"THE COURT ORDERED that no one shall publish or reveal the names or addresses of the children of the Applicant who is the subject of these proceedings or publish or reveal any information which would be likely to lead to the identification of the Applicant, her children or any member of the Applicant's family in connection with these proceedings."

Michaelmas Term
[2017] UKSC 73
On appeal from: [2015] EWCA Civ 49

JUDGMENT

R (on the application of HC) (Appellant) *v* Secretary of State for Work and Pensions and others (Respondents)

before

Lady Hale
Lord Clarke
Lord Wilson
Lord Sumption
Lord Carnwath

JUDGMENT GIVEN ON

15 November 2017

Heard on 21 and 22 June 2017

Appellant	*Respondents*
Richard Drabble QC Ranjiv Khubber (Instructed by Platt Halpern Solicitors)	Jason Coppel QC Amy Rogers (Instructed by The Government Legal Department)
	Intervener (The AIRE Centre) Charles Banner (Instructed by Herbert Smith Freehills LLP)

LORD CARNWATH: (with whom Lord Clarke, Lord Wilson and Lord Sumption agree)

Introduction

1. This appeal concerns the rights of so-called "*Zambrano* carers" and their children to financial support from the state. That expression is derived from the decision of the Court of Justice of the European Union dated 8 March 2011, in *Ruiz Zambrano v Office national de l'emploi* (Case C-34/09) [2012] QB 265. The case concerned a Colombian who had been living in Belgium with his wife, and working (and paying social security contributions), but without a right to reside. Their three children, born between 2003 and 2005, acquired Belgian nationality at birth, and with it European citizenship and the right of free movement, under article 20 of the Treaty on the Functioning of the European Union ("TFEU"). When in 2005 he lost his job, he was refused unemployment benefit, because under the relevant national law that depended on his having a right to reside. The European court held that the refusal of such a right was unlawful because it would result in the children being deprived of effective enjoyment of their rights as European citizens.

2. The present appeal arises from a challenge to the legality of amendment regulations introduced in this country in November 2012 in response to the *Zambrano* decision. They were designed to limit the rights of *Zambrano* carers to claim certain categories of non-contributory social security assistance to which those "habitually resident" would otherwise be entitled: more specifically, income-related benefits, child benefit and child tax credit, and housing and homelessness assistance. The amendment regulations in question are:

i) The Social Security (Habitual Residence) (Amendment) Regulations 2012 (SI 2012/2587), amending the Income Support (General) Regulations 1987 (SI 1987/1967).

ii) The Child Benefit and Child Tax Credit (Miscellaneous Amendments) Regulations 2012 (SI 2012/2612), amending the Child Benefit (General) Regulations 2006 (SI 2006/223).

iii) The Allocation of Housing and Homelessness (Eligibility) (England) (Amendment) Regulations 2012 (SI 2012/2588), amending the Allocation of Housing and Homelessness (Eligibility) (England) Regulations 2006 (SI 2006/1294).

The effect of the amendment in each case is to add to the relevant list of exclusions from qualifying rights of residence, a right to reside existing by virtue of TFEU article 20, where that right "arises because a British citizen would otherwise be deprived of the genuine enjoyment of the substance of their rights as a European Union citizen".

3. The Secretary of State's evidence (in a statement by Gareth Cooper, Policy Adviser) refers to the Explanatory Memorandum to the amendment regulations. This explained the purpose as being to maintain the existing policy that non-European Economic Area (EEA) nationals are not entitled to claim income-related benefits, following the ruling in the *Zambrano* case. Mr Cooper (para 8) quotes it as follows:

> "… the Home Office are amending their regulations to provide a right to reside and a right to work to a non-EEA national who is a primary carer of a dependent British citizen only if the British citizen would otherwise be forced to leave the UK and be deprived of exercising their rights as an EU citizen. If the social security regulations are not amended such persons would become entitled to income related benefits."

The amendments had been subject to consultation with local authority associations and the Social Security Advisory Committee, and had attracted no objection or substantive comment. According to Mr Cooper it had been estimated by the Home Office that there would initially be some 700 people a year qualifying for *Zambrano* rights, giving rise to a potential annual cost of between £3.8m and £9.4m in respect of income support, housing benefit and council tax benefit together. Mr Cooper does not indicate what consideration, if any, had been given to how children of workless *Zambrano* carers were to be supported, if not entitled to such assistance.

4. The facts relevant to the present appellant, Mrs HC, can be shortly stated. She is an Algerian national who has been living in this country since 2008, having arrived with leave but over-stayed. In 2010 she married a British national on whom she was financially dependent. She has two children by him, born in August 2011 and March 2013. Her relationship with him ended after domestic violence in late 2012, when she sought help from the Oldham City Council, in whose area she was then living. After an initial refusal, the council agreed to provide temporary housing and financial support under section 17 of the Children Act 1989. Separate judicial review proceedings against the council resulted in an interim order by His Honour Judge Pelling QC, under which she and her children were accommodated by the council in two bedroom accommodation and given £80.50 per week to cover subsistence and utility costs. Those proceedings were later stayed by consent on the

council's agreement to carry out a further assessment of their needs, and to continue the support in the meantime.

5. It is now common ground (following a decision of the First-tier Tribunal in April 2014) that she is entitled to reside in the UK as a *Zambrano* carer. It is also not in dispute that that entitlement, taken with the financial support provided by the council, provides not only the legal right, but also the practical support, necessary to protect the children against being obliged to leave the territory of the European Union while under her care. Her case (para 36 of her second witness statement) is that this is not enough:

> "As I cannot go back to Algeria and have no right to live in any other country my only option is to remain here, where at least I have the protection of a prohibited steps order and the British courts. … Also my children are British. This is their home country and the only place they know. They are entitled to grow up here and, I pray, to enjoy the same benefits and opportunities of growing up in Britain that other British children have. At present when I see how they must live compared to their British cousins and step-siblings I know that they do not in practice have the same rights. We are expected to make do with far less, the bare minimum, only enough to survive."

6. In legal terms, Mr Drabble QC on her behalf submits that it was not legally possible for the amendment regulations to deny a *Zambrano* carer and her child mainstream welfare and housing provision, without contravening what he calls "the fundamental principle of equal treatment that is part of EU law", as embodied in article 21 of the EU Charter of Fundamental Rights ("the Charter"). As a fall-back position he relies also on article 14 of the European Convention on Human Rights ("the Convention").

7. Against this background, the following issues arise:

i) The *Zambrano* principle.

Does the principle require from the state more for the children and their *Zambrano* carer than bare protection (legal and practical) against being obliged in practice to leave the territory of the Union?

ii) Discrimination:

a) In so far as the regulations placed limits on the benefits available to *Zambrano* carers was the UK "implementing Union law" (within the meaning of article 51 of the EU Charter), so as to bring the Charter into play? If so, did those limits involve unjustified discrimination on grounds prohibited by article 21 of the Charter?

b) Alternatively, did those limits involve unjustified discrimination contrary to article 14 of the Convention, taken with article 8 (right to respect for private and family life) or article 1 of the First Protocol (right to property)?

The Zambrano principle

8. I start from the formulation of the principle by the European court in *Zambrano* itself. Having described citizenship of the European Union as "the fundamental status of nationals of the member state", the court said:

> "42. In those circumstances, article 20 TFEU … precludes national measures which have the effect of depriving citizens of the European Union of the genuine enjoyment of the substance of the rights conferred by virtue of their status as citizens of the European Union …
>
> 43. A refusal to grant a right of residence to a third country national with dependent minor children in the member state where those children are nationals and reside, and also a refusal to grant such a person a work permit, has such an effect.
>
> 44. It must be assumed that such a refusal would lead to a situation where those children, citizens of the European Union, *would have to leave the territory of the European Union* in order to accompany their parents. Similarly, if a work permit were not granted to such a person, he would risk not having sufficient resources to provide for himself and his family, which would also result in the children, citizens of the Union, *having to leave the territory of the European Union*. In those circumstances, those citizens of the European Union would, as a result, be unable to exercise the substance of the rights conferred on them by virtue of their status as citizens of the Union.

> 45. Accordingly, the answer to the questions referred is that article 20 TFEU … is to be interpreted as meaning that it precludes a member state from refusing a third country national on 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." (emphasis added)

9. It is clear (particularly from the passages highlighted in para 44) that the reasoning of the court turned specifically and solely on the risk of being obliged to leave the territory of the Union. There was no issue as to the nature of financial support (if any) required, nor as to the extent of any right to benefits otherwise available to nationals. Once the right of residence, and with it the right to work, were established, the entitlement to and the amount of unemployment benefit followed as a matter of Belgian law. Indeed Advocate-General Sharpston had dismissed arguments that there might be an "unreasonable burden" on public finances, pointing out that Mr Zambrano had worked full-time for nearly five years, paid social security contributions, and thus "contributed steadily and regularly to the public finances of the host member state" (Opinion paras 118-120). Mr Drabble rightly does not suggest that in itself the judgment throws any light on the right to non-contributory benefits.

10. The same emphasis is found in the next significant case: *Dereci v Bundesministerium für Inneres* (Case C-256/11) [2012] 1 CMLR 45. Mr Dereci, a Turkish national, had entered Austria illegally. He had married an Austrian woman and had three children who were EU citizens. He applied for a residence permit, but this was refused by the national authorities because the EU citizens concerned had not exercised their right of freedom of movement. The European court accepted that, in the light of its decision in *Zambrano*, the situation of Union citizens who have not made use of their freedom of movement could not "for that reason alone, be assimilated to a purely internal situation" (para 61). Having summarised the decision in that case, the court said:

> "66. It follows that the criterion relating to the denial of the genuine enjoyment of the substance of the rights conferred by virtue of EU 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, although subordinate legislation on the right of residence of third country nationals is not applicable, *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.
>
> 68. Consequently, the mere fact that it might appear desirable to a national of a member state, for economic reasons or in order to keep his family together in the territory of the Union, for the members of his family who do not have the nationality of a member state to be able to reside with him in the territory of the Union, is not sufficient in itself to support the view *that the Union citizen will be forced to leave Union territory* if such a right is not granted.
>
> 69. That finding is, admittedly, without prejudice to the question whether, on the basis of other criteria, inter alia, by virtue of the right to the protection of family life, a right of residence cannot be refused. However, that question must be tackled in the framework of the provisions on the protection of fundamental rights which are applicable in each case."

11. That passage indicates both the "exceptional" nature of the *Zambrano* right (para 67); and that it is triggered not by the mere desirability of keeping the family together, on economic or other grounds, but solely by the threat of being "forced to leave Union territory" if the right were not granted (para 68). Subsequent authorities are to the same effect. We have been referred to no European court authority which extends *Zambrano* rights to include non-contributory benefits of the kind in issue in the present appeal.

12. A more recent example, on which Mr Drabble relies, is *Rendón Marin v Administración del Estado (Judgment: Citizenship of the Union)* [2016] EUECJ C-165/14; [2017] QB 495, where the court described this line of cases as having -

> "… the common feature that, although they are governed by legislation which falls, a priori, within the competence of the member states, namely legislation on the right of entry and residence of third-country nationals outside the scope of provisions of secondary legislation which provide for the grant

> of such a right under certain conditions, they nonetheless have an intrinsic connection with the freedom of movement and residence of a Union citizen, which prevents the right of entry and residence being refused to those nationals in the member state of residence of that citizen, in order not to interfere with that freedom." (para 75)

13. Mr Drabble asks us to note that the national (Spanish) court, in making the reference, had referred to its possible relevance to social benefits under domestic law (para 30). However, there is nothing in the European court's treatment of the case itself to suggest that the "scope of EU law" for these purposes extended beyond protection against being obliged to leave. Thus it was left for the national court to determine whether the refusal to grant residence to the father would mean that he had to "leave the territory of the European Union" with the result that "the children could be compelled to go with him, and therefore to leave the territory of the European Union as a whole" (para 78).

14. In *R (Agyarko) v Secretary of State for the Home Department* [2017] UKSC 11; [2017] 1 WLR 823, paras 62-63, in a judgment agreed by the other members of the Supreme Court, Lord Reed referred to this line of cases and emphasised the specific and derivative nature of the rights so conferred. He cited a passage from the judgment of the European court in *S v Secretary of State for the Home Department* (Case C-304/14) [2017] QB 558; [2017] 2 WLR 180, para 29, holding -

> "that there are very specific situations in which, despite the fact that the secondary law on the right of residence of third-country nationals does not apply and the Union citizen concerned has not made use of his freedom of movement, a right of residence must nevertheless be granted to a third-country national who is a family member of his since the effectiveness of citizenship of the Union would otherwise be undermined, if, as a consequence of refusal of such a right, that citizen *would be obliged in practice to leave the territory* of the European Union as a whole, thus denying him the genuine enjoyment of the substance of the rights conferred by virtue of his status." (emphasis added)

15. The emphasised words in that citation are critical in defining the limited scope of the right. On this issue I agree entirely with the analysis of Elias LJ (*Harrison (Jamaica) v Secretary of State for the Home Department* [2012] EWCA Civ 1736; [2013] 2 CMLR 23, paras 63-70). As he said:

> "The right of residence is a right to reside in the territory of the EU. It is not a right to any particular quality of life or to any particular standard of living. Accordingly, there is no impediment to exercising the right to reside if residence remains possible as a matter of substance, albeit that the quality of life is diminished …" (para 67)

Baumbast and related cases

16. It is convenient at this point to address Mr Drabble's argument based on a line of cases beginning with *Baumbast v Secretary of State for the Home Department* (Case C-413/99) [2002] ECR I-7091, followed in *Ibrahim v Harrow London Borough Council* and *Teixeira v Lambeth Borough Council* (Joined Cases C-310/08 and C-480/08) (both reported at [2010] ICR 1118). These were concerned directly with a quite different issue: the interpretation of EU Regulation 1612/68, on freedom of movement for workers. Article 12 provided that children of a national of a member state employed in the territory of another member state should be admitted to that state's general educational courses "under the same conditions as the nationals of that state, if such children are residing in its territory".

17. In *Bambaust* itself there was an issue whether the children's rights of residence under the article continued after a change in the position of the parents in the state concerned. It was held that the children retained their right under article 12 to reside for the purpose of attending educational courses, notwithstanding the facts that the parents had divorced, that the only Union citizen parent had ceased to be a migrant worker in the state concerned, and that the children were not themselves citizens of the Union (para 63). It was held further that the parent who was the primary carer, irrespective of nationality, must be permitted to reside with them in order to facilitate the exercise of their right.

18. Mr Drabble relies in particular on the application of that principle in the second case, *Ibrahim*. That concerned a Somali national who entered with leave to join her Danish husband, who was at the time working here; their children began to attend school shortly after her arrival. They later separated, and the husband had ceased working here, and she was wholly dependent on social assistance. The question arose whether she had a right of residence derived from her children's rights under article 12, or whether that was subject to the conditions laid down in the Citizenship Directive (2004/38), including that of "sufficient resources". On a reference from the Court of Appeal, the CJEU held that the rights of both children and their primary carers were derived from article 12, and were not as such subject to any such conditions (under the Citizenship Directive or otherwise) (paras 50-59).

19. Mr Drabble relies on this as showing that once the right of residence is established it was not necessary to show a positive right to claim social assistance. In the words of his case (para 4.34):

> "The whole approach proceeds on the basis that if there is a right of residence which arises even if the individuals concerned are not self-sufficient, the individuals who are exercising the rights derived from EU law will be able to claim the same benefits as nationals of the host state."

By the same token, he submits, in the absence of any self-sufficiency condition or other limitation, the residence rights of *Zambrano* carers should be treated as giving rise to the same benefits as those of other categories of resident.

20. He adopts a passage from an article by Dr Charlotte O'Brien "'Hand-to-mouth' citizenship: decision time for the UK Supreme Court on the substance of Zambrano rights, EU citizenship and equal treatment": [2016] 38(2) JSWFL 228 at p 234:

> "The CJEU [in *Zambrano*] created an EU citizenship-based right to reside, which necessarily triggers a right to equal treatment under EU law. Nowhere did the CJEU suggest that those exercising that right were not intended to really have that kind of right. Given that the *Zambrano* case was a benefits case, it seems only fair to suppose that had the CJEU wished to invent a new equal-treatment free right to reside, that is something they might have mentioned.
>
> We have been here before, and should have learnt from past experience. Following *Baumbast* UK authorities were adamant that *Baumbast* only applied to the self-sufficient (ie the well-off), even though the CJEU had not said so, and in spite of the incongruity with the case law. According to the UK the right to reside did not entail equal treatment. The Court of Appeal, while making the reference in *Ibrahim* … [2008] EWCA Civ 386 was inclined to agree, expressing scepticism about the idea that they shouldn't read a self-sufficiency condition into *Baumbast* (55). However, the CJEU in *Ibrahim* ... made clear that there was no basis for a condition of self-sufficiency in the legislation in question (52), or in the case law (53) and specifically pointed out that the ruling in *Baumbast* had not been based on a finding of self-sufficiency …"

21. I have two difficulties with the comparison so made with this line of cases. In the first place, the domestic law context was quite different. As the court noted in *Ibrahim* (para 14), entitlement under the national legislation turned on whether she had a right of residence conferred by EU law, but was otherwise unlimited. The issue was whether it was implicitly subject to a self-sufficiency condition derived from EU law. No such issue arises here. The limitations are derived from the domestic legislation, and the only issue is their compatibility with EU law. Secondly, the proposition that the right of residence created in *Zambrano* "necessarily triggers" a right to equal treatment under EU law begs one of the principal issues raised by the present appeal - a question to which I now turn.

Discrimination under the Charter

22. Although Mr Drabble has referred to what he calls the "fundamental principle of equal treatment that is part of EU law", his submissions (rightly in my view) are not based on any such general principle. They are directed specifically to article 21 of the Charter, as applied by article 51, rather than any more general principle. At an earlier oral permission hearing of this case permission was refused for a separate ground of appeal based on article 18 of the Treaty, which prohibits discrimination on the grounds of nationality. That can have no application to a third country national, such as Mrs HC. As Lady Hale has said (*Patmalniece v Secretary of State for Work and Pensions* [2011] 1 WLR 783, para 83):

> "This [article 18] is not a general prohibition of discrimination on grounds of nationality. Only the nationals of member states are protected. Discrimination against third country nationals is not prohibited. Indeed it is positively expected. The underlying purpose is to promote the objects of the Union and in particular the free movement of workers between the member states and the free establishment of businesses within them."

23. Under the Charter, the starting point is article 51, by which the principles of the Charter apply to member states "only when they are implementing Union Law". Mr Drabble submits that for this purpose it is sufficient that the *Zambrano* principle brings the carer and child "within the scope" of the EU treaties "*ratione personae"* (adopting the language of the CJEU in *Martínez Sala v Freistaat Bayern* (Case C-85/96), [1998] ECR I-2691). Alternatively, in setting the support to be provided to *Zambrano* carers, and in choosing between section 17 support and mainstream welfare benefits, the Secretary of State was choosing between different modes of implementing EU law, or (as Mr Banner puts it, for the AIRE Centre, as intervener) regulating the entitlement to financial assistance under EU law.

24. Mr Coppel, for the Secretary of State, rejects that approach. It is not enough to say that Mrs HC is personally ("*ratione personae*") within the scope of the Treaty by virtue of her derivative right of residence. *Sala* was directed specifically to the rights of EU citizens (see judgment paras 62-63), and was not in any event concerned with the application of the Charter. Nor is it enough that the national law is related in some way to EU law. There must be a direct link between the act in question and the implementation of that law.

25. This is illustrated by reference to *Ymeraga v Ministre du Travail, de l'Emploi et de l'Immigration* (Case C-87/12) [2013] 3 CMLR 33. That concerned the refusal by the Luxembourg government, under a national law on freedom of movement, to grant a right of residence to family members of the first applicant (Mr Y). One issue concerned the application of the Charter to the law in question. The court considered whether the refusal was "a situation involving the implementation of European Union law" within the meaning of article 51. For that purpose -

> "… it must be ascertained among other things whether the national legislation at issue is intended to implement a provision of EU law, what the character of that legislation is, and whether it pursues objectives other than those covered by EU law, even if it is capable of indirectly affecting that law, and also whether there are specific rules of EU law on the matter or capable of affecting it …" (para 41)

The court accepted that the national law on freedom of movement was "indeed intended to implement EU law", but that was not enough. The situation of the applicants was not governed by either of the EU directives relied on, nor did the refusal of a right of residence to Mr Y's family members "have the effect of denying him the genuine enjoyment of the substance of the rights conferred by virtue of his status as citizen of the Union". Accordingly the refusal did not involve the implementation of European Union law, and accordingly the Charter had no application (paras 41-43).

26. Mr Coppel relies particularly on *Dano v Jobcenter Leipzig* (Case C-333/13) [2015] 1 WLR 2519 ("*Dano*"), as showing that decisions about the level of non-contributory benefits, absent any specific requirement or condition of EU law, are not within the scope of the Charter. In that case a Romanian mother had been living in Germany with her son, where she was looking for work. Her application for benefits as a job-seeker was refused because national law excluded such benefits for foreign nationals whose right of residence arose solely out of the search for employment. This was challenged as breaching their right to equal treatment under Parliament and Council Regulation No 883/2004 (which categorised such benefits as "special non-contributory cash benefits"), article 4 of which provided that Union

citizens residing in another member state should enjoy the same benefits as nationals of the host member state. It was held by the CJEU (in summary) that, although the benefits in question fell within the scope of article 4, they were linked to the right of residence under the Citizenship Directive and could be limited by reference to its conditions.

27. A fourth question related to the application of certain provisions of the Charter. The court referred to article 51, and to article 6(1) of the EU Treaty, by which the provisions of the Charter are not to extend the competences of the EU as defined in the Treaties (paras 87-88). It noted that the relevant regulation did not lay down conditions for the rights in question; it was therefore for the legislature of each state to lay down those conditions (para 89). It concluded:

> "91. Consequently, when the member states lay down the conditions for the grant of special non-contributory cash benefits and the extent of such benefits, they are not implementing EU law."

28. In my view Mr Coppel's approach is correct. The test is not whether Mrs HC is personally within the scope of EU law in some way. The issue must be judged by reference to the test set by article 51, which is directed to "implementation" of EU law. Once it is determined that EU law does not require more for the children of a *Zambrano* carer than practical support sufficient to avoid their being obliged to leave the Union, that also sets the limits of what is involved in its implementation. Although it is open to the state to provide more generous support ("gold-plating", as it is sometimes called), that is the exercise of a choice under national law, not EU law. To describe this as "regulating" the financial assistance given to the EU carer does not alter that fact. Just as Mr Ymeraga could not rely on the Charter to extend the derivative rights otherwise available to his family members, so Mrs HC cannot rely on it to give her any entitlement to financial assistance beyond the limited support required by the *Zambrano* principle itself.

29. The point does not bear of much elaboration, but the conclusion is sufficient to dispose of this issue in favour of the Secretary of State. It is unnecessary therefore to consider the interesting questions which would have arisen under article 21, had the Charter been held to apply.

Discrimination under the Convention

30. I can deal relatively briefly with this issue, which was not developed in any great detail by Mr Drabble, other than by repetition of the arguments advanced in

respect of article 21 of the Charter. In short, he submits that the amendment regulations have an impact within the ambit of article 8, or article 1 of the First Protocol, and that accordingly there is right under article 14 not to be discriminated against without reasonable justification.

31. It is unnecessary for present purposes to enter into the continuing debate about the application to benefits of this kind of article 8, as opposed to article 1 of the First Protocol) (see per Collins J *R (DA) v Secretary of State for Work and Pensions* [2017] EWHC 1446 (Admin), paras 39-40). I am prepared to proceed on the basis that the case falls within the ambit of convention rights so as potentially to engage article 14. That article provides:

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

The "status" on which Mr Drabble relies, as I understand his submission, is either immigration status, or, more narrowly, the status of *Zambrano* carer and child. I do not think that either can assist him under article 14. Discrimination on the basis of immigration status is of course a fundamental and accepted part of both EU and national law, but cannot in itself give rise to an issue under article 14. In so far as Mrs HC's differential treatment arises from her status as a third country national, she can have no complaint. So far as concerns her *Zambrano* status, that is a creation of European law, and such differences of treatment as there are, as compared to other categories of resident, do no more than reflect the law by which the status is created.

32. In any event, the Strasbourg court has long accepted that the allocation of limited public funds in the social security and welfare context is pre-eminently a matter for national authorities, subject only to the requirement that their decisions should not be "manifestly without reasonable foundation" (see *R (MA) v Secretary of State for Work and Pensions (Equality and Human Rights Commission intervening)* [2016] 1 WLR 4550, para 32 per Lord Toulson). The government's reasons for not providing support to *Zambrano* carers, as explained in the evidence of Mr Gareth Cooper, included the objectives of reducing costs by allocating benefits to those with the greatest connection with this country, of encouraging immigrants here unlawfully to regularise their stay, of encouraging TCNs wishing to have children here to ensure that they had sufficient resources to support themselves and their children, and of reducing "benefits tourism". Like Arden LJ in the Court of Appeal (para 96) in spite of criticisms made by Mr Drabble, I find it impossible to say that these objectives fall outside the wide margin of discretion allowed to national governments in this field.

Section 17

33. As I have said, no issue arises in this appeal as to the scope of the local authority's duties under section 17 of the Children Act 1989, and we have heard no argument upon them. However, it has emerged as an important aspect of the government's response to *Zambrano* principle, which may not have been anticipated at the time that the amending regulations were being prepared. There is no indication that it was the subject of discussion between central and local government at that time. Mr Cooper does no more than refer to the actions taken by the Oldham Borough Council, as the responsible local authority under that Act. He does not suggest that section 17 formed any part of the government's thinking when preparing the regulations, or of any impact assessment then carried out. Nor have we heard any submissions from the Oldham Borough Council itself. However some brief comment may be appropriate.

34. Section 17(1) imposes a "general duty" on local authorities:

> "(a) to safeguard and promote the welfare of children within their area who are in need; and
>
> (b) so far as is consistent with that duty, to promote the upbringing of such children by their families,
>
> by providing a range and level of services appropriate to those children's needs."

The services so provided may include providing accommodation and giving assistance in kind or in cash (section 17(6)). A child is taken to be in need for this purpose if (inter alia) -

> "… he is unlikely to achieve or maintain, or to have the opportunity of achieving or maintaining, a reasonable standard of health or development without the provision for him of services by a local authority under this Part." (section 17(10))

More detailed provision as to how that duty is to be carried out is contained in Schedule 2 to the Act. Also relevant is section 11 of the Children Act 2004, which requires local authorities to make arrangements to ensure that "their functions are discharged having regard to the need to safeguard and promote the welfare of

children" (section 11(2)(a)); and in so doing to have regard to any guidance given to them for the purpose by the Secretary of State (section 11(4)).

35. The scope of the section 17 duty was considered by the Court of Appeal in *R (C) v London Borough of Southwark* [2016] EWCA Civ 707; [2016] HLR 36. That case concerned assistance provided to children of a Nigerian mother following the refusal of leave to remain, and pending their return to Nigeria. The court rejected, on the evidence, a claim that the authority had applied an unlawful policy of setting financial support by reference to levels of child benefit, or to amounts paid by the Secretary of State to asylum-seekers, rather than by way of assessing their actual needs. In the leading judgment Ryder LJ described the duty in these terms:

> "12. It is settled law that the section 17 scheme does not create a specific or mandatory duty owed to an individual child. It is a target duty which creates a discretion in a local authority to make a decision to meet an individual child's assessed need. The decision may be influenced by factors other than the individual child's welfare and may include the resources of the local authority, other provision that has been made for the child and the needs of other children … Accordingly, although the adequacy of an assessment or the lawfulness of a decision may be the subject of a challenge to the exercise of a local authority's functions under section 17, it is not for the court to substitute its judgment for that of the local authority on the questions whether a child is in need and, if so, what that child's needs are, nor can the court dictate how the assessment is to be undertaken …
>
> …
>
> 14. A local authority that provides support for children in need under the 1989 Act is acting under its powers as a children's services authority (a local social services authority with responsibility for children) not as a local social services authority performing functions relating to homelessness and its prevention, and not as a local housing authority. The limited nature of the local authority's power is important. The local authority appropriately remind this court of the statement of principle in this regard which is to be found in *R (Blackburn Smith) v London Borough of Lambeth* [2007] EWHC 767 (Admin) at para 36 per Dobbs J:

> '… the defendant's powers [under section 17] were never intended to enable it to act as an alternative welfare agency in circumstances where Parliament had determined that the claimant should be excluded from mainstream benefits.'"

36. As that judgment makes clear, section 17 is designed to cover a wide range of circumstances in which a local authority may need to take action to protect the interests of children in their area, temporary (as in that case) or more long-lasting. The duty arising in the present context is perhaps unusual in that arises from a responsibility imposed by EU law on member states. It is also likely to continue so long as no other sources of support are available to the child. On the view I have taken the allocation of responsibility for that support, as between central and local government, is an issue of national rather than EU law. However, that does nothing to diminish the importance of the duty.

37. It must always be remembered that the primary objective is to promote the welfare of the children concerned, including the upbringing of such children by their families. The assessment of need must remain the responsibility of the local authority (as Ryder LJ made clear), but, given that this is a national responsibility, it is clearly desirable that there should be a degree of consistency as between authorities. The legislation allows for the provision of national guidance. Judicial review is available as a backstop, but it is likely to be unsatisfactory for the levels of appropriate support to be left for determination by the individual authorities on a case-by-case basis, subject only to control by the courts by reference to conventional *Wednesbury* principles. On this aspect I agree also with the observations of Lady Hale at paras 43-46 of her judgment.

Conclusion

38. For the reasons given above, which are substantially the same as those of the Court of Appeal, I would dismiss the appeal.

LADY HALE:

39. I have found this a very troubling case. It is not a case about adults' rights. It is a case about children's rights - specifically the right of these two very young British children to remain living in their own country and to have the support which they need in order to enable them to do so. Self-evidently they need the support of their mother in the shape of the care which she is able to give them. But they also need support in the shape of a place to live and enough to live on.

40. Yet this is not the way in which the policy-makers who framed the various Regulations which are under attack in these proceedings saw the matter. They saw it solely in terms of the mother and other *Zambrano* carers like her, as third country nationals who should be put in the same position as any other third country national. Third country nationals are not, in general, entitled to income-related benefits; and so (as Mr Gareth Cooper explains) the Department for Work and Pensions extended this rule to *Zambrano* carers. Third country nationals are only entitled to be allocated social housing or given homelessness assistance if this accords with the Government's immigration and asylum policy, broadly only if they have leave to enter or remain without a condition that they have no recourse to public funds; and so (as Ms Frances Walker explains) the Department for Communities and Local Government excluded *Zambrano* carers from eligibility. Third country nationals are only entitled to child benefit and child tax credits in broadly the same circumstances; and so (as Mr Phillip Dearne explains) Her Majesty's Revenue and Customs excluded them from eligibility.

41. Yet *Zambrano* carers are not like any other third country nationals. They have British (or other EU citizen) children dependent upon them. That is why, because of the *Zambrano* decision, the Immigration (European Economic Area) Regulations 2006 (SI 2006/1003) had to be amended to give them the right to live and work here. There is not a hint in the evidence which we have seen that any consideration was given to how these children would be supported if the parent looking after them was unable to work, whether because of the demands of child care or for any other good reason. We are told that the Department of Work and Pensions consulted the local government associations about the exclusion from benefits and the associations made no objection. We do not know whether it had occurred either to central or to local government that (unless there was family or charitable support) the only way in which these children could escape destitution was through the powers of local children's services authorities under section 17 of the Children Act 1989. If that had been made clear, one imagines that the local government associations might well have expressed some concern about the transfer of this responsibility to them without some corresponding transfer of the considerable sums entailed in discharging this responsibility properly.

42. Section 17 empowers and obliges local authorities to provide a range of services to safeguard and promote the welfare of "children in need" and, so far as is consistent with that duty, to promote their upbringing by their families. It is a development of a duty dating back to the Children and Young Persons Act 1963 to provide families with help in order to avoid the need for children to be taken into care or looked after by the local authority. It was not intended to be a long-term substitute for social housing or means-tested benefits. Fortunately, however, section 17(6) provides that "The services provided by a local authority in the exercise of functions conferred on them by this section may include providing accommodation and giving assistance in kind or in cash". As originally enacted, cash could only be

provided "in exceptional circumstances", but those words were repealed in 2011, under powers granted by the Children and Young Persons Act 2008.

43. Section 17 services have the great merit of flexibility. They can be adjusted to the needs of the particular child or family. They may well be in addition to the benefits and services to which the family are entitled under other legislation and thus may provide assistance at a higher level than that. But they have several disadvantages when compared with the benefits and services from which these children and their carers are excluded. First, they depend upon the local authority considering that the child is "in need" as defined in section 17(10) and (11) (see para 34). This is a judgment to be made by the local authority subject only to judicial review on the usual principles. Second, they are discretionary and not as of right to those who qualify. Indeed, it has been held that (unlike the duty to accommodate a child in section 20 of the 1989 Act) the section 17 duty is a "target duty" rather than a duty owed to any individual child. Third, there are no standard rates for assistance in cash, as there are with state benefits generally, with the consequent risk of inconsistency between authorities. Fourth, providing assistance in cash does not automatically bring with it entitlement to other assistance, such as free school meals, to which receipt of certain benefits is a passport. Fifth, the only way in which a family can seek to challenge the local authority's decision is through judicial review, which is far more limited in scope and accessibility than an appeal to the social entitlement chamber of the First-tier Tribunal.

44. Thus, according to the mother's evidence, when she approached the local authority for the area where she was living with her husband, she was given her train fare to travel north to the area where her sister and family were living. This is a typical use of section 17 money. When she approached the local authority for that area, because her sister could not house and feed her and her child and her expected second child indefinitely, she was at first refused. But eventually she was offered one room in a local hotel and £45 per week in cash. That is how things stood when these proceedings were launched in July 2013. The local authority then reassessed the children's needs and (through their Head of Safeguarding, Mr Saul Ainsworth) offered them two-bedroomed accommodation of the sort which would be offered to a family who may be eligible for homeless accommodation and in effect to discharge her council tax liability; £55 a week for subsistence, based on the UK Border Agency's figures for the amount needed to meet the needs of one adult and two children under three (as they then were); and £25.50 a week for gas, electricity and water, based on local inquiries. The annual cost of this package was estimated at £11,368.76, while the local authority's annual budget for section 17 support was £12,000 (which is an indication that it is not expected to be used to provide long term income support).

45. It was on that basis that, on 1 August 2013, the proceedings against the local authority were stayed while the proceedings against the Department of Work and

Pensions, the Department for Communities and Local Government and Her Majesty's Revenue and Customs, challenging the various regulations, continued. We are told that that is still the position today, although of course the local authority may carry out a further review of the children's needs, especially as they are older now, and will no doubt have to do so if these proceedings are concluded in the Government's favour.

46. In carrying out that review, the local authority will no doubt bear in mind, not only their duties under section 17, but also their duty under section 11 of the Children Act 2004, to discharge all their functions having regard to the need to safeguard and promote the welfare of children, and their duty, under section 175 of the Education Act 2002, to exercise their education functions with a view to safeguarding and promoting the welfare of children. Safeguarding is not enough: their welfare has to be actively promoted. The authority will no doubt take into account that these are British children, born and brought up here, who have the right to remain here all their lives; they cannot therefore be compared with asylum-seeking children or the children of asylum-seeking parents, who may end up with no or only a limited right to remain. They will no doubt also wish to take into account the impact upon the proper development of these children of being denied a level of support equivalent to that of their peers, that is, the other British children around them whose families are dependent on income-related benefits. That level of support is not fixed at a level designed to lift children out of poverty, as officially defined, but at a level much closer to subsistence.

47. The above is, of course, premised on the dismissal of this appeal. *Zambrano* and the later cases say nothing about entitlement to benefits, but they do recognise that the children are dependent upon their parents, not just for care, but also for financial support, at least if it is derived from the parents' ability to work. The situation of *Zambrano* carers and their children does not fall within the European Union legislation on access to social security and other welfare benefits. All that *Zambrano* requires is that the children are not effectively deprived of their rights as European citizens by the situation in which they find themselves. Section 17 support, at least if it is determined giving due weight to the factors suggested above, should be sufficient to ensure that they are not effectively deprived of their rights as British and European citizens.

48. So the questions of EU law which arise are, first, does the Charter of Fundamental Rights apply, and second, what difference, if any, would it make if it did? By article 51 of the Charter, its provisions are addressed to the member states "only when they are implementing Union law". The change to the 2006 Immigration Regulations, allowing *Zambrano* carers to live and work here, was of course implementing Union law. But were the changes to the Regulations at issue here doing so? They were in consequence of a development in Union law, but they were not implementing it - in fact, quite the reverse. Supposing that there had been no

fall-back in the shape of section 17, this could well have been a *failure* to implement Union law, leaving these children and their carers without support in this country and thus effectively obliging them to leave. But there is section 17, and in my view it is the administration of section 17 which could be said to be implementing Union law, by enabling these children to remain living in this country.

49. Assuming for the moment, without deciding, that the Charter can apply, not only to domestic legislation which implements Union law but also to domestic administration which does so, what difference would the Charter make in this context? Article 24(1) requires that "Children shall have the right to such protection and care as is necessary for their well-being"; section 17 of the 1989 Act is designed as a way of doing this. Article 24(2) requires that "In all actions relating to children, whether taken by public authorities or private institutions, the child's best interests must be a primary consideration". This obligation is obviously derived from article 3(1) of the United Nations Convention on the Rights of the Child, as was the obligation in section 11 of the 2004 Act. Properly understood, they should amount to the same thing.

50. By article 21(1) of the Charter, "Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited". The discrimination complained of here is between two types of British citizen child - the child who is being cared for by a third country national with only *Zambrano* carer's rights to be here, and the child who is being cared for by a parent (or anyone else) who is entitled to claim income related benefits, child benefit and child tax credit, and to seek social housing and homelessness assistance. In general, of course, member states are entitled to draw distinctions between different categories of their own citizens, as long as these are not based on the listed personal characteristics. But, at a stretch, it might just be possible to regard this as a "ground such as" those listed.

51. If that were so, I am not impressed by the justifications given by the respondents' witnesses. These were justifications for exclusion from mainstream benefits. They were addressed to the parents, viewed as third country nationals rather than *Zambrano* carers, and not to the children. A child-focussed approach would have been quite different. Thus the first aim, allocating benefits to those with the greatest connection with this country, would obviously include allocating benefits to British children who were born here and have lived here all their lives. The second aim, of strengthening immigration control, is irrelevant to children who are not subject to it. Their *Zambrano* carers are only here to support them and for a long as they need that support. A third aim, of saving money, is less than compelling, given that what has in fact happened is a transfer of responsibility from one arm of government to another. As we have seen, the sums involved for a local authority such as this one are not negligible.

52. But if there is a need to avoid discrimination against the children of *Zambrano* carers, this merely reinforces my view of what local authorities should be taking into account when making their decisions about the level of support to be provided under section 17. Section 17 is one way of providing these children with what they need and deserve. That fact that there are other, and in some respects preferable, ways of doing so does not mean that the United Kingdom is in breach of its obligations under EU law. But no doubt local authorities would welcome some guidance on how they should meet their responsibilities to children with *Zambrano* carers (and even some help in doing so).

53. For these reasons, I agree that there is no question to be referred to the Court of Justice of the European Union and this appeal should be dismissed.