the lead appeal were that Mr Dereci, a Turkish national, had entered Austria illegally. It is to be noted that that did not automatically disqualify him from benefitting under the *Zambrano* principle (see also Case C-127/08 *Metock v Minister of Justice, Equality and Law Reform* [2008] ECR I-6241, [2009] QB 318). There he had married an Austrian wife and had three children. He applied for a residence permit, but this was refused because his family had not exercised their right of freedom of movement and moved to

another member state. The CJEU held that the refusal did not breach EU law so long as it did not deprive his family of the genuine enjoyment of the substance of their rights, which was a question for the referring court to determine. The EU citizen children were not dependent on Mr Dereci.

56. The court rejected the argument that, as there was no cross-border element, the matter fell purely within the internal order of the member state ([61], [62]). It repeated the point established in *Zambrano* that Article 20 TFEU precluded national measures which had the effect of depriving EU citizens of the genuine enjoyment of the substance of their rights as EU citizens ([64]). At [66], the CJEU held that the criterion established in *Zambrano* applied where the Union citizen "has, in fact, to leave" Union territory, i.e. the threat of removal was critical. At [67] of its judgment, the CJEU made it clear that this status is exceptional and is conferred notwithstanding that it is not covered by subordinate legislation and that it is granted on the basis that the effectiveness of EU citizenship would otherwise be undermined. Economic reasons for a *Zambrano* carer to live with her family were not enough.

57. The CJEU then turned to private and family life. At [72], the CJEU made it clear that it was for the national court to decide which was the relevant law, i.e. whether Article 7 of the EU Charter or Article 8 of the Convention applied. These Articles both confer the right to respect for private and family life. This court in *Harrison* took the reference to Article 8 to be an important indication of the limits of the *Zambrano* decision. This court held that the decision in *Zambrano* did not mean that the rights of the EU citizen child extended to preventing one of their carers (who was a TCN) from being removed from the jurisdiction because his removal would necessarily diminish the quality of their lives. If that had been a consequence of the *Zambrano* decision, the CJEU would have not had to consider either Article 7 or Article 8. But this court did not resolve the question why the CJEU had included [72] in its judgment or the significance of the reference to Article 8 (see [69] of the judgment of Elias LJ).

58. Mr Coppel submits that the reference to Article 8 is an indication that the CJEU recognised that the EU Charter would not apply unless the applicant had a right to reside by virtue of the EU CBSBL scheme since, if he did not, the question whether he had a right to reside would be outside the scope of EU law and governed by national law.

59. I accept this submission up to a point. The significance of the reference to Article 8 is surely that the CJEU contemplated that there will be cases which are outside the scope of EU law, so that Article 8 of the Convention would apply and not Article 7 of the EU Charter. Therefore, if the applicant does not have the attributes of a *Zambrano* carer, the national court will be thrown back on whatever right to reside may exist under national law. That would be the case, for example, if the question of the EU citizen child having to leave the Union is academic (see *Iida*, below). That indeed was the situation in *Dereci* and it seems reasonable to conclude that that was the situation which the CJEU were addressing in [72]. On that basis, the paragraph does not assist on the question whether a *Zambrano* carer who has the necessary attributes has an EU law right to reside throughout the time that he satisfies EU law or only if prohibited national measures are taken or are imminent.

60. In its conclusion on the *Zambrano* issue, at [74] of its judgment in *Dereci*, the CJEU held that EU law does not preclude a member state from refusing to allow a TCN to reside in its territory where the TCN wishes to reside with a member of his family, who is an EU citizen residing in that member state and who has never exercised his right to freedom of movement. The CJEU added this qualification:

> "provided that such refusal does not lead, for the Union citizen concerned, to the denial of the genuine enjoyment of the substance of his status of Union citizenship right."

61. Mr Coppel submits that it is clear from the end of [74] of *Dereci* that the question whether rights of residence are conferred on TCNs in the circumstances described in the preceding paragraph of this judgment is a question to be decided by national law. I accept his submission. However, if the applicant is, or becomes, a *Zambrano* carer, her right to reside will also be, or (as the case may be) will become, one recognised and protected by EU law.

Further case law: when does the Zambrano carer's right to reside arise?

62. Both *Zambrano* and *Dereci* are unclear about when a *Zambrano* carer acquires her right to reside. Mr Coppel took us to a number of further decisions which, he submits, support his case that the right arises only on the Last Date.

63. Mr Coppel relied on a number of cases following *Zambrano* and *Dereci*. They included Case C-40/11 *Iida v Stadt Ulm* about a TCN whose child was a German national who lived with her mother in Austria. The question was whether he had an EU right of residence, derived from his daughter, after he separated from his wife. He remained in Germany. The German authorities refused to issue him with a residence card as the refusal was "not liable" to deny the wife or daughter the genuine enjoyment of their rights associated with their status as Union citizens or impede the exercise of their rights to move and reside freely within the Union pursuant to Articles 20 and 21 TFEU. The CJEU agreed, emphasising that EU law would intervene only exceptionally where the effectiveness of EU citizenship was undermined. There had to be a real prospect of that occurring. Mr Knafler sought to derive some support from the use of the word "liable" here but the support is not in my judgment of great assistance.

64. Mr Coppel cited Cases C-356/11 and C-357/11 *O v Maahanmuuttovirasto*, which emphasise the role of the national court in determining whether the prohibited national measures will actually cause the *Zambrano* carer to leave the Union with the EU citizen child. This case also makes it clear that the status of a *Zambrano* carer did not necessarily depend on a blood relationship nor on the child (where, for example, having a disability) being a minor: that directly supports Mr Knafler's test of "relationship dependency".

65. Mr Coppel also cited Case C-87/12 *Ymeraga v Ministre Du Travail de l'Emploi et de L'Immigration* [2013] 3 CMLR 33 and Case C-86/12 *Alopka v Ministre Du Travail de l'Emploi et de L'Immigration.*

66. However, none of these cases decides any new point of principle. None of them discusses the First Date/Last Date point. To my mind the main interest of these

further cases lies in the repeated confirmation of the principle established in *Zambrano* and in the absence of any suggestion that the carer was entitled to social assistance as a matter of EU law, a point to which I shall return below.

67. So these additional cases do not throw any great light on to main issues (1) and (2). In my judgment, for the answers to those questions we have to go back to the effective citizenship principle, and look at the cases not involving *Zambrano* carers which have been decided more generally by applying that principle.

The effective citizenship principle

68. Matters of entry and stay for non-EU citizens are matters outside the exclusive competence of the EU but the CJEU has laid down the principle that decisions which member states take on these matters must not be such as to make the rights of EU citizenship ineffective. There have been many cases on this point over the years. The most significant for present purposes are Case C-200/02 *Zhu and Chen* [2005] QB 325, Case C-413/99 *Baumbast v Secretary of State for the Home Department* [2002] 3 CMLR 23, Case C-310/08 *Ibrahim v Harrow LBC* and Case C-480/08 *Teixeira v Lambeth LBC* [2010] PTSR 1913.

69. It is only necessary to take one of those cases in detail. I will take *Baumbast*. In that case there were children in education in the UK who were not British citizens but the children of a German national and a TCN. The German national worked here for many years but his business failed and he went back to work in Germany. The question arose whether the children could stay here in right of being in further education here. There was a further question as to whether the mother could stay here as their carer. The CJEU held that the children's right to reside in the UK (the host member state) in order to attend general educational courses pursuant to Article 12 of Regulation 1612/68 had to be interpreted so as to entitle the parent who is the primary carer of the children, irrespective of nationality, to reside with them in order to facilitate the exercise of that right, notwithstanding the fact that the parents have meanwhile divorced or that the parent who had the status of an EU citizen had ceased to be a migrant worker in the UK (see [75] of the judgment).

70. *Baumbast* was applied in the CJEU's later decision in *Chen.* In *Chen*, the CJEU held that Article 18(1) EC and Directive 90/364 conferred a right to reside for an indefinite period in the host member state on a minor who was a national of another member state, was covered by appropriate sickness insurance and was in the care of a parent who was a TCN and had sufficient resources for the minor not to become a burden on public finances of the host state. The CJEU further held that, since the child's right to reside would be deprived of any useful effect if the child's carer were not permitted to reside with the child, those provisions also allowed a parent who was the child's primary carer to reside with the child in the host member state.

71. In my judgment, these cases throw considerable light on *Zambrano* and demonstrate its place in EU law. While *Zambrano* is intended to apply only exceptionally, it is not itself an exceptional or unprincipled piece of jurisprudence. It forms part of the wider principle which I have called the effective citizenship principle. It thus does not in any way disturb the coherence of that principle.

72. The wider principle, in my judgment, informs the answer to the Main Issues. In my judgment, it is clear that the principle is concerned with creating rights to reside where that is necessary to make a person's EU citizenship status meaningful and effective.

73. That right to reside stems from Article 20 TFEU and so it is also a right to work. We are told that the Home Office issues those who apply as *Zambrano* carers on request with a certificate of application which will entitle them to live and work here. That practice is entirely consistent with the EU law position as I see it to be.

74. Given that the *Zambrano* carer's right is to reside so as to support the status of the EU citizen child, it makes no sense that the right should arise only from the Last Date. The fact that presence in the UK without a right to reside would also put the *Zambrano* carer in breach of the criminal law, even if it were to be an abuse for a prosecution to be brought, confirms this conclusion.

75. My conclusion on this point is consistent with a concession that the Secretary of State for the Home Department made in *Pryce v Southwark LBC* [2012] EWCA Civ 1572. That case was about a claim by a *Zambrano* carer for social housing. She would have been ineligible if she was subject to immigration control. As a TCN, she would have been subject to immigration control unless EU law gave her a right to reside. The Secretary of State conceded that she was not subject to immigration control. So the Secretary of State accepted on that occasion that the *Zambrano* carer had a right to reside.

76. That leaves the question whether the EU law right is greater than the right to reside and work – extending, for instance, to the right to claim social assistance.

77. In *Baumbast* no question arose as to access to social assistance. In any event, the father maintained health insurance in Germany which covered the children. On the other hand, nothing is said in Article 12 of the Citizenship Directive 2004/38 about having to show sufficient resources or about the family members becoming a burden on the social assistance system. Accordingly the CJEU in Case C-480/08 *Teixeira v Lambeth LBC* held that it was not necessary for the parent to show self-sufficiency (see the CJEU's judgment at [72] to [75]). In that case, Mrs Teixeira, who was of Portuguese nationality, applied for housing assistance in 2007. By then she had been in the UK for nearly 20 years. She might therefore have qualified as a permanent resident. But her right to apply for social assistance, while not a right expressly given by the Citizenship Directive, was one which the CJEU considered was implicitly given by that Directive. The CJEU unusually examined the *travaux preparatoires* to assist it to reach this conclusion.

78. The *Zambrano* carer is in a very different position. The *Zambrano* carer cannot point to any provision in the Citizenship Directive or any other directive which gives her a right to social assistance as a matter of EU law. The right of the *Zambrano* carer is derived directly from Article 20 TFEU.

79. This is where Mr Coppel's argument on the EU CBSBL scheme bites. Since there is no basis in that scheme for holding that the *Zambrano* carer has a right to receive social assistance, the Zambrano carer cannot claim a benefit under it. In the case of EU citizens it is exhaustive of EU law rights and any further right can only be found

in national law. That conclusion is supported by the decision of the CJEU in Case C-333/13 *Dano v Jobcentre Leipzig*, delivered after the date of the hearing on which the parties made written submissions. *Dano* supports Mr Coppel's submission that the EU CBSBL scheme constitutes an exclusive code as to when member states are obliged as a matter of EU law to provide social assistance.

80. In *Dano*, the CJEU held that member states were entitled to withhold benefits to economically inactive migrants from other member states. In that case, Mrs Dano and her infant son, who were Romanian nationals, moved to Germany. Mrs Dano did not seek work. She did, however, receive child benefit and an advance on maintenance payments for her son. She challenged Jobcentre Leipzig's decision to refuse her application for a benefit for jobseekers, in accordance with German law. The German court referred a question to the CJEU as to whether German law was compatible with EU law.

81. The CJEU held that a host member state is not obliged to confer entitlement to social assistance on a migrant either during the first three months of residence or during the period in which he seeks employment or prior to the acquisition of a right of permanent residence. Nor was the host member state obliged to grant maintenance aid for studies to persons others than workers, self-employed persons, persons who retain such status after ceasing to be such workers or persons, and members of their families, because this is not provided for by the Citizenship Directive.

82. Importantly, the CJEU held that EU citizens who are economically inactive and have lived in a host member state for between three months and five years could not rely on the non-discrimination principle unless they had acquired the right of permanent residence, on the basis that the contrary conclusion would conflict with the Citizenship Directive.

83. The appellants and the AIRE Centre contend that *Dano* does not affect the appellants' case because, in *Dano*, Ms Dano had no right of residence. To my mind, that is not the significant point in *Dano* for present purposes. The significant point is that the CJEU held that an EU citizen could not rely on the nationality non-discrimination principle to obtain social assistance outside the scheme provided in the Citizenship Directive. The same point must apply to a TCN who seeks to rely on that principle to obtain social assistance outside the Long-Term Residence Directive. It follows that, where those Directives do not apply, member states can in principle decide on the level of benefits.

84. Mr Lintott, for Croydon, makes the further point that housing assistance is in any event a benefit outside the benefits conferred on EU citizens from other member states. The parties did not address the meaning of "social assistance" for the purposes of the Citizenship Directive, which does not define that term, and accordingly I do not propose to rule on this submission.

85. The AIRE Centre submits that the position of the *Zambrano* carers is different from that of EU citizens because they do not have a member state of origin to which to return and that therefore the restrictions in the Citizenship Directive on EU citizens from other member states who have not become permanent residents do not apply.

86. However, that cannot amount to a good reason for distinguishing a *Zambrano* carer from that of other TCNs to whom the Long-Term Residence Directive applies, and giving her a right which is better than that of an economically inactive EU citizen in the first 5 years of residence in a new member state.

Basic support test

87. The position then is that there is no EU treaty provision or legislative measure which restricts the freedom of a member state to decide on the level of benefits for *Zambrano* carers. That leads Mr Coppel to submit that the *Zambrano* carer has no entitlement to social benefits and that Supperstone J was right so to find. He submits that there is nothing in *Zambrano* or any subsequent CJEU or domestic authority to that effect. I agree that there is nothing to that specific effect in the case law shown to us.

88. Mr Coppel further submits that *Zambrano* is predicated on the assumption that a *Zambrano* carer will not have any access to social benefits since the CJEU was concerned that Mr Zambrano should have the right to work so that he would not have to leave Belgium. I do not accept that submission. The reason why Mr Zambrano needed the right to reside in Belgium was so that he could obtain a social benefit, namely unemployment benefit. The CJEU were well aware of that. It would be unreal to think that the CJEU did not contemplate the possibility that his children would be deprived of the benefits of EU citizenship if he was not able to work.

89. Moreover, there is no suggestion in the CJEU jurisprudence that a *Zambrano* carer must be economically active. In practice a single parent of a very young child may find it difficult to work. There will, therefore, be circumstances in which, if a member state were not to provide any social assistance, the *Zambrano* carer would be reduced to destitution.

90. Some of the domestic decisions before us have sought to draw a distinction between destitution and being forced out of the EU for want of resources. In my judgment, the CJEU jurisprudence does not require this distinction to be drawn. If necessary, an assumption about being forced out will be made, as stated by the CJEU in [44] of its judgment in *Zambrano* (see paragraph 4 of this judgment). Destitution can be as undermining of the benefits of EU citizenship as being forced out of the EU. The law here looks to the substance, and not the form. The law also looks to practical reality: as Mr Drabble emphasises in his submissions, in reality the *Zambrano* carer has nowhere else to go. She is likely to be a long-term resident: so far as the EU is concerned, that is the consequence of the EU CBSBL scheme (which is in that respect a double-edged sword in Mr Coppel's hands). The law must here be interpreted in the real world and freed from the shackles of unreality. The need to find that someone will be forced to leave the UK is therefore equivalent to saying that the *Zambrano* carer and the EU citizen child must not be left without the resources which are essential for them to live in this jurisdiction.

91. In those circumstances, in my judgment, the effective citizenship principle must be taken to mean that the member state will not undermine the right to reside of the *Zambrano* carer conferred by EU law by failing to meet the basic needs of the *Zambrano* carer. These needs of course include the need to be able to care for the

EU citizen child. This is not inconsistent with the EU CBSBL scheme because the Zambrano carer's right to residence does not derive from any Directive within that scheme but from Article 20 TFEU.

92. A number of submissions were made about the proportionality of the amount of social assistance made available to the *Zambrano* carer. Mr Banner advocates what he calls a "fact-specific proportionality test". He submits that, to be proportionate, the member state's decision on social assistance must take into account the relevant factors of the case, for example, whether the *Zambrano* carer was or had been economically active and whether on the facts of the case support under section 17 of the Children Act 1989 would be available and, if so, its effect. He further submits that, as *Zambrano* carers have the right to reside, economically inactive *Zambrano* carers should, in the absence of compelling reasons, be treated in the same way as economically inactive EU citizens. He bases this submission on the decision of the CJEU in Case C-140/12 *Pensionversicherungsanstalt v Brey* and the Opinion of the Advocate General in Case C-507/12 *Saint Prix v Secretary of State for Work and Pensions.* In *Brey* at [64] the CJEU held that a member state could not make a decision to deny social assistance to an economically inactive EU citizen with no right to reside on the grounds that the grant would impose an unreasonable burden on the state unless it had considered the effect of granting assistance in the particular circumstances of the claimant's case. In *Saint Prix*, the Advocate General re-iterated these points ([43] to [52]).

93. Mr Coppel relies on the existence of section 17 of the Children Act 1989 to show that the provision of social assistance to *Zambrano* carers and their children is adequate. Section 17 imposes a duty on local authorities to provide support to children in need. The support can be financial support and/or accommodation for both parent and child. Thus, submits Mr Coppel, a *Zambrano* carer and the EU citizen child for whom they care would not be left destitute. If it was adequate it was also proportionate. In any event, he submits, it follows from the decision of this court in *Mirga v Secretary of State* [2013] EWCA Civ 1952 that EU law does not require a further fact-specific proportionality test to be satisfied.

94. The parties did not agree over the adequacy of support under section 17 of the Children Act 1989. It is well known that there have been substantial cuts in public funding. I note that there have been a number of first instance decisions on the operation of section 17 in practice but it is not open to this court on the material presented in these appeals to determine whether section 17 operates satisfactorily on the ground. Suffice to say, if section 17 assistance is available, it would have the effect contended for by Mr Coppel, namely of ensuring that the basic needs of the child and the *Zambrano* carer are both properly looked after.

95. In my judgment, however, the EU principle of proportionality does not apply to the amount of social assistance to be made available to *Zambrano* carers. As I explain in paragraphs 3 and 26 above, the status of *Zambrano* carers is derivative. Their status is not founded on any personal right of residence, or right to be paid social assistance, conferred on them by any EU treaty provision or legislative measure. Their status is derived from the EU citizenship rights of the child as interpreted by the CJEU. EU law has no competence to determine the level of social assistance to be paid to the *Zambrano* carer. Accordingly, the EU principle of proportionality does not apply. As I have said, the EU law requirement not to take prohibited

measures is met by the member state making available social assistance to *Zambrano* carers who are in need and who cannot work of such amount as would enable them to support themselves with the EU citizen child within the EU. On the evidence available to this court, this court is not in a position to determine that the basic support test is not met.

96. The UK's reasons for making less social assistance available to *Zambrano* carers than to EU citizens are to be found in the witness statement, filed on behalf of the Secretary of State, by Gareth Cooper, a Policy Adviser at the Department for Work and Pensions. His evidence explains that denying access to income-related benefits by those who are subject to immigration control reduces the incentive for people to come to the UK to claim benefits and encourages immigrants here unlawfully to regularise their stay. His witness statement contains an estimate of the costs of providing income-related benefits to *Zambrano* carers, which, exclusive of the costs of administration and based on current projected numbers, could range between £3.8m and £9.4m each year. The UK government considered that, with the limits on public spending, public funds should be allocated to those with the greatest connection with the UK. A number of *Zambrano* carers had been in the UK for some years before the decision in *Zambrano,* and had been able to support themselves and their families. The purpose was also to encourage TCNs wishing to have children here to ensure that they had sufficient resources to support themselves and their child, and to reduce "benefits tourism".

97. Mr Drabble does not accept that the deterrence argument is valid in the context of *Zambrano* carers who will have had children before they are faced with the limitation on benefits. But the court is not in a position to say that the deterrence argument is for that reason clearly unreasonable. There are many other persons, apart from *Zambrano* carers, for whom the message may be intended.

98. Had I needed to be satisfied that the social assistance made available to *Zambrano* carers was proportionate I would have accepted Mr Coppel's submissions on proportionality for the following reasons:

i) Mr Cooper's evidence shows that the UK considers that the legitimate aim of the Amendment Regulations is to safeguard public finances by strengthening immigration control and putting *Zambrano* carers on a par with other TCNs seeking social assistance.

ii) The measures are suitable to promote that objective.

iii) There is a rational connection between the measures and their legitimate aim.

iv) The level at which benefits are pitched reflects the EU law imperative which is that the *Zambrano* carer should not be forced to leave the EU. As I have explained, in paragraph 90 above, in my judgment, the law does not descend to asking whether a carer will or will not in fact leave the UK with an EU citizen child if denied access to particular benefits. It looks to the substance and not the form. It is sufficient if the *Zambrano* carer would be unable to meet basic needs, including needs arising from their caring responsibilities. I am satisfied that, particularly with the inclusion of assistance under section 17 of the

Children Act 1989, the measures in place are designed to prevent that from happening.

v) The *Zambrano* carer is not relegated to some peculiarly inferior position in domestic law. She is not singled out from other TCNs who do not have unconditional leave to remain in domestic law.

vi) The decision to exclude *Zambrano* carers from income-related benefits does not affect their ability to work and claim contributory benefits.

99. Moreover, once the conclusion is reached that the scheme is proportionate, the court is not required to consider whether it operates proportionately in individual cases: see *Mirga* at [29], where this court declined to consider whether the application of the Workers' Registration Scheme with which migrant workers from certain states which acceded to the EU had to comply operated proportionately in an individual case, as the House of Lords had already held in Z*alewska v Department of Social Development* [2008] 1 WLR 2602 that the scheme, in general, was proportionate.

100. *Brey* is in my judgment distinguishable. The holding in *Brey* on which Mr Banner relies concerns a blanket rule in Austrian law which rejected an EU citizen migrant worker's claim for social assistance on the basis that it was inconsistent with the requirement imposed by the Citizenship Directive for him to have sufficient resources to mean that he was not an unreasonable burden on public finances. It was said that the claimant's residence was unlawful under the Citizenship Directive. The relevant holding of the CJEU was that the Austrian courts had to be satisfied that the burden imposed by the migrant worker's claim on the particular facts of his case was disproportionate. But the context was entirely different. Article 8(4) of the Citizenship Directive, for example, provides that member states should take into account the personal situation of the person concerned, and thus requires member states to determine whether a person has sufficient resources on a case-by-case basis. This is one of the reasons which the CJEU gives for its holding: see [67] of its decision in *Brey.*

101. For these reasons, in my judgment, the level of social assistance made available to *Zambrano* carers is not in breach of any requirement of EU law.

MAIN ISSUE (3): CAN A ZAMBRANO CARER CLAIM TO BE ENTITLED TO SOCIAL BENEFITS BY VIRTUE OF THE NON-DISCRIMINATION PRINCIPLE AND IF SO IN WHAT CIRCUMSTANCES?

102. Mr Drabble relies on the nationality non-discrimination principle in Article 18 TFEU. He contends that the Amendment Regulations discriminate against *Zambrano* carers on the basis of nationality.

103. In my judgment, the decision of the Supreme Court in *Patmalniece v Secretary of State for Work and Pensions* [2011] 1 WLR 783 binds us to hold that the

discrimination between *Zambrano* carers and other benefits claimants, resulting from the Amendment Regulations, is not direct discrimination on the grounds of nationality but indirect discrimination on other grounds. In that case, the claimant was a Latvian national and therefore an EU citizen. She had no right to reside as then defined in the UK. She claimed an entitlement to UK state pension benefit. When met with the response that she did not have the right to reside, Ms Patmalniece contended that the legislation discriminated against her on the grounds of nationality. The Supreme Court, by a majority of 4 to 1, rejected this argument. It was not just non-UK nationals who were affected by the right to reside test: UK nationals may in some circumstances fail to meet it. The test, however, was one which it was easier for UK residents to satisfy. Accordingly, there was indirect discrimination.

104. It followed that the right to reside test was open to justification. The majority held that this requirement was justified. Importantly Lord Hope, with whom Lord Rodger and Lord Brown agreed, held that the right to reside was justified as a means of controlling benefits tourism (see [52] of the judgment).

105. In one of the appeals before us, *HC*, Supperstone J rejected HC's challenge to the Amendment Regulations on the basis of the nationality non-discrimination principle. He held that the discrimination was on the grounds of immigration status and was therefore indirect. He further held that, on the facts, the discrimination was justified. He reached this conclusion on the grounds of *Bah v United Kingdom* [2012] 54 EHRR 21, a decision of the Strasbourg court. I consider that the judge was correct to say that the discrimination resulting from the right to reside test was not discrimination on the grounds of nationality. This follows from the decision of the European Court of Human Rights. However, the right to reside test is clearly indirectly discriminatory on some ground. There was a concession in *Patmalniece* that, if the right to reside test was discriminatory on some ground other than nationality, but was indirectly discriminatory, the discrimination could be justified (see Lord Hope's judgment at [15]). That concession was in my judgment correctly made. Accordingly I proceed on the basis that the substantial ground of discrimination in the Amendment Regulations is not nationality but immigration status. If Ms HC had not been a TCN with no leave to remain, but an EU citizen with a right to reside, her claim to social assistance would have succeeded.

106. But, even if Mr Drabble were able to demonstrate that the discrimination is on the basis of nationality, he meets the difficulty that the CJEU has held that TCNs cannot rely on Article 18 TFEU: see, for example, Case C-22/08 *Vatsouras v Arbeitsgemeinschaft (AGRE) Nurnnerg 900* [2209] ECR I-4585, [2009] ALL ER (EC) 747 at [52] and C-85/96 *Martinez Sala v Freistaat Bayern* [1998] ECR I-2691at [62]. It was the view taken by Lady Hale in *Patmalniece* (at [83]) that only EU nationals could rely on Article 18 TFEU.

107. Mr Drabble seeks to avoid that result by submitting that the case of the *Zambrano* carer is distinguishable because she has an EU law right to reside in the EU. He relies particularly on *Martinez Sala*. In that case, Ms Sala was a Spanish national living in Germany. Ms Sala claimed a child-raising allowance. The CJEU ruled that this was a benefit within the scope of EU law. Ms Sala was, however, refused the benefit by the German authorities because under domestic law non-nationals had to have a residence permit to claim this benefit and at the relevant time Ms Sala did

not have this permit. The CJEU held that Ms Sala could challenge this domestic law requirement on the basis of the non-discrimination principle if the national court was satisfied that she was a worker for the purposes of the EU Treaty, or an employed person for the purposes of EU secondary legislation.

108. Therefore, in my judgment, *Sala* cannot be read as holding that it is sufficient to bring a non-discrimination challenge that the subject matter of the challenge is within the scope of EU law, or as otherwise assisting the *Zambrano* carer. The claimant must also personally have status to bring the claim. To do this, Ms Sala had to be an EU citizen with a right which is given by the Treaty or EU secondary legislation. In the present case, a *Zambrano* carer is not a potential beneficiary of social assistance within the EU CBSBL scheme, since her right to reside is not derived from that scheme but from Article 20 TFEU. Accordingly, her case is distinguishable from that of *Sala* and does not enable her to bring a claim within Article 18 TFEU.

109. Mr Drabble also relies on Case C-45/12 *ONAFTS v Ahmed.* In that case, the CJEU held that, although the claimant, an Algerian national, had a right under domestic law to be present in Belgium, that was not enough to enable her to claim social assistance under EU law. She had not qualified as a permanent resident. In the circumstances, it was not incompatible with EU law for Belgian law to discriminate against her in determining the allocation of social benefits. The fact that she had a Belgian residence permit did not mean that she could rely on the nationality non-discrimination principle in Article 18 TFEU.

110. Mr Drabble submits that the result would have been different if Ms Ahmed had had an EU law right to reside. However, this submission is inconsistent with the judgment of the CJEU which made it clear that references in earlier case law to the possession of a residence permit enabling a person to rely on Article 18 TFEU had been made in the context of EU citizenship (see its judgment at [40] and [41]). Therefore *Ahmed* does not assist Mr Drabble.

111. Mr Coppel submits that, if it were correct to say that the non-discrimination principle can apply wherever the subject matter is covered by an EU law right, the Long-Term Residence Directive would be invalid because it restricts social benefits for permanent residents to core benefits. The correct analysis, on Mr Coppel's submission, is that, outside those core benefits, any challenge by the TCN would be outside the scope of EU law and the TCN would be unable to rely on the non-discrimination principle.

112. That submission is plainly right.

113. Mr Drabble argues forcefully that the situation is unacceptable. EU citizen children of *Zambrano* carers are treated differently from other EU citizen children in the United Kingdom. Their family life is adversely affected. Supperstone J also rejected the argument that there was discrimination against Zambrano carers' EU citizen children because it was the carers, and not the children, who were entitled to the benefits. But this argument does not avail Mr Drabble either because EU law does not prohibit "reverse discrimination", that is, unfavourable treatment by a member state of some of its own nationals. That indeed is what has happened with

respect to these children. In her opinion in *Zambrano*, Advocate General Sharpston invited the CJEU to reconsider reverse discrimination, but it did not do so.

114. The fact that EU law permits reverse discrimination means that, contrary to the submissions of Mr Drabble and Mr Banner, Ms HC cannot succeed by relying on another form of discrimination relied on before Supperstone J, namely "associative" discrimination. A *Zambrano* carer cannot allege that she is discriminated against because of her child because, even if that would constitute discrimination in other circumstances, it is only reverse discrimination for EU law purposes. The judge was, therefore, in my judgment correct to reject this argument.

115. That means that the only protection from discrimination available to the *Zambrano* carers (or their children) is that to be derived from Article 14 of the Convention. In order to show that the discrimination violates the Convention, Mr Drabble would have to show that the legislative policy was manifestly without foundation (see *Bah v UK* (2012) EHRR 21 at [37]). In my judgment he cannot show this for the following reasons. First, the differentiation does not leave the *Zambrano* carer and the EU citizen child destitute. They can have recourse to assistance under section 17 of the Children Act 1989. In addition a *Zambrano* carer can apply for long-term leave to remain under Appendix FM to the Immigration Rules. Normally, leave is given for the first ten years on the condition that there will be no recourse to public funds but the guidance shows that, where the applicant has suffered domestic violence and is a lone parent, that period is abbreviated.

116. In addition, there are deliberate policy reasons for treating *Zambrano* carers and their children differently from other TCNs or indeed other EU citizen children. This can be seen from Mr Cooper's evidence, summarised at paragraph 96 above. In part, the policy reasons include deterrence. Mr Drabble submits that argument is nonsensical because, by the time the problem arises, the *Zambrano* carer will have already had the child. But that is only part of the policy justification for the differentiation. Moreover, the question whether the deterrence is of value must be a matter for political judgment.

117. Finally, the non-discrimination principle includes Article 21 of the EU Charter. This does not give the *Zambrano* carer any independent right to assert that she is entitled to social assistance on the same basis as EU citizens because Article 52(5) of the EU Charter expressly provides that Charter rights only apply to acts of member states when they are implementing EU law. In any event Article 21(2) of the EU Charter provides that Article 21 applies only "within the scope of application of the" EU Treaty. The *Zambrano* carer has, therefore, to show some right to that level of the benefit elsewhere in EU law, which she cannot do.

MAIN ISSUE (4): DID THE SECRETARY OF STATE PAY DUE REGARD TO EQUALITY CONSIDERATIONS BEFORE MAKING THE AMENDMENT REGULATIONS IN AUTUMN 2012?

118. Section 149 of the Equality Act 2010 imposes an important duty on public authorities to have due regard to the need to eliminate discrimination prohibited by the 2010 Act and that would certainly include discrimination against *Zambrano* carers on the grounds of race or gender. As Elias LJ put it in *R (Hurley) v Secretary*

of State [2012] HRLR 374 (Div Ct) at [91], this duty requires a "structured attempt to focus on the details of the equality duties". However, it is for the decision-maker, and not the court, to decide what weight to give to the various considerations (*Hurley* at [78]).

119. In October 2012, the Department for Work and Pensions completed an Equality Impact Assessment ("EIA"). Mr Cooper described this as a "conscientious analysis of the equality issues". (The later EIA in 2014 is not relevant for present purposes.)

120. Mr Drabble however, is roundly critical of the EIA in 2012 for failing to focus on the hardship that would be suffered by lone parents as a result of the Amendment Regulations. It does not deal separately with the position of women who are unable to work outside the home because of their caring responsibilities. Mr Drabble submits that the *Zambrano* principle predominantly affects women in this group. The statistics in the EIA show that some 73% of the lone parents applying for residence cards were women.

121. Mr Drabble submits that the EU citizen children of *Zambrano* carers are disadvantaged because the benefits which their carer receives are not the same as those received by carers for UK nationals. He contends that there is no recognition of the needs of the children. The Amendment Regulations create a class of UK nationals who are not able to access mainstream benefits. Mr Drabble submits that it is, using his words, unacceptable to create a group of children without access to income-related benefits and moreover to do so is contrary to one of the purposes of the public sector equality duty. He submits that *Zambrano* carers and their children have to show destitution to get benefits via removal of the public funds condition when leave is granted under Appendix FM to the Immigration Rules or section 17 of the Children Act 1989. They are caring for an EU citizen child who is forced to live "a hand to mouth existence". On his submission, the child and the carer should be treated in the same way as other settled families whose presence is permitted**.**

122. In my judgment, the essential point is that the EIA is dealing with a situation of no change in legislative policy. Even before *Zambrano*, TCNs who had no leave to remain and who cared for EU citizen children did not have access to social benefits. That means that, in practical terms, the Amendment Regulations made no change of policy. All that had happened was that the decision of the CJEU in *Zambrano* had given these TCNs a right to reside under EU law which co-incidentally triggered a right to claim benefits under domestic law which they were never intended to have. The situation is comparable with that in *R (o/a Greenwich Community Law Centre) v Greenwich LBC* [2012] EWCA Civ 496 where the local council's decision to reduce the number of legal centres it funded for each type of work, which had no effect on the consumers of those services, did not engage the PSED. We were told that in this case only a tiny minority will have claimed benefits and almost all have had their claims refused. There are some exceptional cases, including that of Ms Sanneh. In these circumstances, the impact of the PSED is necessarily limited, and the duty must also be limited.

SHOULD THIS COURT REFER ANY QUESTION OF EU LAW TO THE CJEU FOR A PRELIMINARY RULING?

123. Mr Banner submits that the court should refer to the CJEU the questions (A) whether the *Zambrano* carer can by virtue of her EU law right to reside rely on the nationality non-discrimination principle; and (B) if there is indirect discrimination on some other basis, whether justification for any indirect discrimination should be assessed on a fact-specific basis. This court may make a reference even though this is not the final court dealing with these issues in this jurisdiction. I accept Mr Banner's submission that this court should carefully consider the question of a reference of any of the EU law issues because, if it is inevitable that a reference should be made by the Supreme Court, there may well be advantages, in terms of time and cost to the parties, in this court making a reference even when it is not bound to do so.

124. Mr Banner relies on a press release issued by the EU Commission on 27 June 2014 that it has started proceedings against the UK for a declaration that it is contrary to Regulation (EC) 883/2004 for the UK to impose the right to reside test for child benefit and child tax credit purposes. But this Regulation is concerned with the rights of EU citizens, and their family members, and is not relevant to the appellants' cases.

125. The answers to questions (A) and (B) are not *acte clair,* and could in principle properly be referred by this court for a preliminary ruling by the CJEU under Article 267 TFEU. However, I do not consider that it would be right to do so for a number of reasons.

126. First, these are only some of the issues before this court. It is not appropriate to refer the question whether a *Zambrano* carer has a right to reside and if so from when because in my judgment the answers are to be found in the CJEU's consistent jurisprudence. To refer some issues might lead to the unsatisfactory situation that some issues would be before the CJEU and (if permission to appeal further were granted) some before the Supreme Court. In some cases this is unavoidable or of no consequence but if the issues on this appeal are to be considered further it would be better if the same court had the option of hearing all of them rather than some only of them.

127. Second, Lady Hale in *Patmalniece* did not envisage any exceptions to her holding that only EU nationals may rely on the nationality non-discrimination principle. Mr Banner argues that it is distinguishable on the ground that it was not dealing with a TCN with an EU law right to reside. But that leads to the next point.

128. Third, the appellants' interpretation of EU law is that *Zambrano* carers have rights which are better than those conferred by EU legislation on economically inactive EU citizens who lawfully move here but have not yet become entitled to benefits on the same basis as UK nationals. On their case, the appellants can rely on the nationality non-discrimination principle, and sidestep this problem. They automatically obtain a privileged position. That interpretation would make EU law internally inconsistent and incoherent. This result is unlikely, therefore, in my judgment to find favour with the CJEU. None of the appellants offered any solution to this, or even a fall back solution.

129. Fourth, I have held that it is for member states, and not the CJEU, to determine the level of social assistance that should be made available to *Zambrano* carers who are in need and unable to work.

130. Fifth, Mr Banner's submission that proportionality should be applied on a fact-specific basis was based on *Brey*, which deals with the very different situation of the sufficiency of resources requirement imposed on economically inactive EU citizens exercising their right to move to another member state by Article 7 of the Citizenship Directive. In any event, we were told by Mr Coppel that this principle is to be considered by the Supreme Court in an appeal shortly to be heard in *Mirga*.

131. Sixth, there is no reason to believe that the CJEU would wish to reconsider reverse discrimination in this context since it declined a clear invitation to do so in *Zambrano* itself.

132. In conclusion, I would not make a reference to the CJEU for a preliminary ruling in this case.

CONSIDERATION OF THE FACTS OF THE INDIVIDUAL CASES

133. I now turn to consider the appeals individually.

Ms Sanneh

134. Ms Sanneh is a Gambian national who came to the UK in 2006 on a student visa, which was repeatedly renewed until expiring in November 2009. On 17 September 2009, Ms Sanneh had a daughter with a British national, Mr B, and this child is also a British national. Shortly after the child's birth, Ms Sanneh and Mr B separated. Mr B has no part in the child's upbringing. Ms Sanneh is estranged from her family in Gambia and has no connection with any other EU state. On appeal the Upper Tribunal recognised that "realistically, she can only live in the UK or Gambia". Ms Sanneh is the child's primary carer and is the only person who could be. As regards income, the First-tier Tribunal found that Ms Sanneh had a monthly income of £477, in payments of child benefit, child tax credit and child support. In outgoings, Ms Sanneh had to pay £250 per month in rent plus £55 in council tax, and £75 in utilities. She did not have permission to work, relied on food banks and short- term loans and had exhausted those loans by the time of the hearing before the Upper Tribunal.

135. Ms Sanneh made a claim for income support on 13 June 2011 which was refused on 12 July 2011 on the grounds that she did not satisfy section 115 of the Immigration and Asylum Act 1999, which required her to have leave to remain in the UK. She did not require leave to remain if she had an enforceable EU right to reside in the UK: see section 7(1) of the Immigration Act 1971.

136. Ms Sanneh appealed the refusal to the First-tier Tribunal, who on 28 November 2011 allowed her appeal and remitted the matter to the Secretary of State for assessment of whether Ms Sanneh meets the others conditions for income support and the rate of benefit payable. The Tribunal's reasoning was that without income support, Ms Sanneh's continued presence in the UK was not viable and she would have to leave the UK and would have to take her daughter with her. The CJEU in

Zambrano decided that where it can be "assumed" that refusing a right to reside to a parent would lead to the child leaving the member state, a right to reside would arise. On this basis, Ms Sanneh had a right to reside.

137. On 7 January 2013, the Upper Tribunal reversed the decision of the First-tier Tribunal. The Upper Tribunal took the view that she only had the right to reside at the Last Date (as defined in paragraph 23 of this judgment). That date had not been reached at the relevant date in June/July 2011. For the reasons given in this judgment, this decision must now be set aside on the basis that it is wrong in law.

138. Following the decision of the Upper Tribunal, Ms Sanneh applied for interim payments pending this appeal but her request was refused. Ms Sanneh then applied for leave to bring judicial review proceedings in respect of the refusal of the Secretary of State. She obtained leave but, by order dated 10 April 2013, Hickinbottom J refused to grant judicial review. He held that the grant of assistance under section 17 of the Children Act 1989 would effectively prevent any breach of EU law. It was a matter for member states to decide how her *Zambrano* right should be protected and there was no realistic possibility that she would be compelled to leave the UK.

139. Ms Sanneh's claim relates to periods prior to 8 November 2012. For the reasons given above, if she qualified to be a *Zambrano* carer before that date, the Upper Tribunal should not have set aside the order of the First-tier Tribunal.

140. It has emerged since the hearing before the Upper Tribunal that, in a decision dated 26 June 2014, the First-tier Tribunal (Immigration and Asylum Chamber) held on an appeal by Ms Sanneh against the Secretary of State's refusal on 27 June 2013 to issue her with a residence card under Regulations 15A of the Immigration (EEA) Regulations 2006 that she was entitled to remain in the UK under Article 8 of the Convention (right to private and family life) but that she was not qualified on the facts as a *Zambrano* carer. Ms Sanneh has not appealed that decision. Looking at the facts as set out by the First-tier Tribunal it is likely that she also had Article 8 rights during the periods to which her claim relates. However, the findings in the decision dated 26 June 2014 are not binding on the Secretary of State for Work and Pensions. Moreover, the Secretary of State for Work and Pensions did not seek to resist liability in the Upper Tribunal on that basis, and does not now seek to do so.

141. In those circumstances, the order of the Upper Tribunal should be set aside and that of the First-tier Tribunal reinstated.

Ms HC

142. Ms HC is an Algerian national who came to the UK in 2008 on a six-month visa. When it expired, she remained in the UK unlawfully. In 2010, Ms HC married Mr H, a British national, and had two children on 28 August 2011 and 23 March 2013 in the course of that relationship. Both children are British nationals. When Ms HC was pregnant with her second child, she was the subject of domestic violence by her husband and ended the relationship in October 2012. At this time, Ms HC moved in with her sister and family in Oldham but Ms HC's sister could not afford to support

her and her children. Ms HC therefore approached Oldham Council seeking assistance on 30 November 2012.

143. Oldham Council initially refused assistance but subsequently agreed to provide temporary housing and financial support under section 17 of the Children Act 1989, which took the form of one bedroom accommodation and £45 per week in financial support. Following an order of HHJ Pelling QC on 1 August 2013 and still pursuant to section 17, Ms HC and her family were placed in two-bedroom accommodation and given £55 per week for subsistence and £25.50 per week towards utilities. It should be noted that Ms HC was granted permission to work by the United Kingdom Borders Agency ("UKBA") in a certificate of application dated 19 November 2011.

144. Ms HC brought judicial review proceedings challenging the Amendment Regulations on the grounds that they: (i) involved unlawful discrimination against the claimant and/or her children ; (ii) breached Articles 24 and 34 of the EU Charter; and (iii) breached the PSED, as there was insufficient recognition of the effects on women and children in the defendants' equality analysis and statements.

145. Supperstone J rejected all three grounds. Ms HC would not be forced to leave the UK if she was not given the benefits which she sought. He held that there was no discrimination, that, if there was discrimination, it was justified, that Ms HC could not rely on the breach of any rights in the EU Charter and that there was no breach of the PSED.

146. It follows from my conclusions on the Main Issues that I would dismiss this appeal.

Ms Merali and others

147. HHJ McKenna was asked to determine a preliminary issue in each of these appeals as to whether the appellant was a *Zambrano* carer. HHJ McKenna allowed the appeals in part by his order dated 19 September 2013. I summarise the facts of these cases in turn.

(1) Ms Merali

148. Ms Merali is a Tanzanian national. On 31 July 1999, Ms Merali married Mr M, a British national, and had two children in the course of that relationship, who are also British nationals. Ms Merali came to the UK in September 2009 with only her son from the relationship on a visit visa. Her visa expired but she stayed with her son and lived with her sister in London until mid 2011. When her sister returned to Africa, Ms Merali moved to Birmingham where she was assisted by the Muslim Community of Birmingham. On 4 October 2012, Ms Merali was given leave to remain on condition that she had no recourse to public funds for three years.

149. Around this time, Ms Merali received notice that her support would end on 1 December 2012. On 19 November 2012, Ms Merali applied for homelessness assistance from Birmingham CC under Part 7 of the Housing Act 1996. From this time, Ms Merali was provided housing assistance under section 17 of the Children Act 1989 but voluntarily left this address to live with a friend.

150. By its decision letter dated 6 December 2012, Birmingham CC determined that Ms Merali was ineligible for housing assistance. This decision was maintained following two reviews. The conclusion of Birmingham CC was that Ms Merali had demonstrated her ability to access accommodation and financial support despite the constraints of her leave, and consequently would not be compelled in practice to leave the UK either at that time or in the foreseeable future. Ms Merali issued an appeal against this decision under section 204 of the Housing Act 1996 in the County Court on 22 May 2013.

(2) Ms Lewis

151. Ms Lewis was a Jamaican national who arrived in the UK in 2002 on a six-month visit visa, overstaying on expiry of that visa. She had three children as a result of two relationships and one of those children is a British national. When the second relationship came to an end, Ms Lewis moved in temporarily with a friend but had to leave.

152. On 6 February 2013, Ms Lewis applied to Birmingham CC for assistance as a homeless person. By letter of the same date, Birmingham CC made a decision, upheld on review and further review, that Ms Lewis was ineligible for assistance. She was not a *Zambrano* carer because she had previously been able to support herself in the UK and would be able to do so again. Ms Lewis appealed this decision on 22 May 2012, under section 204 of the Housing Act 1996. Birmingham has since supported Ms Lewis and her children pursuant to section 17 of the Children Act 1989.

153. In January 2014, Ms Lewis was granted leave to remain on the basis that she should have no recourse to public funds.

(3) Ms Francis

154. Ms Francis is a Jamaican national who came to the UK in 1999 on a six-month visit visa and remained here following the expiry of renewed visas. In 2006, Ms Francis formed a relationship with a British national, by whom she had a child (also a British national) on 19 June 2008. When the relationship ended in 2009, Ms Francis lived with various friends but was asked to leave on 11 February 2013. Ms Francis applied to Birmingham CC for homelessness assistance on 29 January 2013 and, by a letter of the same date, Birmingham CC held that Ms Francis was a *Zambrano* carer and therefore ineligible for assistance. From February 2013, Birmingham has accommodated and maintained Ms Francis and her child under section 17 of the Children Act 1989.

155. The basis of the decision in Ms Francis's case was that she was able to secure accommodation and assistance absent state support and had at no time since she had arrived in the UK felt compelled to leave to avoid destitution. Ms Francis was consequently not a *Zambrano* carer and ineligible for housing assistance. Ms Francis appealed the decision on review to the county court under section 204 of the Housing Act 1996.

156. Ms Francis has made an application for leave to remain, which is still pending.

(4) Ms Sigala

157. This appeal has now been resolved because on 7 April 2014 Ms Sigala was granted leave to remain without any condition about recourse to public funds. In November 2014, she was granted a tenancy by Birmingham. Accordingly, Birmingham CC's appeal must be dismissed. The only issue is as to costs, on which the parties will have to file further submissions. I need not set out the facts of this appeal

Judgment of HHJ McKenna

158. In all these cases, the applications for social assistance were made after the commencement date of the Amendment Regulations. Accordingly the only question should have been whether the appellants were ineligible by virtue of those Regulations. In fact, the judge decided whether they were *Zambrano* carers for the purposes of the CJEU jurisprudence. It is not necessary to go into the details of the judge's reasoning because on any basis the three extant appeals have to be allowed and, unless the parties are otherwise able to agree the position under the Amendment Regulations, those cases remitted to the Birmingham County Court to be determined in accordance with the law as it stood at the date of the appellants' claims.

Ms Scott

159. Ms Scott, a Jamaican national, came to the UK in 1999 on a visit visa. She was subsequently granted leave to remain as a student but overstayed on the expiry of that leave. Ms Scott formed a relationship with a Mr B, a British national (now deceased), and had one child on 28 February 2008 within that relationship. The child is also a British national. It should be noted that, on 13 December 2012, Ms Scott was issued with a certificate of application by UKBA granting her the right to work pending a decision on her immigration application.

160. On 28 April 2013, Ms Scott and her son left the property in which they had been residing in difficult circumstances, spending the night in the home of a Church Minister and thereafter with various friends and acquaintances. On 29 April 2013, Ms Scott's solicitors wrote to Croydon to apply for housing under Parts 6 and 7 of the Housing Act 1996. This was refused by the Borough in a letter dated 30 April 2013. While Croydon accepted that Ms Scott had a right to reside in the UK as a *Zambrano* carer, it held that this rendered her ineligible for housing assistance. Ms Scott's solicitors requested a review of this decision and accommodation pending review. Further representations were made on 21 June 2013. By a decision of 24 July 2013, Croydon decided on review that, as Ms Scott was a *Zambrano* carer, she was consequently ineligible for housing assistance. Ms Scott appealed against that decision to the County Court on 18 August 2013.

161. On 17 January 2014, HHJ Ellis in the Croydon County Court dismissed her appeal, applying the Amendment Regulations and the decision of Supperstone J in *HC*. Ms

Scott then appealed to this court on substantially the same grounds ("the *HC* grounds") as are raised in the appeal in *HC,* and one further ground.

162. For the reasons given above, I would dismiss the appeal on the *HC* grounds.

163. The further ground relates to the 'right to reside' test for entitlement to social benefits. Mr Coppel, Mr Vanhegan and Mr Lintott apply for this part of the appeal to be stayed pending the decision of the Supreme Court in two appeals which we are told are to be heard shortly, namely *Mirga* and *Samin v Westminster City Council* [2012] EWCA Civ 1468. I would make that order in the light of the parties' agreement.

Conclusion

164. I have summarised my conclusions in paragraphs 2 and 22 to 30 of this judgment. In my judgment, EU law gives a *Zambrano* carer the right to reside in the UK from the time when it becomes apparent that she qualifies as a *Zambrano* carer. However it does not give her an entitlement to social assistance on the same basis as an EU citizen lawfully resident here. It is for national law to determine the level of benefits to which she is entitled. I do not regard it appropriate to refer any issue to the CJEU for a preliminary ruling.

Lord Justice Elias:

165. I am in broad agreement with the judgment of Lady Justice Arden, and merely wish to add a few observations of my own.

166. This appeal raises questions about the full implications of the *Zambrano* decision as a matter of EU law. The Secretary of State submits that they are extremely limited. Indeed, on his analysis there is no right to reside as such until the point where removal of the carer is imminent; at that moment, but not before, the carer can claim the benefit of a right - more accurately described as an immunity - which provides the carer with a defence to any attempt to remove her from the country. The argument is that until steps to remove her are taken, the carer's presence in the country is *de facto* tolerated and therefore her charge, the EU citizen from whose right to reside the carer's right is derived, is not in jeopardy of being removed. The child is not at risk of being deprived of "the genuine enjoyment of the substance of the right" conferred by virtue of the child's status as an EU citizen, to use the language in paragraph [42] of *Zambrano*. Accordingly, if no steps are taken against the carer (and assuming there is no issue of the carer being forced to leave for financial reasons) no *Zambrano* status ever arises and therefore there can be no question of any benefits being acquired by virtue of that status. Any benefits to which the carer is entitled must be derived from some other legal source.

167. I wholly reject this analysis of the nature of the *Zambrano* right. In my view, it is barely coherent. The logic appears to be that although the State at all times has the right to take action to remove the TCN, in practical terms it is necessarily and always meaningless. At the very same moment as the State takes steps to exercise it, a countervailing right magically springs into being which enables the carer to claim to be immune from the process. Presumably on this analysis if the State then agrees not to take removal action, the need to invoke the *Zambrano* principle disappears and the

carer returns to the status of someone whose presence is simply tolerated but who has no right as such to remain in the country.

168. I cannot accept that this would be a proper implementation of the EU right. The right lawfully to remain and work in the UK can only sensibly mean that no action can be taken by the State to defeat those rights. Of course, the right to remain need only be asserted when the State seeks to interfere with it; that is so with all rights which confer freedom from State interference. It does not follow that the right arises only at the point when it is being asserted. At all times whilst the *Zambrano* conditions are met, the carer has the right not to have action taken to remove her from the country if the effect would be to deprive the child of his or her right, as a citizen of the EU, to remain within the EU.

169. The Secretary of State's submission is made all the more bizarre given that someone not lawfully present in the UK is under a duty to leave, and indeed is committing a criminal offence by remaining: see section 24 of the Immigration Act 1971. As I understand the response to this point of Mr Coppel QC, counsel for the Secretary of State, it is that in practice no proceedings are ever instituted against those illegally present, and if they were there would be an immunity from the criminal process. But to be effective the immunity must have the effect that at no time when the carer has been performing her role as a *Zambrano* carer has she been acting illegally by remaining in the country. The carer's presence in the circumstances must be lawful, not merely tolerated, and that can only be on the premise that there is at all times a right to stay.

170. The right to reside conferred by EU law takes effect automatically in domestic law. It follows that where under domestic law an entitlement to social benefits depends upon lawful residence, or habitual residence, a *Zambrano* carer will qualify for them. This consequence was conceded by counsel for the Secretary of State in this court in *Pryce v London Borough of Southwar*k [2012] EWCA Civ 1572. Pill LJ, with whose judgment Rimer LJ and Burton J agreed, expressed the view (para. 31) that the concession was appropriately made, whilst recognising that the court had not heard submissions to the contrary. We now have heard argument to the contrary, and in my judgment the court was plainly right in its conclusion. So the position with respect to the benefits at issue in these proceedings is that *Zambrano* carers were entitled to these benefits by virtue of their right to reside (assuming their residence was habitual) until they were specifically and deliberately made an exception to that principle so as to deprive them of the benefits to which, by virtue of their habitual residence, they would otherwise have been entitled. They are deemed not to be habitually resident even when in fact they are: see the discussion in the judgment of Arden LJ, paras. 11-13.

171. I agree with Arden LJ that the logic of the *Zambrano* right is that where the carer does not have the resources to remain in the country and so will in practice, absent State support, be compelled to leave with the child for economic reasons, there will be an obligation on the State to take steps to ensure that they are able to remain. EU law focuses on the substance of the right and not merely the form and will require the State to take steps to ensure that the essence of the right is respected. That does not, however, require the State to guarantee any particular quality of life: see *Dereci v Bundesministerium fur Inneres* [2011] EUECJ C-256/11 and *Harrison v Secretary of State for the Home Department* [2013] CMLR 580. Provided sufficient assistance is

provided to ensure that the carer does not in practice have to leave the country and thereby the EU, taking the child with her, the obligation imposed by the principle will be met. In my judgment, for the reasons given by Arden LJ (and which also reflect the view of Hickinbottom J in *R (on the application o*f *Sanneh) v Secretary of State* [2013] EWHC 793 (Admin)), section 17 of the Children Act provides a back-stop provision which is designed to save the carer and child from homelessness and destitution, and we are not in a position to say that it fails in that objective. In my judgment, that suffices to meet the State's *Zambrano* obligation; there is no duty to provide fuller benefits.

172. As to the question of discrimination, in my judgment any discrimination is clearly indirect, for the reasons given by Arden LJ. I consider that in all likelihood the CJEU would consider it to be justified. Although I would not personally go as far as to say that the position is *acte clair,* if only because the *Zambrano* resident is a judicially created concept of uncertain scope, that is debatable. In the circumstances, I would not refer this issue to the CJEU at this stage.

Lord Justice Burnett

173. I agree with both judgments.