Unapproved

THE COURT OF APPEAL

CIVIL

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Court of Appeal Record Number: **2023/91**
High Court Record Number: **2022/275 JR**

Ní Raifeartaigh J.
Power J.
Allen J.

BETWEEN:

L.A. (A MINOR SUING BY HIS MOTHER AND NEXT FRIEND A.A.), A.A. AND N.A.

APPLICANTS/APPELLANTS

– AND –

THE INTERNATIONAL PROTECTION APPEALS TRIBUNAL, THE MINISTER FOR JUSTICE AND EQUALITY, IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

JUDGMENT of Ms Justice Power delivered on the 29th day of May 2024

Introduction

1. This case raises the novel question of whether a right, conferred upon an individual, may be exercised, vicariously or '*by proxy*', on behalf of that individual with the aim of

ensuring that the person concerned is not deprived of the benefit of the right, by reason of an incapacity to exercise the right conferred.

2. The question as it arises in this case is whether an infant, as an '*applicant*' under the State's scheme for international protection, has a '*right*' to access the labour market and, if so, whether such a right may be exercised by the infant's parents on his behalf.

3. To understand the nature of the appellants' claim, on appeal, it is necessary to set out, briefly, the relevant provisions of European Union ('EU') law on which the appellants rely.

The Law

4. Directive 2013/33/EU[1] ('the Directive' or 'the Reception Conditions Directive') lays down minimum standards within the EU for the conditions that govern the reception of persons seeking international protection and it does so in the form of obligations that are enforceable against Member States. Having opted into the Directive, the Irish State was obliged to bring into force regulations necessary to ensure Ireland's compliance with the terms thereof. The European Communities (Reception Conditions) Regulations 2018 (S.I. 230/2018), as amended by the European Communities (Reception Conditions) (Amendment) Regulations 2021 (S.I. 52/2021), the European Communities (Reception Conditions) (Amendment) (No. 2) Regulations 2021 (S.I. 178/2021) and (more recently) the European Communities (Reception Conditions) (Amendment) Regulations 2023 (S.I. 649/2023), constitute the means by which the Irish State gives effect to the Directive. Unless otherwise specified, I shall refer to the Regulations and their amending provisions, collectively, as 'the 2018 Regulations'.

[1]Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection [2013] OJ L180/96.

The Directive

5. Several recitals of principle precede the Articles set out in the Directive. For example, Recital 9 provides that, in applying the Directive, Member States ought to seek to ensure full compliance with the principles of the '*best interests of the child*' and of family unity. Recital 11 stipulates that standards for the reception of applicants should suffice to ensure them '*a dignified standard of living'*. To promote the self-sufficiency of applicants, Recital 23 provides that it is essential that clear rules on their access to the labour market are laid down. Recital 35 recalls that the Directive seeks to ensure *'full respect for human dignity*'.

6. Article 1 of the Directive sets out its purpose which is to '*lay down standards for the reception of applicants for international protection*' in Member States.

7. Definitions of several relevant terms are set out in Article 2. An '*applicant*' means a '*third-country national or a stateless person who has made an application for international protection in respect of which a final decision has not yet been taken*'.[2] The phrase '*family members*' is defined, *inter alia*, to include the parents of a minor applicant.[3] Whereas '*reception conditions'* are said (in Article 2(f)) to denote the '*full set of measures that Member States grant to applicants in accordance with [the Directive]*', '*material reception conditions*' mean the '*reception conditions that include housing, food and clothing provided in kind, or as financial allowances or in vouchers, or a combination of the three, and a daily expenses allowance*' (Article 2(g)).

8. Article 5 concerns the provision of information in respect of the general reception conditions and provides that Member States must inform applicants, in writing, of any established benefits to which they are entitled and of their obligations in respect of

[2] Article 2(b).
[3] Article 2(c).

reception conditions. If applicants are provided with housing, Member States must take appropriate measures to maintain, as far as possible, family unity within their territory (Article 12). Subject to certain provisions, Members States are obliged to grant to minors (whether applicants or children of applicants), access to the education system under conditions similar to those of their own nationals (Article 14).

9. Central to this appeal is the requirement set out in Article 15 of the Directive. Where there has been a delay on the part of a Member State in deciding an application for international protection (the outer permissible limit for such being nine months), then, Article 15 requires that an applicant be given access to the labour market.[4] It provides:

> *"1. Member States shall ensure that applicants have access to the labour market no later than 9 months from the date when the application for international protection was lodged if a first instance decision by the competent authority has not been taken and the delay cannot be attributed to the applicant.*
>
> *2. Member States shall decide the conditions for granting access to the labour market for the applicant, in accordance with their national law, while ensuring that applicants have effective access to the labour market.*
>
> *For reasons of labour market policies, Member States may give priority to Union citizens and nationals of States parties to the Agreement on the European Economic Area, and to legally resident third-country nationals.*
>
> *3. Access to the labour market shall not be withdrawn during appeals procedures, where an appeal against a negative decision in a regular procedure has suspensive effect, until such time as a negative decision on the appeal is notified."*

[4] Under Regulation 11(4) of the 2018 Regulations, Ireland implemented this aspect of the Directive. Whilst the Directive sets the outer limit of such delay at nine months, the Irish State later amended the 2018 Regulations so as to reduce that period to six months. See Regulation 3(b) of the European Communities (Reception Conditions) (Amendment) Regulations 2021 (S.I. 52/2021) which substituted '*6 months*' for '*9 months*'. The 2021 Regulations came into effect on 9 February 2021.

10. Article 17 requires that material reception conditions be made available to applicants at the time when their application for international protection is made. Such conditions must provide '*an adequate standard of living'*, which guarantees applicants' subsistence and protects their physical and mental health. Material reception conditions may be provided in the form of financial allowances or vouchers. Article 17(5) permits, in principle, the granting of less favourable treatment to applicants than that which is afforded to nationals of Member States *'in particular where material support is partially provided in kind or where those level(s), applied for nationals, aim to ensure a standard of living higher than that prescribed for applicants under this Directive'.*

11. Minors are classified as '*vulnerable persons*' under Article 21 and, when implementing the Directive, Member States are obliged to take their specific situation into account. To that end, Article 22 imposes upon Member States the obligation to assess whether a vulnerable applicant has '*special reception needs*' and to indicate the nature of any such needs.[5] Member States must ensure that the support provided takes account of any such special reception needs throughout the duration of the application procedure and States must also provide for appropriate monitoring of the situation.

12. Member States are required, under Article 23 of the Directive, to regard the '*best interests of the child*' as a primary consideration when dealing with minors. In making this assessment, they must take due account of certain factors, including, the minor's social development and their safety and security. Moreover, Member States are obliged to ensure that minors are '*lodged with their parents*' and have access to leisure activities, including, play and recreational facilities. Member States must ensure '*a standard of living adequate for the minor's physical, mental, spiritual, moral and social development*.'

[5] Emphasis here and throughout the judgment is mine unless otherwise indicated.

The 2018 Regulations

13. The Directive, as noted, has been transposed into Irish law by the 2018 Regulations. Pursuant thereto, an '*applicant*' means, *inter alia*, an applicant under the International Protection Act 2015 ('the 2015 Act') and a '*recipient*' includes an applicant. A '*family member*' is defined, *inter alia*, as the unmarried minor children of a recipient and, where a recipient is a minor and unmarried, then, his or her parents.[6]

14. A recipient shall, subject to the 2018 Regulations, be entitled to receive the material reception conditions where he or she does not have sufficient means to have an adequate standard of living (Regulation 4). This entitlement may be varied or withdrawn.

15. Reflecting the principles recorded in Recital 9 and Article 23 of the Directive, Regulation 9(1) provides that, in the application of the 2018 Regulations, the '*best interests of the child*' must be a primary consideration.

16. Regulation 11, transposing into domestic law the provisions of Article 15 of the Directive, provides that, save as may be required by law, an applicant must *not* seek, enter or be in employment (or self-employment), except in accordance with a valid '*labour market access permission*' ('a LMAP'), granted by the Minister for Justice ('the Minister').[7]

17. The specific provisions governing the grant of a LMAP are set out in Regulation 11(4). Pursuant thereto, the Minister may, on receipt of an application made in accordance with paragraph (3), grant a permission to the applicant where the Minister is satisfied that:

[6] Regulation 2(1).
[7] Regulation 11(1).

"(a) subject to paragraph (6), a period of 6 months, beginning on the application date, has expired, and, by that date, a first instance decision has not been made in respect of the applicant's protection application, and

(b) the situation referred to in subparagraph (a) cannot be attributed, or attributed in part, to the applicant."

18. Regulation 11 applies to a minor applicant, subject to the modification that the employment of such an applicant pursuant to a LMAP must, in addition, be subject to the provisions of the Protection of Young Persons (Employment) Act 1996 ('the 1996 Act').[8]

19. While section 3(1) of the 1996 Act provides for a general prohibition on the employment of children, section 3(2) provides that the Minister for Enterprise and Employment may, by licence, authorise, in individual cases, the employment of a child in cultural, artistic, sports or advertising activities which are not likely to be harmful to the safety, health or development of the child and which are not likely to interfere with the child's attendance at school, vocational guidance or training programmes or capacity to benefit from the instruction received.

20. The right of a minor recipient to education in the like manner and to the like extent as a minor who is an Irish citizen is provided for in Regulation 17.

21. A recipient who is dissatisfied with a decision may apply for a review and a recipient who is dissatisfied with a decision of a review officer may, subject to certain conditions, appeal that decision to the International Protection Appeals Tribunal ('the IPAT' or 'the Tribunal').[9] Regulation 21(5)(a) provides that the designated member of that Tribunal may determine an appeal by affirming or setting aside the decision of the review officer.

[8] Regulation 16.
[9] Regulation 21(1).

Background

22. The facts of the case are set out in the judgment of the High Court (Simons J.) which was delivered on 23 March 2023 ([2023] IEHC 141). The first applicant is a child, born on 22 April 2021, and his mother is the second named applicant. The third named applicant is the child's father.

23. The child's parents, both of whom are nationals of a non-EU state, applied for international protection in Ireland on 14 December 2016. Whilst their applications were pending, they each sought and obtained from the Labour Market Access Unit ('the LMAU') a LMAP in circumstances where a first instance decision had not been made within nine months of their applications having been lodged. Ultimately, their applications for international protection were unsuccessful. Once those refusal decisions were upheld on appeal, they were, at that point, no longer '*applicants*' seeking international protection and their right of access to the labour market terminated on 7 February 2020.

24. For a period of approximately two-and-a-half years, thereafter, the parents' immigration status in the State was – as the High Court judge described it – precarious and they were the subject of (unexecuted) Deportation Orders. It was during this period that their infant son, the first appellant, was born. When the child was approximately three months old, his mother applied, on his behalf, for his international protection on 26 July 2021.

25. Whilst the child's application for international protection was pending, each of the parents applied to the LMAU, on 16 November 2021, for permission to access the labour market. Their applications were rejected shortly thereafter on the basis that they had already had their applications for such permission determined. On 19 November 2021, the parents, through their solicitor, sought a review of that decision and clarified that the '*new*' applications were made by way of proxy, that is, on the assumption that they had a

vicarious right to work, lawfully, in the State by reason of their being parents of a minor applicant for international protection whose application was then pending.

26. On 21 February 2022, the first instance decision rejecting the applications was upheld, on review, by a LMAU review officer.

27. The parents then appealed that decision to the IPAT contending that as their child, *qua* applicant for international protection, was entitled, in principle, to access the labour market, they, as his parents, ought to be entitled to exercise that right, vicariously, on his behalf.

28. On 23 March 2022, the Tribunal issued decisions rejecting both the mother's and the father's appeals, respectively. Those decisions were almost identical in terms, and I shall refer to them, collectively, as 'the impugned decision'.

High Court Proceedings

29. The following month, on 4 April 2022, judicial review proceedings were instituted with the child and his parents named as the applicants therein. They sought various reliefs, including, an Order of *Certiorari* quashing the impugned decision that had been made under Regulation 21(5)(a) of the 2018 Regulations. The applicants also sought a declaration that Regulation 11(4) of the 2018 Regulations, interpreted in such a way as to exclude the parents of a minor applicant for international protection from access to the labour market, was contrary to Articles 15, 17, 18, 19 and 23 of the Directive.

30. Several declarations were sought in the following terms: that Regulation 11(4) should be disapplied insofar as it is inconsistent with the provisions of the Directive in that it excludes from the labour market the parents of a minor applicant for international protection; that the exclusion from the labour market of the applicants as parents of the minor applicant for international protection, whether that exclusion was under

Regulation 11(4) or otherwise, was unlawful having regard to Articles 40.1, 40.3 and/or 42A of Bunreacht Na hÉireann; and, that such exclusion was in breach of EU law and, in particular, the Treaty on European Union and the Treaty on the Functioning of the European Union ('the TFEU'), and the EU Charter of Fundamental Rights ('the Charter').

31. The applicants requested, if necessary, a reference to the Court of Justice of the European Union ('the CJEU') under Article 267 of the TFEU referring the question of whether, in order to give effect to the Directive, a parent of a minor applicant for international protection may be granted access to the labour market by proxy under Article 15 of the Directive so as to ensure an adequate standard of living for the child. Finally, a general claim for damages was included together with an order providing for the costs of the proceedings.

Procedural Developments

32. The case was heard by the High Court on 17 January 2023 and judgment was reserved. Two days later – on 19 January 2023 – the infant appellant's applicant for international protection was granted. The High Court, through the Registrar, was informed of this development and the proceedings were relisted for directions. However, when the case came back into the list on 16 February 2023 the focus was not on the grant of the child's international protection but on a development which had taken place after the commencement of the proceedings and before the hearing.

33. As noted above, at the time when the child's parents had instituted judicial review proceedings in April 2022, their immigration status was precarious. Subsequently, and before the case came on for hearing, their status was regularised, and they later received

a Stamp 4 permission to reside and work in the State for a period of 3 years from 30 September 2022.

34. It was for this reason that, when the case was listed for further directions, the respondents contended that the proceedings were moot. The parents disagreed arguing that there remained a live controversy in the proceedings in respect of the damages claim against the State for the period during which they had been denied access to the labour market whilst their child's application for international protection was pending. The period in question was a little over eight months, that is, from a date, approximately, six months after the child's application for international protection had been submitted until the date when his parents were able to work, lawfully, in the State. During that period from 27 January 2022 until 4 October 2022, the child had been between nine months to just under eighteen months old. The applicants' claim for damages was calculated by reference to the difference in the amount the parents received by way of social protection payments and the amount of estimated earnings which they might have been expected to receive had they been permitted to access the labour market in lieu of their infant so doing.

35. As I will come to, although the respondents raised the question of mootness, it was not pressed. Specifically, there appears to have been no real engagement as to the plausibility of the damages claim.

36. The applicants were directed to furnish further and better particulars of their claim for damages, which they did on 8 March 2023. Judgment was delivered two weeks later.

On the Issue of Mootness

37. Applying the principles of settled case law on the doctrine of mootness as articulated in *Lofinmakin v. Minister for Justice, Equality and Law Reform* [2013] 4 IR 274

('*Lofinmakin*') and *Odum v. Minister for Justice and Equality* [2023] IESC 3 ('*Odum*'), Simons J. concluded that the judicial review proceedings should be determined. In his view, it was not necessary to address in detail the rival contentions of the parties in respect of the claim for damages. It was sufficient to the purpose for the court to find that there would be a plausible basis for a claim for damages if the decision to refuse labour market access to the parents were found to be invalid.

38. The trial judge noted that in *Odum*, O'Donnell C.J. had underscored that a key principle justifying the doctrine of mootness was the importance of the resolution of cases which present '*live*' controversies. Interlinking factors are brought to bear in the doctrine, including, a requirement of a full adversarial context for a legal decision, the management of scarce and expensive court resources and, in cases likely to become precedent, the desirability of avoiding purely advisory opinions (*Odum* at para. 32).

39. An outstanding claim for damages is also a relevant consideration in assessing whether or not proceedings have become moot. In *MC v. Clinical Director of the Central Mental Hospital* [2021] 2 IR 166 ('*MC*'), the Supreme Court held that the proceedings were not moot in circumstances where the claim of an alleged infringement of fundamental constitutional rights had been sufficiently particularised in concrete and credible complaints. The rights in issue in *MC* were of a fundamental and important nature and included the right to personal liberty and autonomy, together with rights associated with marriage and family rights.

40. Simons J. observed that, in many cases, applications for international protection may be decided before judicial review proceedings are heard. In his view, there was a gravamen to the case before him involving an asserted entitlement for a limited period. The trial judge considered that an over-rigid application of the doctrine of mootness could result in legal issues evading capture because they may have become '*timed out*'.

Thus, he was satisfied that even if the present proceedings were entirely moot, it would still be in the public interest to decide the legal issues raised.

41. The trial judge took the view that, strictly speaking, the proceedings were not moot. There remained a live controversy between the parties in respect of a claim for damages for the eight-month period during which, on the parents' account, they were wrongfully denied their entitlement to work. He also observed the high threshold generally required of an applicant who alleges that a public authority has acted *ultra vires*. This case, according to Simons J., was different in that the applicants had identified '*a plausible claim for damages*' in the event that the decision to refuse them labour market access was found to be invalid.

42. Simons J. noted that the claim advanced was for '*Francovich*' damages (Joined Cases C-6/90 and C-9/90 *Francovich v. Italian Republic* [1991] ECR I-5357 ('*Francovich*')) in that the applicants were seeking damages against an EU Member State for a breach of EU law—in this case an alleged failure to transpose the Directive—which the applicants claimed conferred upon them a vicarious right of access to the labour market. He considered that the applicants could '*plausibly point to a pathway leading from a finding of invalidity to the potential recovery of damages'.*

43. The trial judge was, therefore, satisfied that there remained a concrete legal dispute between the parties which required to be ruled upon by the court. However, he found it necessary to decide the substantive issue in the proceedings first because only if the substantive issue were to be resolved in the applicants' favour, would the need to rule upon their claim for damages arise.

On the Substantive Issue

44. The trial judge approached the substantive issue by addressing two questions. The first was whether the parents enjoyed a vicarious right to work based on their infant's asserted entitlement. On this issue, Simons J. identified what he considered to be the '*fundamental difficulty*' with the applicants' claim, namely, that it necessitated the court finding that an infant child enjoys a right to work. He noted the parents' attempt to avoid this difficulty by endeavouring to distinguish between a right of access to the labour market and a right to work *per se*. He considered such a distinction to be *'entirely artificial'*. He was satisfied that the essence of the right identified in Article 15 of the Directive was a right to work and, in this regard, referred to the Advocate General's Opinion in Joined Cases C-322/19 and C-385/19 *KS and Others. v. The International Protection Appeals Tribunal* ECLI:EU:C:2021:11 ('*KS*').[10]

45. The judge noted that the effect of the implementing Regulations was to remove a legal impediment which an applicant for international protection would otherwise have encountered. It was crucial, in his view, that the 2018 Regulations do not alter the general conditions which govern employment in the State. Simons J. observed that the normal age restrictions continue to be in force and noted that it was expressly provided under Regulation 16 that the employment of an applicant for international protection who was under the age of eighteen years shall be subject to the 1996 Act. He was satisfied that, save in exceptional circumstances which, he considered, did not arise in this case, a child under the age of fourteen does not, normally, have a right to work in the State. Thus, it made no sense, in his view, to speak of the infant in question having a right of access to

[10] There were four applicants in these joined cases each of whom had been the subject of decisions by the IPAT. For ease of reference, I shall refer to the case and to the applicants, collectively, as *KS.* The preliminary ruling followed separate applications for judicial review of decisions to uphold refusals of permission to access the labour market.

the labour market. Any application for a LMAP on his behalf would have to be refused precisely because he was not entitled to work by reason of his tender years. The trial judge observed that Article 15 of the Directive expressly provides that Member States shall decide the conditions for granting access to the labour market in accordance with their national law. In his view, the imposition of restrictions on young children entering the employment market was well within the discretion of a Member State and was entirely proportionate. He observed (at para. 31) that a child applicant for international protection does not obtain any greater rights than a child who is an Irish citizen or an EU citizen; *'[n]either is entitled to work, lawfully, in the Irish State until they reach the age of fourteen years*.'

46. Being satisfied that the applicants' case was predicated on a false premise, namely, that the child enjoys a right of access to the labour market, the trial judge found that '*[no] such right inheres in the child*' (para. 32). That being so, he held that the parents could not exercise, vicariously, a right which the child himself did not possess. In the High Court's view, the meaning of Article 15 of the Directive was clear and unambiguous. A minor applicant of less than eighteen months old does not have a right to access the labour market. Moreover, there was nothing in the statutory language which suggested or indicated that the right could be exercised by any other person, such as, a family member of a minor, there being no reference to family members in Article 15.

47. The second point considered by the trial judge was whether the parents might enjoy what they asserted as a *'derived right to work'*. In this regard, he observed that the chid, as an applicant for international protection, was entitled to reside in the State and to have an adequate standard of living during the pendency of his application. He noted that the logic of the parents' case was that in order for the child to exercise those entitlements his

parents should be permitted access to the labour market – their right to work thus being derived from the rights enjoyed by the child.

48. Simons J. observed that the concept of a *vicarious* right to work was predicated on the child himself having a right to work, lawfully, in the State and the *derived* right was predicated on the child's right to reside and enjoy an adequate standard of living. He observed that the CJEU had held in Case C-34/09 *Ruiz Zambrano v. Office National de l'Emploi* [2011] ECR I-1177 ('*Zambrano*') that the parents of a minor child who was an EU citizen may enjoy a derived right of residence and a derived right to work. In his view, the immigration status of a child who was an applicant for international protection was a much lesser status than a child who enjoyed rights by virtue of being an EU citizen. The trial judge noted the parents' attempt to draw an analogy between both types of derived rights. They had contended that it was necessary for one or both of them to be granted access to the labour market so as to ensure that their child would have an adequate standard of living. Simons J. further noted the applicants' reliance on the CJEU's decision in *KS* to argue that the values identified in the Directive included family autonomy, self-sufficiency and the dignity of work. The CJEU in *KS* had held, in the context of an adult applicant for international protection, that conferring a right to work contributes to the preservation of an applicant's dignity since income from employment allows an applicant to provide not only for his own needs but also for the needs of his or her family, including, housing or accommodation outside the reception facilities offered to applicants.

49. The trial judge concluded that the argument in favour of a derived right to work was not well founded. In his view, it overlooked the fact that the Directive imposes an obligation upon the *'Member State'* (and not the parents) to ensure that material reception conditions, including housing, food, clothing, and education, are made available to a minor applicant. It is the Member State that must ensure that the requisite standard

of living is met in the specific situation of *'vulnerable persons'*. Noting that Article 23 of the Directive provides that the best interests of the child shall be a *'primary consideration'* when implementing the provisions of the Directive, Simons J. listed the various factors which Member States are required to take into account when assessing the best interests of a minor applicant. These include family reunification possibilities, a minor's well-being, his or her social well-being and development, his or her safety and security, and the minor's views in accordance with his age and maturity. He also noted the provisions relating to where minors are to lodge and the Directive's requirements in respect of their schooling and education (Article 14).

50. The trial judge was satisfied that the scheme of the Directive envisages the obligation to provide for the needs of a minor applicant as resting with the authorities of the Member State. The fallacy underlying the applicants' position was that the court should *'read into'* Article 15 a rider to the effect that the parents of a minor must be allowed to work in order to ensure that the child has an adequate standard of living. He found that the Directive does not require Member States to extend access to the labour market to persons who are otherwise not entitled thereto merely by dint of their being parents of a minor applicant. Where parents are unable to provide for a minor child because they are not entitled to work, it falls to the Member State to ensure that an adequate standard of living is available for the child as a vulnerable person. He noted that, in this case, the parents were in receipt of social protection payments throughout the period of the child's application for international protection and that they were able to afford rental accommodation. He was satisfied that the child's ability to exercise his rights during the pendency of his application for international protection were vindicated notwithstanding the prohibition on his parents accessing the labour market during that period.

51. Finally, the trial judge considered the question of the constitutional right to seek employment, and, in this regard, noted the Supreme Court's judgment in *NHV v. Minister for Justice & Equality* [2018] 1 IR 246 ('*NHV*'). He observed the distinction which the Supreme Court had made between the right to work and the freedom to seek work, the latter of which implies a negative obligation on the State not to prevent a person from seeking employment without substantial justification. Simons J. considered that the imposition of a restriction on the child, in this case, which prohibited him from working, was well within the margin of appreciation of the legislature and, in this regard, he cited the judgment of *Landers v. Attorney General* (1975) 108 ILTR 1.

52. Having examined the substantive issue in the proceedings, the trial judge found that the application failed on the merits. It was incorrect, in his view, for the parents to assert that their child enjoyed a right to access the labour market which could then be exercised, vicariously, by them on his behalf. It was further incorrect to assert that they had a derived right to access the labour market to ensure an adequate standard of living for their child as it was the Member State that was obliged to ensure that reception conditions were made available to the minor applicant. He was satisfied that there was no evidence in this case that the child's needs were not met.

53. Simons J., accordingly, dismissed the application for judicial review. On the question of costs, he found that the applicants had succeeded on an issue which took up some time (the mootness issue) and that the proceedings raised a point of law of public importance justifying a departure from the default position in respect of costs. The judge, therefore, decided that no costs should be awarded to the successful party.

Application to the Supreme Court

54. An application was made to the Supreme Court for leave to appeal the High Court judgment on the basis of Article 34.5.4° of the Constitution. The general principles applied by the Supreme Court in determining whether or not to grant leave to appeal having regard to the criteria incorporated into the Constitution by the 33rd Amendment thereto, were considered in *BS v. Director of Public Prosecutions* [2017] IESC DET 134 and in *Price Waterhouse Coopers (A Firm) v. Quinn Insurance Ltd (Under Administration)* [2017] IESC 73. The additional criteria required to be met in order that a so-called *'leapfrog appeal'* can be permitted were addressed by the Supreme Court in *Wansboro v. Director of Public Prosecutions* [2017] IESC DET 115.

55. The Supreme Court delivered its Determination in this case on 15 June 2023. It noted that, of importance to the judgment of the High Court, was the fact that the minor at the time of the application was under the age of fourteen years and did not, in those circumstances, normally have a right to work. That being so, the Supreme Court noted that the trial court considered that the parents could not exercise, vicariously, a right which the child did not possess. The Supreme Court determined that leave to appeal was not warranted because, on the facts, it was the tender age of the minor applicant that prevented him from accessing the labour market and not any failure on behalf of the respondents to respect any EU or constitutional rights. It further noted that the High Court had found that the national implementing regulations did not alter the general conditions which govern employment or self-employment and that the normal age restrictions continue to be in force.

56. The Supreme Court held that the facts of the case did not support a contention that the minor child could have made any statable argument that he was entitled to work having regard to his very tender age. It was satisfied that the distinction sought to be

made by the applicant between the right of access to the labour market and the right to work was not one that had a basis in law, noting, in this regard, the opinion of the Advocate General in *KS*. Observing that the decision of the High Court ultimately turned on the merits and facts of the case, and, in particular, the tender age of the child, and further observing that there was no evidence of the child's needs not having been met, the Supreme Court held that leave to appeal was not warranted. It further held that no point of general public importance arose having regard to the facts. The interests of justice, it said, were not served by an appeal as there were no other cases awaiting the determination of the application.

The Appeal

57. The Court is asked to determine the legal question of whether Article 15 of the Directive provides for a right of access to the labour market which may be exercised by a parent of a minor applicant for international protection in circumstances where such a parent does not otherwise enjoy such a right. This right to labour market access is characterised by the appellants as being either a '*vicarious*' right or a '*derived*' right. They also say that the exclusion of the second and third named appellants from accessing the labour market as parents of a minor applicant is unlawful having regard to the Constitution and that it in breach of EU law.

58. If the Directive is not clear on this point, if Article 15 is not '*acte clair*', then, the appellants say that a preliminary reference ought to be made to the CJEU pursuant to Article 267 of the TFEU.

59. If their right of access *is* held to exist, then the appellants say that the Court must decide the issue of whether their claim for damages has been established.

60. Before turning to these matters, however, a brief word about the issue of mootness is apposite.

On the Question of Mootness

61. At the hearing of the appeal, the Court observed that no cross-appeal had been lodged in respect of the High Court's finding on mootness. Of its own motion, the Court questioned whether the proceedings were, in fact, moot. The parties recalled the sequence of events in the proceedings, including, the regularisation of the parents' immigration status on 30 September 2022, the hearing before the High Court on 17 January 2023 and the grant of international protection to the child on 19 January 2023. The Court was informed that, by the time the mootness question was raised, the court below had already heard the judicial review application but had not delivered its judgment thereon.

62. Before this Court, the appellants contended that the proceedings were not moot and that the High Court had been correct in its ruling on this point.

63. Counsel for the State conceded that his clients had not pressed the mootness issue in the court below. From the point of view of resources, he submitted that there was little to be gained at High Court level by pressing the point given that the hearing had already taken place. However, he indicated that recent case law of the Supreme Court suggested that a distinction might be drawn, at appellate level, when the question of mootness is raised, particularly, where a written judgment has not issued. The Court's assessment on the issue of resources at appellate level, for example, may be different from an assessment that might be made at first instance.

64. Counsel for the State questioned whether a hearing on appeal was, in fact, necessary, particularly in the light of the Determination that issued from the Supreme

Court. In his view, it was difficult to see that there was a public interest in issue. The terms of the Directive are clear, the period of the alleged breach was brief, and there was no evidence of any prejudice.

65. The Court rose to consider the issue of mootness.

66. In ruling on the issue, the Court noted that the court below had dealt, comprehensively, with the question of mootness and that, in coming to his view, Simons J. had relied on the leading cases of *Lofinmakin*, *MC* and *Odum*. This Court, in coming to its view on the matter, also had regard to this Court's recent judgment in *Blythe v. The Commissioner of An Garda Síochána* [2023] IECA 255, wherein, (referring to *Odum* and *Kozinceva v. The Minister for Social Protection* [2020] IECA 7), Collins J. observed:

> *"As O'Donnell C.J. noted [in Odum] (§12) the more advanced a case is the more each party stands to lose by way of costs if the case is halted by reasons of mootness. Furthermore – and perhaps more significantly – if an appellate court refuses to proceed with an appeal on the basis of mootness, a legal precedent will stand without ever having been subjected to appellate review (or, in the case of an appeal from the Court of Appeal to the Supreme Court) without being subjected to Supreme Court review. Once a case is decided and is the subject of an appeal, 'there will be a decision (which in some case may be capable of being a precedent controlling other cases and decisions) and an order for costs, which in some cases can be substantial' (§33). It may therefore be undesirable to refuse to decide the appeal leaving that decision unreviewed and (where wrong) undisturbed.*

67. Leaving aside considerable reservations about the way in which the appellants' claim for damages has been formulated, the Court decided not to disturb the High Court's finding that there was a concrete and credible basis for advancing a claim in damages if the decision to refuse labour market access to the parents was found to be invalid. This

Court was prepared to contemplate that there was, at least at the level of principle, a plausible claim for damages in the case and, on that basis, it proceeded to hear the appeal.

The Right to Access the Labour Market

68. The central question in the appeal is whether the trial judge erred in finding that the legislative framework invoked by the second and third appellants does not confer upon them, *qua* parents of the minor applicant for international protection, the right which they seek to assert. The appellants rely on several arguments in support of their claim that the High Court judge erred as a matter of law.

The Appellants' Arguments

69. Principally, the appellants urge the Court to interpret the Directive and its implementing provisions as providing for either a '*vicarious or [a] derived right*' of access to the labour market on the parents' part. This, they say, would ensure that the benefits accruing to the minor applicant are '*effective*'. Their submissions may be summarised as follows.

On Article 15 of the Directive

70. The High Court fell into error in finding that there were no principles in the Directive nor any support within the Constitution which would permit labour market access to be granted to the parents of a minor applicant for international protection. Article 15 of the Directive and Articles 40.1, 40.3, 41 and 42A of the Constitution provide a sufficient basis to ground a vicarious right to work on the part of the parents (*Gorry v. Minister for Justice* [2020] IESC 55). There is an obligation to provide the minor with

every available assistance, including, a grant of labour market access to his parents who take care of him.

71. The High Court found that fatal to the appellants' case was the absence of the child's right to work. This finding – it is said – was flawed. The High Court also found that, as parents, they could not exercise, vicariously, a right which the child did not possess. There was in fact – it is said – no dispute between the parties about the child's right to access the labour market and the affidavit of the Minister's deponent confirmed this. The trial judge appears to have missed the import of the parties' agreement on this point. The right of labour market access in this case is *'negated'* by a legal incapacity on the part the minor.

72. The High Court further erred in finding that the distinction between the right of access to the labour market and the right to work was *'entirely artificial'*. The Directive is quite clear that labour market access must be granted to an *'applicant'* (that term being defined in Article 2(b) of the Directive). The minor clearly fulfilled the required conditions. Where a minor is unable to give effect to the right due to his tender age, this can be overcome by conferring the right of access on his parents. They are entitled to work because the child is unable to do so because of a legal incapacity. The High Court's finding amounted to disentitling the minor applicant to the benefit of Article 15 and the trial judge, impermissibly, read a restriction into the provisions thereof. Whilst the High Court was correct to observe that Article 15, on its face, does not allow a '*family member*' to exercise an applicant's right, vicariously, permitting the parents to exercise the child's right is the only means possible to give effect to the right. *Zambrano* – it is said – is authority for this proposition. If there exists any uncertainly or *lacuna* in the Directive, in this regard, then this would justify a reference to the CJEU.

73. The High Court was correct to find that a minor applicant for international protection does not obtain any greater rights than a minor who is an Irish citizen. However, this begs the question of whether parents, in their circumstances, should have a right to work to support their child.

74. In dismissing the appellants' claim to have *a 'derivative'* right to work based on their child's right to enjoy an adequate standard of living, the High Court fell into error. Examined teleologically, the Directive's provisions on the best interests of the child and the family unit provide a sufficient basis to ground such a right. That the State must consider a minor's well-being and social development, supports their claim. Simons J. had found that it was *'a fallacy'* to suggest that there was any need to supplement the comprehensive suite of protections which the State must provide by *'reading into'* Article 15 a rider. Such reasoning suggests that the means by which a Member State can ensure an adequate standard of living for a minor applicant is limited only to the provision of public welfare benefits. No such limitation is apparent from the Directive.

75. The High Court had observed that since the parents received social welfare protections, their child's ability to exercise his rights was vindicated. The logic of this approach further compels the recognition of a vicarious or derived right of labour market access. If their entitlement to social protection payments is to be seen as a means to protect the child's rights, then, so, too, should their right to work. EU jurisprudence favours a liberal not a minimalist interpretation of Directives where the best interests of the child are engaged. The CJEU's judgment in Case C-112/20 *Belgian State (Retour du parent d'un mineur)* ECLI:EU:C:2021:197 is authority for the proposition that Member States are required '*to take due account*' of the best interests of the child even where a particular decision does not involve a child. The High Court erred in making a limited finding that a Member State is only required to ensure the provision of material reception

conditions and that the State's obligation does not extend to granting a right to work to the parents so as to ensure an adequate standard of living for the child.

On the Constitution

76. The appellants submit that whilst the trial judge was correct to find that the imposition of restrictions on the employment of children was justifiable, he erred in concluding that there was no breach of *the parents'* constitutional right not to be prevented from seeking employment without substantial justification. *NHV* entailed the recognition by O'Donnell J. (as he then was) that work was connected to the dignity and freedom of the individual which the Constitution seeks to promote. The Supreme Court found that the freedom to work or to seek employment was part of the human personality. Since individuals are to be held equal before the law, *'those aspects of the right which are part of human personality cannot be withheld absolutely from non-citizens'*. Moreover, the freedom to work is not for an individual's benefit but also for the benefit of dependent family members. The minor appellant, like all children, is entitled to look to his parents for support and they, in turn, are obliged to supply it, insofar as they can.

77. O'Donnell J. had found in *NHV* that an absolute prohibition on seeking employment without any temporal limit was contrary to the constitutional right to seek employment. To read Regulation 11(4) in a way that excludes, absolutely, the parents from seeking employment, would fail to comply with that finding. The absolute ban on the parents of a minor applicant seeking work, vicariously, is unconstitutional. The Minister thus breached the parents' right to work while their dependent child was in the international protection system and thus, had breached their right to be held equal, with other parents, before the law, contrary to Articles 40.1 and 40.3 of the Constitution. The failure to allow for the provision of the child's needs was also contrary to Article 42A thereof.

On Human Dignity

78. Dignity, which is inherent in work, strongly suggests that the parents ought to have been permitted to work and so provide for their applicant child. Under the Directive and EU law the right to work is seen as a facet of human dignity. Recitals 11, 25 and 35 and Articles 1 and 20(5) of the Directive support this view. The CJEU decision in Case C-79/13 *Federaal agentschap voor de opvang van asielzoekers v. Saciri and Others* ECLI:EU:C:2014:103 ('*Saciri*') held (at para. 35) that the general scheme and purpose of Directive 2003/9/EC (the precursor to the Directive),[11] and the observance of fundamental rights under which '*human dignity must be respected and protected*', precluded an asylum seeker from being deprived of the protection of the specified minimum standards even for a temporary period between the making of an application for asylum and the transfer of an applicant to another Member State responsible for processing the application. All things being equal, as a matter of dignity, parents should be allowed to provide for their children through work.

79. The obligation to allow the parents to work is *'bolstered'* by the position of the family unit, the best interests of the child and the general right to work. Several cases confirm that EU laws must be effective to achieve their aim.[12] The CJEU in *KS* held against domestic legislation which had excluded applicants from the labour market. At para. 69 of its judgment, the CJEU noted the Advocate General's observation that '*work clearly contributes to the preservation of the applicant's dignity*'. It further noted that Recital 23

[11]Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers [2003] OJ L31/18.

[12] In particular, the appellants cite: Joined Cases C- 322/19 and C-385/19 *KS and Others v. The International Protection Appeals Tribunal and Others* ECLI:EU:C:2021:11; Joined Cases C-356/11 and C-357/11 *O & Others* EU-C:2012:776; *Von Colson v. Land Nordrhein Westfalen* [1984] EUECJ R-14/83 (10 April 1984); Case C-378/17 *Garda Commissioner v. WRC* ECLI:EU:C:2018:979 (4 December 2018); *LK v. International Protection Appeals Tribunal* [2022] IEHC 441; and Case C-409/06 *Winner Wetten* [2010] ECR I-8015 (8 September 2010).

states that the Directive pursues, *inter alia*, the objective of promoting the '*self-sufficiency of applicants*' and that '*access to the labour market is beneficial both to applicants […] and to the host Member State*.'

80. Joined Cases C-356/11 and C-357/11 *O and S v. Maahanmuuttovirasto* EU-C:2012:776 demonstrate that a Member State must not only interpret its national law in a manner consistent with EU law but must also make sure that it does not rely on an interpretation of an instrument of secondary legislation which would conflict with the fundamental rights protected by the legal order of the EU. National authorities must make a balanced and reasonable assessment of all the interests at play, taking particular account of the interests of a child. A similar approach must be taken in respect of the Directive.

81. In Case C-378/17 *The Minister for Justice and Equality and The Commissioner of An Garda Síochána v. Workplace Relations Commission* ECLI:EU:C:2018:979 the CJEU found, in essence, that a body entrusted with ensuring the implementation of and compliance with the obligations of the relevant Directive must be entitled to '*disapply*' a national provision that runs contrary to the Directive in order to give effect to EU rules. Rules of national law cannot be allowed to undermine the unity and effectiveness of Union law. The IPAT in this case, the appellants say, failed to disapply Regulation 11(4) in favour of a proper interpretation of Article 15. Alternatively, the appellants request that the provisions of national law be interpreted to ensure that EU law is fully effective.

On Vulnerability

82. The minor appellant is, indisputably, an applicant for international protection under the 2015 Act and the 2018 Regulations and, as a *'recipient'* and '*vulnerable person*',

he has *'special reception needs'*. [13] This may require that one or both of his parents be granted labour market access in order to provide for his welfare. His personal legal entitlement to access the labour market cannot be *'effective'* unless his parents can do so for him by way of proxy.

83. In *RR and Others v. Hungary* (36037/17, 2 March 2021, §§ 58–65) the European Court of Human Rights reiterated that children are '*extremely vulnerable*' and have specific needs relative to their age, dependence and status as asylum-seekers. The Strasbourg Court noted that the Convention on the Rights of the Child encourages States to take appropriate measures to ensure that children seeking refugee status receive appropriate protection and humanitarian assistance. Applying a similar analysis here, the appellants say that the Minister should not permit the development of '*an exceptional category of applicant'*, namely, one fully entitled to all material reception conditions but then excluded, in effect, from the benefit of '*effective*' access to the labour market. There is nothing in the Directive to suggest that minor applicants are entitled to some material conditions but not others.

84. The 2018 Regulations should be interpreted in the light of the best interests of the child such that labour market access is granted to one or both of his parents. If such an interpretation is not *acte clair* then an Article 267 reference is required. Advocate General Richard de la Tour in *KS* opined that whilst Member States are entitled to introduce conditions additional to those set out in Article 15(1), they must, nevertheless, ensure effective access to the labour market. In the absence of EU rules, the conditions for access to that market '*must not render impossible in practice or excessively difficult the exercise of rights conferred by the EU legal order'*. Advocate General Richard de la Tour

[13] See Article 22 of the Directive and Regulation 8(1)(b) of the 2018 Regulations.

further observed that the reception conditions are aimed at ensuring respect for fundamental rights enshrined in the Charter.

The Respondents' Position

85. The respondents submit that the High Court was correct to find that the Directive does not confer upon the second and third appellants a vicarious right of access to the labour market. Their submissions may be summarised as follows. The Directive is clear in how it makes provision for persons in the position of a minor applicant, and it offers no support for the right asserted in this case. It is common case that, at all times relevant to these proceedings, the child was an applicant for international protection; that (because of the processing period involved) he was eligible for a LMAP; and that, due to his tender age, he was not in a position to work. In their application of 16 November 2021, the parents had not claimed that the *child* himself should be granted permission. Instead, they claimed that included in Article 15 was an implied right on their part to access the labour market pending the processing of their child's application. In the impugned decision, the Tribunal had expressly considered whether the 2018 Regulations should be disapplied in favour of a provision of the Directive that was said to be incompatible with the Regulations. Labour market access permission was refused because there was no vicarious right of access on the basis of a transfer of the child's right to the parents.

86. What falls to be considered in this appeal is (i) whether the parents of the minor applicant have a right of access to the labour market that is separate and distinct from their own individual rights in this respect; (ii) whether a preliminary reference to the CJEU under Article 267 of the TFEU should be made; and (iii) whether the appellants are entitled to *Francovich* damages.

87. The purpose of the Directive – it is said – is to harmonise basic reception conditions for international protection applicants throughout the EU such that they enjoy consistent access to certain minimum standards of support. To promote *'the self-sufficiency of applicants*' it is essential that '*clear rules*' on access to the labour market are provided (Recital 23).

88. The contention that the term '*applicant*' can be interpreted to include family members runs counter to the express provisions of the Directive in their natural, ordinary and/or literal meaning. Article 2(b) defines an applicant, unambiguously, as a third-country national or a stateless person who has made an application for international protection in respect of which a final decision has not yet been made. Family members are specifically and separately defined in Article 2(c) of the Directive. Contrary to the appellants' position, no *lacuna* exists in the Directive. It is the clear purpose of Article 15 to confer a right of access on an applicant, personally, once certain conditions are met. It does not, expressly or by implication, allow for that right to be exercised by any other person on behalf of an applicant. The present appeal concerns a straightforward interpretation issue, and, as the High Court observed (at para. 32), the Directive is '*clear and unambiguous'*. The appellants' interpretation would require the Court to disregard the specific definitions in the Directive and/or to '*do violence to the plain language'* used therein.

89. It is legitimate and in accordance with Article 15(2) of the Directive for a Member State to set a minimum age for a child to exercise his or her right to access the labour market. Regulation 16 of the 2018 Regulations provides that any labour market access is subject to the 1996 Act. In practice, the 1996 Act means that the youngest age at which a minor in Ireland could apply for and receive a LMAP is fourteen. While this amounts to a restriction, there is no '*absolute ban*' on children receiving labour market access in this

jurisdiction. The restriction is to protect children and it applies to all children in the State irrespective of their immigration status. It is, demonstrably, in the best interests of the child.

90. An additional safeguard is built into the system by ensuring that where an application form for labour market access is being completed by a person under the age of eighteen, the signature of a parent or guardian must appear on the form. In line with the opinion of the Advocate General in *KS* (at para. 74) to the effect that the conditions for access to the labour market '*must not render impossible in practice or excessively difficult the exercise of rights conferred by the EU legal order*', the restriction and the safeguard do not render the right excessively difficult to exercise. There are many examples in Irish legislation where a minimum age is set at which young people are permitted, lawfully, to carry out certain acts. No unlawful restriction of the effective enjoyment of the child's right to access the labour market has occurred.

91. Ensuring a consistent approach to child labour across the board in this jurisdiction, by imposing a minimum age before which a child can work, lawfully, irrespective of immigration status, respects the best interest of children in the State in accordance with Article 42.A.1 of the Constitution. It is the young age of the minor appellant in this case that prevents him from accessing the labour market and not his status as a minor *per se* and not any failure by the respondents to respect his EU or constitutional rights.

92. As to the allegedly derivative nature of the right asserted, an obvious example of an EU '*derived*' right is to be found under the Free Movement Directive 2004/38/EC.[14] There, derived rights are granted to family members of EU citizens so as not to inhibit the

[14] Directive 2004/ 38/ EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC [2004] OJ L158/77.

exercise of EU rights by EU citizens. The kind of considerations that appear in the recitals to and provisions of that Directive do not apply here. The minor appellant's inability to exercise his right of access by virtue of his young age did not hamper the progression of his application for international protection. The child had the benefit of a vulnerability assessment in 2022. Apart from his young age, no special reception needs were identified. There was no evidential basis to support the claim that his well-being and social development were unduly restricted in the absence of a vicarious or derived right accorded to his parents to seek and enter employment.

93. In *NHV* it was held that '*work is connected to the dignity and freedom of the individual*' but the issue in that case concerned an absolute prohibition of access to the labour market. No absolute ban arises in the instant case. The High Court found that there is an obligation upon the Member State to ensure that material reception needs are made available to a minor applicant. The child and his parents were residing in private accommodation and the High Court was satisfied that the child's needs were met. Thus, the claim that a parental right to work was necessary to obtain special reception needs is not well founded.

94. Arguments in respect of dignity and other rights are wholly speculative. They do not arise on the facts of the case and do not arise as a matter of law under the Directive.

The Court's Assessment

On the Interpretation of the Directive

95. The right of access to the labour market, as asserted in this case, is articulated as a *'vicarious'* or a *'derived'* right to work or as the facilitation of '*proxy employment*'. Simons J. characterised the *vicarious* right asserted as a right that inheres in the child but is

exercised by the parents on his behalf. The asserted derived right, he considered, was one that inheres in the parents and is derived from a right enjoyed by the child.

96. The trial judge's finding that '*no right of access*' inhered in the child under Article 15 of the Directive requires a slightly more nuanced articulation, in my view. Because of his finding in this regard, he went on to say that the parents could not exercise, vicariously, a right which the child did not possess. Strictly speaking, the child *qua* applicant for international protection under the Directive *does* enjoy a right of access. Indeed, Regulation 16 of the implementing Regulations expressly provides that Regulations 11 to 14 shall apply in relation to an applicant who is under the age of eighteen. In fact, there was never any dispute between the parties that '*an applicant*' for international protection enjoys a right to access the labour market under Article 15 and that, at least at the level of principle, the child *qua* applicant for international protection enjoys such a right. Nothing in Article 15 qualifies that right by reference to the age of an applicant. Whilst Regulation 16 provides that Regulations 11 to 14 *shall* apply in relation to an applicant under the age of eighteen, that, however, is subject to the qualification that the employment of such an applicant shall, in addition, be subject to the 1996 Act.

97. While section 3(2) of the 1996 Act *prima facie* prohibits the employment of a child, the Minister for Enterprise and Employment may, by licence and subject to certain conditions, authorise in individual cases, the employment of a child in cultural, artistic, sports or advertising activities. Thus, strictly speaking, had the infant in this case been selected for casting in a television advertisement or a film production, it is, at least, conceivable that his Article 15 right could have been exercised on foot of an authorisation issued by the Minister for Enterprise and Employment.

98. I accept that there is nothing, in principle, to prevent a minor applicant for international protection from exercising a right of access to the labour market under

Article 15 upon obtaining permission so to do in the form of a licence authorised by the relevant Minister. It must be open to minor applicants for international protection, as the Directive makes clear, to apply their talents in the domestic market to the same extent as any Irish citizen child or EU citizen child in this jurisdiction. To be fair, Simons J.'s finding that the minor had '*no right of access*' was based on the fact that, because of his tender years and his not having obtained a section 3(2) licence, the minor appellant was precluded from working, lawfully, during the relevant period. That being so, there was no entitlement that could then be exercised, vicariously, by his parents on his behalf.

99. In approaching any interpretation of a legislative provision, the words used therein must be given their ordinary and natural meaning so that the intention of the drafters is respected. It is only where an ambiguity as to the intention behind those words arises or where a literal interpretation would give rise to an absurd construction or would fail to reflect the discerned intention, that another approach may be adopted.

100. An account of the guiding principles governing the construction of legislation is set out in the judgment of Murray J. in *A, B and C (A Minor Suing by His Next Friend, A) v. The Minister for Foreign Affairs and Trade* [2023] IESC 109. That case raised a novel question of statutory interpretation concerning the meaning of *'parent*' (under section 7(1) of the Irish Nationality and Citizenship Act, 1956) in the context of proceedings concerning gestational surrogacy. Murray J. recalled (at para. 73) that:

> "*In answering these questions, it is to be remembered that the cases - considered most recently in the decision of this court in Heather Hill Management Company CLG and anor. v. An Bord Pleanála [2022] IESC 43, [2022] 2 ILRM 313 – have put beyond doubt that language, context and purpose are potentially in play in every exercise in statutory interpretation, none ever operating to the complete exclusion of the other. The starting point in the construction of a statute is the language used in the provision under consideration, but the words used in that section must still be construed having*

regard to the relationship of the provision in question to the statute as a whole, the location of the statute in the legal context in which it was enacted, and the connection between those words, the whole Act, that context, and the discernible objective of the statute. The court must thus ascertain the meaning of the section by reference to its language, place, function and context, the plain and ordinary meaning of the language being the predominant factor in identifying the effect of the provision but the others always being potentially relevant to elucidating, expanding, contracting or contextualising the apparent meaning of those words."

101. The Directive's provisions under Article 15 are expressed in clear language and stipulate, *inter alia*, that '*an applicant'* for international protection whose application has been pending for a specified time has a right to access the labour market. The meaning of '*an applicant*' is clear and this follows from several considerations. '*Applicant*' is defined, in singular terms, in Article 2 of the Directive. In its ordinary meaning it refers to the concept of '*a third country national*' or '*a stateless person*' who has made an application for international protection in respect of which a final decision has not been taken. The definition of '*an applicant*' does not include a '*family member'* which is defined, separately and elsewhere in the Directive. Adopting a literal interpretation of the text and viewing Article 15 in the overall context of the Directive, there is nothing to suggest that the term '*applicant*' includes anyone other than the subject of an application for international protection whose application has not been determined by way of a final decision. To interpret Article 15 to mean that a right to access the labour market is conferred on anyone other than an applicant would be to distort its clear and unambiguous meaning and to overlook the purpose of its provisions. Moreover, if the European legislature had intended to confer upon the parents of a minor applicant for international protection a right to access the labour market in lieu of their child, then it would have said so, expressly. I am satisfied that the correct interpretation of Article 15,

viewed in its own terms and in the overall context of the Directive's purpose and provisions, confers no such right. In these circumstances, the question of disapplying Regulation 11(4) in favour of the appellants' interpretation of Article 15 does not arise.

102. As to the argument that one is obliged to '*read into'* the terms of Article 15 the inclusion of a family member, and, specifically, a parent, in order to ensure that the right conferred on an applicant thereunder is '*effective*', I find that equally unpersuasive. The argument overlooks the fact that the term '*family member'* is expressly defined elsewhere in the Directive. Moreover, the trial judge observed, correctly, that the Directive imposes the obligation on the *Member State* to ensure that material reception conditions are made available to a minor applicant. That duty does not fall upon the parents of such applicants. Simons J. was correct, in my view, to conclude that there is no need to supplement an already comprehensive '*suite of protections*' afforded to a minor applicant by '*reading into*' Article 15 a '*rider*' to the effect that a minor's parents must be allowed to work in order to ensure that the minor has an adequate standard of living.

The 'Zambrano' Principle

103. A central pillar of the case advanced by the appellants is that the CJEU's ruling in *Zambrano* is authority for their claim of a '*derived*' right of access to the labour market. Whilst this proposition is novel, perhaps even audacious, it is also, in my view, misconceived. The *Zambrano* principles form a fundamental part of EU law on citizenship. The case involved two Columbian nationals living in Belgium, whose two children had acquired Belgian citizenship by operation of the nationality law in place at the time. The *Zambrano* parents applied for the regularisation of their immigration status, which was refused as was Mr. Zambrano's application for unemployment benefit. The national court, however, referred a number of questions to the CJEU regarding the

potential applicability of Article 20 of the TFEU because of the fact that minor Belgian citizens were involved. The CJEU ruled that expelling the non-EU parents would, effectively, result in the departure of the children from the territory of the EU, thereby jeopardising the genuine enjoyment of the substance of the children's EU citizenship rights. In these circumstances, it upheld the right of the EU minors to enjoy their citizenship rights under Article 20 of the TFEU. The CJEU stated (at para. 45) that:

> *"Article 20 TFEU is to be interpreted as meaning that it precludes a Member State from refusing a third country national upon whom his minor children, who are European Union citizens, are dependent, a right of residence in the Member State of residence and nationality of those children, and from refusing to grant a work permit to that third country national, in so far as such decisions deprive those children of the genuine enjoyment of the substance of the rights attaching to the status of European Union citizen."*

104. It is well recognised that *Zambrano* was a significant landmark ruling. Not surprisingly, the scope of its application was tested soon after its publication. In Case C-256/11 *Dereci v. Bundesministerium für Inneres* ECLI:EU:C:2011:734 the CJEU, referring to its judgment in *Zambrano*, stated:

> *"66. [...] that the criterion relating to the denial of the genuine enjoyment of the substance of the rights conferred by virtue of European Union citizen status refers to situations in which the Union citizen has, in fact, to leave not only the territory of the Member State of which he is a national but also the territory of the Union as a whole.*
>
> *67. That criterion is specific in character inasmuch as it relates to situations in which […] a right of residence may not, **exceptionally**, be refused to a third country national, who is a family member of a Member State national, as the effectiveness of Union citizenship enjoyed by that national would otherwise be undermined."*

105. The finding in *Zambrano* and the consequences that flowed therefrom were considered by this Court in *Bakare v. Minister for Justice & Equality* [2016] IECA 292 ('*Bakare*'). *Bakare* involved an application for residence of a Nigerian national on the twin basis of his parentage of an Irish citizen child and the principle articulated in the *Zambrano* ruling. Mr Bakare's application was refused by the Minister because there was no evidence that his child would be forced to leave the State or the territory of the EU, in circumstances where the child's mother was a naturalised Irish citizen, with the right to remain in the State.

106. Following the High Court's refusal of the application for leave to seek judicial review of the Minister's decision, this Court dismissed the appeal. It held that the correct application of the test in *Zambrano* was whether the denial of residence to a third-country national parent of an EU citizen child would bring about a situation where the child is compelled to leave the territory of the Union. At para. 18 of his judgment, Hogan J. identified what he viewed as the true rationale of *Zambrano,* namely, whether it is *'likely that the administrative decision taken by the Member State will in practice oblige the parents to take the EU citizen children with them so that the latter are obliged to leave the territory of the Union'.*

107. Upon considering what amounted to a denial of the genuine enjoyment of the substance of the rights of EU citizenship in this context, Hogan J. held (at para. 24):

> *"It is accordingly clear from a consideration of post - Zambrano case-law that the critical consideration is whether the denial of residency or similar rights to one or both third country nationals who are parents of EU citizen children <u>is likely</u> to bring about a situation where those <u>children are in practice compelled</u> to leave the territory of the Union."*

In *Bakare* Hogan J. did not find that the practical effect of the denial of residence would be such as to oblige the Irish citizen child to leave the territory of the EU and he concluded that *Zambrano* did not apply.

108. Peart J. in *MY v. Minister for Justice, Equality and Law Reform* [2017] IECA 317 also found that:

> "*the effect of Zambrano is […] clear. The member state in which the EU citizen child resides may not refuse such an application for permission if by doing so it deprived the citizen child of the opportunity to exercise and enjoy the substance of his/her citizenship rights deriving from Article 20 TFEU."*

109. Approval by the Supreme Court of the approach adopted by Hogan J. in *Bakare* is to be found in *O v. Minister for Social Protection* [2019] IESC 82 ('*O*'). That case concerned the backdating of child benefit payment to parents and whether they were entitled to such benefits prior to the regularisation of their immigration status. Dunne J. confirmed that the '*appropriate question*' for consideration was the one posed by Hogan J. in *Bakare* in his summation of the rationale of *Zambrano*, namely, whether the administrative decision taken by the Member State would, in practice, oblige the parents to leave the territory of the Union, taking the EU citizen children with them. Addressing this question to the facts before her, the learned judge held that the refusal to pay child benefit to Ms Y prior to the grant of a right of residence, did not breach the *Zambrano* principles. She observed that:

> *"the only way in which there could be a breach of Zambrano rights would be if it could be shown that the failure to backdate child benefit payments in respect of Emma*[15] *would have <u>obliged</u> Ms. Y to leave the territory of the Union.*

[15] A pseudonym used by Dunne J. in her judgment.

[…] The core of the right recognised in Zambrano is the right to reside in the State. That is a right afforded to the European Union citizen, in this case, Emma. In order to demonstrate that her right to reside has been interfered with, it has to be established that the failure to make child benefit payments on a backdated basis to the date of Emma's birth was such as to deny her, Emma, the enjoyment of her rights as a citizen of the Union to reside in this Member State. In other words, it would be necessary to show that she was being deprived of her right to reside in the State because the financial circumstances of her mother by the denial of child benefit was such as to require her to leave."

110. Later, this Court in *EO and AO v. Minister for Justice and Equality, Ireland and The Attorney General* [2020] IECA 246 reiterated that the correct application of the test in *Zambrano* was whether the denial of residence to a third country national parent of an EU citizen child would bring about a situation where the child is *compelled* to leave the territory of the Union.

111. Even a brief review of the post-*Zambrano* case law, whether emanating from the CJEU or from the Irish courts, demonstrates that, for several reasons, the appellants' reliance on *Zambrano* to ground their asserted derived right of access to the labour market is misconceived.

112. First, and most obviously, as Dunne J. pointed out in *O*, the core of the right recognised in *Zambrano* is the right to reside in the State and it is a right afforded to an EU citizen. For *Zambrano* to apply, the rights of a Union citizen would have to be engaged and the appropriate question would be whether an impugned administrative decision had the effect of depriving that citizen of the possibility of exercising his or her Union rights. By definition, an applicant seeking international protection is not an EU citizen and the minor applicant, in this case, was no exception. That being so, the Tribunal's refusal

to grant labour market access to his parents did not engage, let alone breach, the principles articulated in *Zambrano*.

113. Moreover, it can hardly be disputed that the right in issue in *Zambrano* was of an entirely different nature to the right asserted by the appellants in this case. Denial of a right to access, temporarily, the labour market within a Member State cannot, realistically, be compared to the denial of the genuine enjoyment of the substance of the rights conferred by Union citizenship status. Citizenship touches upon the very core of a person's identity and the effective exercise of citizenship rights, in my view, falls within that category of rights which McKechnie J. in *OR and Others v. An t-Ard Chláraitheoir and Others* [2014] 3 IR 533 ('*OR*') referred to as being at '*the highest level of our legal order*' (see also the judgment of this Court in *Habte v. Minister for Justice and Equality* [2020] IECA 22). The same cannot be said of the right in issue in this case, in that the particular right is a qualified right granted under specifically identified circumstances to applicants for international protection for a defined and limited period.

114. A decision to deprive a Union child of the effective exercise of his or her citizenship rights has a far greater and longer-term impact than a decision to deny to the parents of a child seeking international protection, the right of temporary access to the labour market. Removing a citizen child, permanently, from the territory of the Union because of his dependence on his third-country national parents entails, for that child, the loss of protection of the full range of constitutional rights conferred upon a citizen and that is *'a matter of grave significance to the individual concerned*' (see Dunne J. in *Damache v. Minister for Justice* [2020] IESC 63, para. 27). Notwithstanding that, conceivably, the minor appellant in this case *might*, indirectly, have suffered the loss of some monetary benefit because his parents were denied a temporary right to access the labour market, such a notional loss is incomparable to the loss that would be visited upon a minor EU

citizen who is forced, by reason of dependence on his or her third-country national parents, to leave the territory of the Union altogether.

115. To the extent that the appellants seek to interpret *Zambrano* more broadly and apply it by analogy, that argument also runs aground. The proposition advanced is that Article 15 forms part of EU law and, thus, where a denial of a right has an *impact* upon a child beneficiary of an EU law provision, then, in view of the importance that EU law accords to the principle of the best interests of the child, that should result in the recognition of a right inhering in his or her parents—*Zambrano b*y extension. The argument fails to persuade not least because incorporation of the '*best interest*' principle already forms part of the overall scheme of the Directive as illustrated by Article 23 and Recital 9 thereof. Article 15 provides for a common approach to the reception conditions of all applicants for international protection. Separate and specific provisions are made in respect of the best interests of minor applicants. There is no requirement to shoehorn into the clear language of Article 15 a right of persons other than the person to whom reference is made in the Article. Moreover, unlike the citizenship rights in issue in *Zambrano,* the limited right in Article 15 exists only for the duration of the application process and its exercise is, as already noted, both time-bound and temporary.

116. At all times during the pendency of the minor appellant's application for international protection, the State, under Article 23 of the Directive, was required to regard his best interests as a primary consideration, to '*take due account*' of his social development, safety and security, and to ensure a standard of living adequate for his physical, mental, spiritual, moral and social development. There is no evidence that the minor applicant in this case suffered any diminution in the benefits to which he was entitled nor any loss of an advantage that he might otherwise have received had *his* Article 15 right been exercised by proxy. The record shows that the child had a

vulnerability assessment in 2022 and that, apart from his young age, no special reception needs were identified. The child and his parents were residing in private accommodation. Admittedly, if the household income had increased by reason of the parents' exercise of their child's right, it is, of course, conceivable that their then eighteen-month-old infant might have enjoyed, for example, a better quality of buggy or a more expensive item of clothing. However, I see nothing by way of convincing evidence to support the claim that the State failed to take '*due account*' of the infant's well-being and social development or that these were unduly restricted by reason of the refusal to allow his Article 15 right to devolve, vicariously or derivatively, upon his parents.

On Human Dignity

117. It was a central pillar of the appellants' appeal that respect for dignity required the recognition of the right asserted by the parents. In this regard, they placed particular emphasis upon two decisions of the CJEU — *KS* and *Saciri*. They submitted that the general scheme of the Directive underscores the importance of respecting and promoting human dignity.

118. The contention that work is associated with human dignity is, in my view, entirely correct. Through vocational endeavours an individual does far more than generate an income. In and through work, a person may advance human understanding, express creativity, safeguard mental health, contribute to community, and support the common good (*O'Connell v. Building and Allied Trade Union & Ors* [2021] IECA 265, para. 104). I accept that the temporary right conferred under Article 15 to persons whose applications are not processed within the specified time frame is one conferred in recognition of the broader value of work and its inherent association with human dignity.

119. It is, however, important to clarify that the right to seek employment is not about what the appellants refer to as the right to dignity. Human dignity is not a right but is the reality upon which all rights are founded. It is not within the gift of the State or the EU or of any other entity to grant or deny dignity as a 'right'. An individual's dignity may be dishonoured or disrespected but human dignity itself cannot be repudiated. It is a given. A person is born, lives and dies with dignity. It is precisely because of this reality that, in a state governed by the rule of law, any interference with human rights, including, the right to work, must have a legal basis, be objectively justifiable, proportionate, and necessary in a democratic society.

120. Based on respect for their human dignity, the parents in this case, having met the legal threshold, were afforded a right to access the labour market whilst their own applications for international protection were pending and they exercised that right, accordingly. When that process was complete and their applications were rejected, the exercise of that right came to an end. As of that moment, they were no longer '*applicants*' for international protection and thus no longer entitled to remain, lawfully, in the State. I am satisfied that all times during the processing of their applications for international protection, the dignity which inheres in them, as human beings, was respected, fully, by the State. The finding that they did not qualify, legally, as persons in need of international protection had no impact on their human dignity. Moreover, respect for the dignity of the minor appellant did not require Article 15 to be interpreted to include a right of labour market access on the part of his parents. The child's dignity was respected throughout the process by the provision of a vulnerability assessment to ascertain whether he had any special reception needs and by ensuring that material reception conditions, including, housing, food, and clothing, were made available to him.

121. In view of the foregoing, the contention that '*dignity considerations*' required that the second and third named appellants be accorded permission to exercise their young child's right to access the labour market under Article 15, is misconceived.

EU Case Law

122. Even a cursory review of the CJEU case law upon which the appellants rely to advance their dignity based claim, demonstrates that such reliance is misplaced. *KS* concerned the interpretation of Article 15 of the Directive. All applicants in *KS* were the subjects of decisions transferring their applications for international protection to another Member State, pursuant to the Dublin III Regulation.[16] The CJEU found that labour market access was not a material reception condition under Article 2(g). It fell within the scope of reception conditions, more generally, as defined in Article 2(f). The CJEU recognised that work contributes to the preservation of an applicant's dignity – a core objective of the Directive (Recital 11) – and that access to the labour market also promotes the objective of the self-sufficiency of applicants (Recital 23). Access to the labour market, it noted, confers mutual benefits upon applicants and the host Member State, preventing the isolation and social exclusion of the former while reducing the social benefit costs of the latter.

123. The CJEU found that Article 15 of the Reception Conditions Directive must be interpreted as *precluding* national legislation that excludes applicants for international protection from accessing the labour market on the sole ground that a transfer decision has been made against them pursuant to the Dublin III Regulation. The CJEU, having

[16] Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (OJ 2013 L 180, p. 31). This regulation was given further effect by the European Union (Dublin System) Regulations 2018 (S.I. No 62/2018) ('the Dublin III Regulation').

considered, *inter alia*, Article 2(b) and Recital 8 of the Directive, affirmed that a transfer decision did not alter an applicant's status *qua* applicant under the Directive. Consequently, it held that the right accorded under Article 15 applies to applicants for international protection pending the implementation of a transfer decision that has been made against them.

124. The appellants assert that because the CJEU in *KS* '*held against*' domestic legislation that had excluded those applicants from the labour market, the domestic Regulations prohibiting access in this case should, likewise, be disapplied. Alternatively, they say the Regulations should be interpreted as granting a positive permission to the second and third appellants to access the labour market on their child's behalf and in his best interests.

125. For several reasons, the decision in *KS* is entirely distinguishable from the instant case and does little to advance the appellants' appeal. First, the submission that the CJEU '*held against*' domestic legislation that excluded applicants from the labour market lacks nuance, context and specificity. The Court determined that Article 15 must be interpreted as precluding legislation which excludes access to the labour market on the sole ground that a transfer decision has been made under the Dublin III Regulation. The Dublin III Regulation does not feature in any way in the instant appeal.

126. Second, the focus of the CJEU's attention in *KS* was, at all times, on the individual subjects whose Article 15 rights were engaged. Whilst the appellants are undoubtedly correct about the dignity-affirming aspect to work and labour market access being an essential element of the Directive's regime, their reliance on *KS* runs aground when it comes to how these propositions translate into a right for a person other than the subject of Article 15, namely, an applicant for international protection.

127. It is notable that in *KS*, dignity was articulated, specifically, in terms of an applicant's self-sufficiency. The Court recalled (at para. 69) the Advocate General's observation that work contributes to the preservation of an applicant's dignity '*since the income from employment enables him or her not only to provide for his or her own needs, but also to obtain housing outside the reception facilities in which he or she can, where necessary, accommodate his or her family*' and that one of the objectives pursued by the Directive is to promote '*the self-sufficiency of applicants*' for international protection.

128. In *KS*, the CJEU was considering the right conferred by Article 15 from the exclusive perspective of the right holder. It was the self-sufficiency of an *applicant* for international protection that was in issue in that case and not the self-sufficiency of anyone else. The logic of the appellants' position, *per KS*, is that their eighteen-month-old child, *qua* the subject of an Article 15 right, should be enabled to provide for his own and his family's needs. Moreover, if the child's right of access to the labour market were to be exercised by someone else, then it could not be said that his right under Article 15 has served to promote his *self*-sufficiency. To contemplate self-sufficiency in the context of a toddler is untenable. The appellants' answer that, indirectly, a vicarious or derived right would operate to secure the self-sufficiency of the '*family unit*' and the '*best interests of the child*' overlooks the reality that in *KS,* the Court was concerned only with the Article 15 right insofar as it vested, explicitly and directly in an individual applicant. To the extent that families featured at all in *KS*, it was from the perspective of an applicant leveraging the right of access so as to provide for or accommodate his family. As the first appellant was a baby, he could have had no role whatsoever, *qua* applicant, in providing for or accommodating his family's needs.

129. Having regard to the overall context of *KS* and to the findings of the CJEU therein, I am satisfied that the appellants' reliance on that decision does not support their claim.

130. The appellants also rely on the CJEU's judgment in *Saciri* to argue that, as a '*matter of dignity*', the parents of the minor appellant should be allowed to provide for him by way of permission to access the labour market. The decision in *Saciri* concerned the interpretation of Article 13(5) of Directive 2003/9/EC, which provided that material reception conditions *may be provided in kind* by Member States, or in the form of financial allowances or vouchers. Article 13 of that 2003 Directive has since been repealed and, in substance, replaced by Article 17 of the Directive in issue in this case. The Saciri family, having filed an application for asylum, immediately thereafter, lodged an application with the Belgian federal agency responsible for the reception of asylum seekers (Fedasil). That agency informed the family that it was unable to provide for them and directed them to OCMW, the competent public centre for social welfare payments.[17] Unable to afford rent in the private market, the family lodged an application for financial aid with OCMW. It rejected their application on the basis that the family ought to have stayed in a reception facility managed by Fedasil. The Saciri family appealed against the decisions of both Fedasil and the OCMW. In that appeal, the Arbeidsrechtbank te Leuven declared the action against the OCMW to be unfounded and directed Fedasil to pay the family a certain sum. Fedasil appealed against that decision and its appeal gave rise to the preliminary reference.

131. The CJEU, having considered the plain terms of Article 13(1) of Directive 2003/9/EC, held that material reception conditions must be available to asylum seekers, whether provided in kind or in the form of financial allowances, when they make their application for asylum. Though not raised by the appellants, it also found that where a Member State has opted to grant material reception conditions in the form of financial

[17] OCMW stands for '*Openbaar Centrum voor Maatschappelijk Welzijn*', meaning Public Centre for Social Welfare.

allowances or vouchers, that Member State must ensure that the total amount of the financial allowances covering the material reception conditions is sufficient to ensure a dignified standard of living, adequate for the health of applicants and capable of ensuring their subsistence.

132. The appellants place particular emphasis on the Court's observation (at para. 35) in *Saciri* wherein, in relevant part, it is stated that:

> *"[...], the general scheme and purpose of Directive 2003/9 and the observance of fundamental rights, in particular the requirements of Article 1 of the Charter of Fundamental Rights of the European Union, under which human dignity must be respected and protected, preclude the asylum seeker from being deprived – even for a temporary period of time after the making of the application for asylum [...] – of the protection of the minimum standards laid down by that directive (see Cimade and GISTI, paragraph 56)."*

Once again, the decision in *Saciri* is of no assistance in advancing the appellants' claim of a right to access the labour market based on their infant's Article 15 right. As a preliminary matter, *Saciri* concerned the interpretation Article 13(5) of the 2003 Directive which governed the provision of material reception conditions and allowed such conditions to be provided by Member States in kind, in the form of financial allowances or vouchers. In 2021, the CJEU in *KS* held that the right of access to the labour market is <u>not</u> a material reception condition under Article 2(g) of the Directive. Instead, it falls within the scope of reception conditions as defined in Article 2(f). Thus, strictly speaking, *Saciri* does not have any bearing on the interpretation of Article 15 of the Directive in respect of labour market access.

133. Moreover, the passage from *Saciri* (para. 35) on which the appellants rely contains a general observation in respect of the (earlier) Directive in which the protection of and

respect for human dignity was linked to the provision of the minimum standards specified in that Directive. The CJEU stated that an asylum seeker may not be deprived of those standards even for a temporary period. That statement of principle holds true, but it does not advance the appellants' claim. As applicants for international protection, they were not, at any time, deprived of the minimum standards laid down in the Directive. Whilst I do not dispute that respect for human dignity lies at the heart of the Directive, it requires something of a leap, in my view, to conclude that this general statement of principle, set out in para. 35 of *Saciri*, means that Article 15 must be interpreted as conferring upon persons, who are not themselves applicants for international protection, a vicarious or derived right to access the labour market on behalf of someone else.

On the Constitutional Right to Seek Employment

134. Another pillar of the appeal was the contention that the High Court had erred in finding that no vicarious right on the part of the second and third named appellants to access the labour market was to be found within the Constitution. Referring to Simons J.'s analysis of *NHV*, they say that the parents of the minor appellant were prevented from seeking employment on behalf of their child '*without substantial justification*' and that the minor was entitled to look to his parents for support. The provision by the State of basic minimum resources could not, in the appellants' view, be an answer to the right asserted under the Constitution. Insofar as Regulation 11(4) was read to exclude, absolutely, the parent appellants from seeking employment, they say that it contravenes the Supreme Court's determination in *NHV*. The Minister, they say, acted in breach of the parents' constitutional right to work while their dependent child was in the protection system.

135. To my mind, the Supreme Court's decision in *NHV* raised an issue that is readily distinguishable from the issue in this appeal. It concerned an appellant who had been in

the State's asylum system for more than eight years and, during all of this time, he was prohibited from seeking employment. O'Donnell J. held that the absolute prohibition on his seeking employment as set out in section 9(4) of the Refugee Act 1996 – and re-enacted, almost identically, in section 16(3)(b) of the 2015 Act – contravened the constitutional right to seek employment. That right was characterised by O'Donnell J. as a freedom to work or seek employment. It implied a negative obligation not to prevent a person from seeking or obtaining employment without substantial justification (para.12). It was a right that inhered in the human personality and O'Donnell J. was of the view that Article 40.1 of the Constitution was engaged in that case (para. 17). Accordingly, he concluded (at para. 17) that:

> *"[...] a right to work at least in the sense of a freedom to work or seek employment is a part of the human personality and accordingly the Article 40.1 requirement that individuals as human persons are required be held equal before the law, means that those aspects of the right which are part of human personality cannot be withheld absolutely from non-citizens."*

136. O'Donnell J. accepted that a number of legitimate considerations justified both a distinction between citizens and asylum-seeking non-citizens in the field of employment and a policy of restriction on employment. He went on to find, however, that it was impermissible to differentiate between these two classes of persons in such a way as to remove '*for all time*' the right of asylum seekers to work or seek employment in circumstances where, in principle, such a right was available to them. Instead of declaring the impugned legislative provision repugnant to the Constitution, the Court adjourned the case for six months to facilitate a legislative reaction, which, ultimately, took the form of the State opting into the provisions of the Reception Conditions Directive and

permitting asylum seekers to work where there was a delay in excess of nine months in the processing of their applications for international protection.

137. Unlike the appellant in *NHV*, the second and third appellants in this case were not prevented, absolutely, from seeking employment whilst in the State's asylum system. They were permitted to apply for a LMAP, did so in August 2018, and had their applications granted. When their applications for international protection were finalised, their permission ceased to be valid. Accordingly, unlike the appellant in *NHV*, it simply cannot be said that the right of the appellants in this case was '*removed altogether*' (para. 20 of *NHV*).

138. Moreover, the facts of this case are patently different from those in *NHV*. The relevant period, in this case, was a little over eight months. In *NHV* the period of exclusion from the labour market was over eight years. There is a world of difference between - as in *NHV* – one being prevented, absolutely, from seeking employment and – as in this case – one being prevented from seeking employment for a limited period based on a refusal to recognise a vicarious or derived right of access during that period.

139. Additionally, it is worth noting that Regulation 11 does precisely what the Supreme Court envisaged (at para. 20) of *NHV*. It is particularly telling that O'Donnell J. stated that:

> *"It may be the case that if there was a legal or practical limitation upon the amount of time during which an application for asylum status could be processed, then a provision in terms of s. 9(4) [of the Refugee Act 1996] itself unlimited as to its time span, could be permissible."*

140. Regulation 11 places an express time limit on the amount of time during which a person may be prevented from seeking employment. The parents in this appeal had the benefit of a LMAP once that limit in their own applications had been exceeded. There is

nothing in *NHV* to support their claim that they were entitled to exercise, by proxy, their child's right to labour market access when the administration of his application had exceeded the stipulated processing time.

141. Having regard to the foregoing, the appellants' claim in respect of an alleged breach of the Constitution in this case must fail.

Preliminary Reference Under Article 267

142. Whilst the appellants accept that Article 15, on its plain terms, does not grant a family member of an applicant a right to access the labour market, vicariously or by proxy, they submit that an interpretation of the Directive in such a way as to result in the recognition of such a right, is the only means possible to give effect to the scheme of the Directive. It is their case that any uncertainty as to its interpretation or any possible *lacuna* in the Directive in this regard warrants a referral to the CJEU under Article 267 of the TFEU.

143. The respondents say that such a referral would not be appropriate where the High Court has found, as a matter of fact, that there was no evidence that the needs of the child were not met and where the child had not been refused any material reception conditions, nor had any special reception needs been identified. In their view, a reference to the CJEU is not '*necessary*' within the meaning of Article 267 because the correct interpretation of Article 2 of the Directive is *acte clair.* There is no doubt or ambiguity about who may be a beneficiary of a right to labour market access under the Directive. The respondents submit that it was open to the EU legislature to make a policy decision conferring the right to labour market access on an individual in a personal capacity only.

The appellants' claim that the Directive should be interpreted so as to cure a perceived *lacuna* would amount, effectively, to an amendment of the Directive by the courts.

144. In this case, the Court is called upon to consider whether there is any ambiguity about who may be a beneficiary of the right to labour market access under Article 15 of the Directive. If there is no doubt about the answer to the question of EU law raised in a given case, then a reference to the CJEU under Article 267 will not be necessary. In Case C-283/81 *CILFIT and Lanificio di Gavardo SpA v. Ministry of Health* [1982] ECR 3415 ('*CILFIT*'), the CJEU observed that '*the correct application of Community law may be so obvious as to leave no scope for any reasonable doubt as to the manner in which the question raised is to be resolved.*'

145. Article 15 of the Directive provides that an *applicant* for international protection whose application has been pending for a specified time has a right to access the labour market. The meaning of the term '*applicant*', in my view, is *acte clair* as is evident from Article 2 of the Directive. The term '*applicant*' is described in the singular. Had the European legislature intended to confer upon the parents of a minor applicant for international protection a right to access the labour market, either vicariously or by proxy, on that minor's behalf, then it would have said so, clearly.

146. I am satisfied that the correct application of the law and, in particular, Article 15 of the Directive, leaves no scope for any reasonable doubt as to the manner in which the question raised by the appellants in this case is to be resolved. The analysis of the appellants' core claim as reviewed in this judgment confirms that the High Court was entirely correct to conclude that a preliminary reference to the CJEU under Article 267 of the TFEU is not necessary in this case.

The Claim for Damages

147. Asserting a clear causal link between the breach of EU law they allege and the loss, as calculated, allegedly sustained, the appellants assert a right to damages. In this regard, they rely both on the judgment of the CJEU in *Francovich* and on the European Asylum Support Office's analysis entitled *'An Introduction to the Common European Asylum System for Courts and Tribunals: A Judicial Analysis*'.

148. It is, of course, well-established that loss caused by the State's failure to transpose EU law may found a claim for damages (referred to as '*Francovich* damages'). The principle established in *Francovich* was elaborated upon in Joined Cases C-46/93 and C-48/93 *Brasserie du Pechêur SA v. Federal Republic of Germany and R v. Secretary of State for Transport, ex parte Factortame Ltd and Others* [1996] ECR I-1029 ('*Brasserie du Pechêur*'). In *Brasserie du Pechêur* the CJEU held that the three conditions for liability for *Francovich* damages are satisfied where (i) the rule breached is intended to confer rights on individuals; (ii) the breach is '*sufficiently serious*'; and (iii) there is a direct causal link between the breach and the damage to the individual. (See also the judgment of O'Malley J. in *Ogieriakhi v. Minister for Justice* [2018] 2 IR 504 at 529).

149. As is clear from my analysis of the appellants' appeal, I reject their contention that Article 15 must be interpreted as intending to confer a right of access to the labour market upon parents of a minor applicant for international protection. No such intention on the part of the EU legislature has been established. That being so, the appellants' further contention that the right so asserted was breached, is entirely ill-founded. In these circumstances, their claim for *Francovich* damages fails at the first hurdle and thus obviates the necessity to consider whether the second and third limbs of the *Francovich* test were met.

150. It might be observed, in passing, that if the appellants *had* succeeded in meeting the relevant criteria for an award of damages, several questions would arise as to how such a claim might have been calculated. For example, if the Court had found that the parents did have a right to exercise, vicariously, their child's right to work, it seems to me that any lost income would then have had to be assessed by reference to the potentially lost income of the child. Inevitably, the assessment would have to factor in the limitations placed on the child's entitlement to work as set out in the 1996 Act. Moreover, a convincing explanation would be required to justify why a right that inheres in the child, as a single individual, should be capitalised upon and exercised by two people, conferring thereby something of a financial windfall upon his parents. Interestingly, there were only two application forms lodged with the IPAT but there were three applicants before High Court. How any losses arising could translate and multiply in such a fashion as to require the Court to consider, as part of the calculus, the damage sustained by three individuals on the basis of one person's Article 15 right, is rather mystifying.

Concluding Remarks

151. The appellants have advanced a rather novel proposition which sought to explore the parameters of the right afforded to an applicant for international protection under Article 15 of the Directive. The essence of their claim is that, as an applicant under the State's scheme for international protection, their child enjoyed a right to access the labour market and that such a right ought to have been exercisable, vicariously or derivatively, by his parents in order to ensure that the child was not deprived, by reason of his age, of the benefit conferred by the right.

152. The law which governs, holds and protects that common space within which human beings encounter one another would rarely evolve unless the boundaries of its application and accommodations were tested by spirited advocates. At the outset of the hearing of this appeal, the Court upheld the High Court's finding that the appellants' claim for damages had not been rendered moot and that it raised a plausible claim.

153. For the reasons set out above, I am, however, satisfied:

(i) that, subject to the provisions of national law, the first appellant, *qua* applicant for international protection under the Directive enjoyed, in principle, a right of access to the labour market under Article 15 of the Directive;

(ii) that the Article 15 right of labour market access conferred, in principle, upon the first named appellant, was a right conferred in a personal and individual capacity and was not a right capable of being exercised, vicariously or otherwise, by any person other than the first named appellant;

(iii) that the Article 15 right of labour market access conferred, in principle, upon the first named appellant, is not comparable or analogous to the rights associated with EU citizenship, does not fall within the application of the *Zambrano* principle, and does not give rise to a derived right on the part of the second and third named appellants;

(iv) that respect for human dignity does not require Article 15 of the Directive to be interpreted in the manner contended for by the appellants;

(v) that there was no failure on the part of the respondents to respect any EU or constitutional rights of the appellants;

(vi) that a reference to the CJEU is not '*necessary*' within the meaning of Article 267 of the TFEU because there is no reasonable doubt as to the manner in which the question raised by the appellants is to be resolved*;* and

(vii) that in the light of the foregoing findings the appellants' claim for *Francovich* damages must fail.

Decision

171. The appeal stands dismissed.

172. On the question of costs, the Court has decided to list this matter for a brief hearing on the 13th day of June 2024 at 09.30 am.

173. As this judgment is delivered electronically, Ní Raifeartaigh J. and Allen J. have indicated their agreement with the reasoning and the conclusions reached herein.