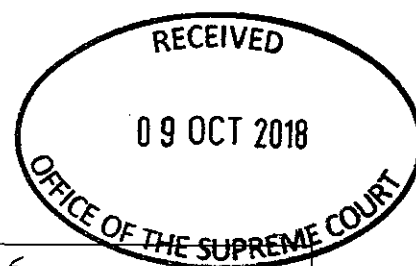


SUPREME COURT
Respondent's Notice



Supreme Court record number	S:AP:IE:2018: 00016 000145
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[Title and record number as per the High Court proceedings]

<i>Victoria Osinuga and Faith Osagie</i>	<i>V</i>	<i>Minister for Social Protection, Ireland and the Attorney general</i>
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Date of filing	
Name of respondent	Victoria Osinuga and Faith Osagie
Respondent's solicitors	Cristina Stamatescu
Name of appellant	Minister for Social Protection, Ireland and the Attorney general
Appellant's solicitors	Chief State Solicitor's Office

1. Respondent Details

Where there are two or more respondents by or on whose behalf this notice is being filed please also provide relevant details for those respondent(s)

Respondent's full name	Victoria Osinuga (a minor suing by her mother and next friend, Faith Osagie) and Faith Osagie
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The respondent was served with the application for leave to appeal and notice of appeal on date	
	27 September 2018

The respondent intends :

<input type="checkbox"/>	to oppose the application for an extension of time to apply for leave to appeal
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<input type="checkbox"/>	not to oppose the application for an extension of time to apply for leave to appeal
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<input checked="" type="checkbox"/>	to oppose the application for leave to appeal
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<input type="checkbox"/>	not to oppose the application for leave to appeal
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<input checked="" type="checkbox"/>	to ask the Supreme Court to dismiss the appeal
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<input checked="" type="checkbox"/>	to ask the Supreme Court to affirm the decision of the Court of Appeal or the High Court on grounds other than those set out in the decision of the Court of Appeal or the High Court
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<input type="checkbox"/>	Other (please specify)

If the details of the respondent's representation are correct and complete on the notice of appeal, tick the following box and leave the remainder of this section blank; otherwise complete the remainder of this section if the details are not included in, or are different from those included in, the notice of appeal.

Details of respondent's representation are correct and complete on notice of appeal:	<input type="checkbox"/>
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Respondent's Representation

Solicitor			
Name of firm	Cristina Stamatescu Solicitors		
Email	info@cssolicitors.com		
Address	Suite 8, Second Floor, Iceland House, Smithfield, Dublin 7	Telephone no.	087 1514292
		Document Exchange no.	
Postcode	D07 E76E	Ref.	
How would you prefer us to communicate with you?			
<input type="checkbox"/>	Document Exchange	<input checked="" type="checkbox"/>	E-mail
<input checked="" type="checkbox"/>	Post	<input type="checkbox"/>	Other (please specify)

Counsel			
Name			
Email			
Address		Telephone no.	
		Document Exchange no.	
Postcode			

Counsel			
Name			
Email			
Address		Telephone no.	
		Document Exchange no.	
Postcode			

If the Respondent is not legally represented please complete the following

Current postal address
Telephone no.
e-mail address

How would you prefer us to communicate with you?			
<input checked="" type="checkbox"/>	Document Exchange	<input checked="" type="checkbox"/>	E-mail
<input type="checkbox"/>	Post	<input type="checkbox"/>	Other (please specify)

2. Respondent's reasons for opposing extension of time

If applicable, set out concisely here the respondent's reasons why an extension of time to the applicant/appellant to apply for leave to appeal to the Supreme Court should be refused

N/A

3. Information about the decision that it is sought to appeal

Set out concisely whether the respondent disputes anything set out in the information provided by the applicant/appellant about the decision that it is sought to appeal (Section 4 of the notice of appeal) and specify the matters in dispute:

- (i) See paragraph 5 below.

4. Respondent's reasons for opposing leave to appeal

If leave to appeal is being contested, set out concisely here the respondent's reasons why:

In the case of an application for leave to appeal to which Article 34.5.3° of the Constitution applies (i.e. where it is sought to appeal from the Court of Appeal)-

*the decision in respect of which leave to appeal is sought does not involve a matter of general public importance

*it is not, in the interests of justice, necessary that there be an appeal to the Supreme Court

Notwithstanding the determination of this Honorable Court, that the constitutional status of an Act of the Oireachtas is, of itself, a matter of general public importance (see *Bederev v Ireland The Attorney General and The Director of Public Prosecutions* [2015] IESCDET 42), the Applicants/Respondents respectfully makes the following submissions:

- (i) The within proceedings concern the rights of a relatively small – albeit the overall number is not estimated – number of applicants (less than a dozen litigants), who, despite being the mothers of Irish citizen children, have been denied Child Benefit on the basis that they do not have a right to reside. Child Benefit, is payable to 610,000 families in respect of 1.16m children (see para. 31, judgment, Court of Appeal). It is therefore, distinguishable from determinations which involved ‘a substantial number of cases’ and ‘a substantial number of persons within the State are said to be effected by the potential outcome’ (see *Luximon and anor -v- Minister for Justice and Equality* [2017])

IESCDET 55). The judgment of the Court of Appeal is thus not far-reaching.

- (ii) The Court of Appeal expressly avoided any intrusion into matters exclusively the realm of the Oireachtas (see para. 26), merely finding that there was unjustified discrimination against Victoria, an Irish citizen child, resident in Direct Provision.**
- (iii) The Court of Appeal considered the question of the constitutionality of the impugned statutory provisions and, applying well-established principles, found unjustified discrimination against Victoria, an Irish citizen child, resident in Direct Provision.**
- (iv) In order to meet the Constitutional criteria for the grant of leave to appeal to this Court, an applicant must be able to demonstrate that he or she has a stateable argument to make (see *The Minister for Justice and Equality -v- Skierczynski* [2018] IESCDET 134). The Respondent/Appellant has not met that threshold, in the premises that: The Court of Appeal considered the question of the constitutionality of the impugned statutory provisions and, applying well-established principles, found unjustified discrimination against Victoria, an Irish citizen child, resident in Direct Provision and; for the reasons set out herein at paragraph 4 and at paragraph 5 below.**
- (v) The Court of Appeal delivered a unanimous decision in the case.**
- (vi) There was no, or no significant, dispute between the parties in the Court of Appeal as to the correct test for determining the constitutionality or otherwise of a statutory provision in this case. This is not a case where there were two conflicting views of the law. The law is well-settled. The Court of Appeal have not advanced the law.**
- (vii) It is respectfully submitted that the impugned provisions are patently unconstitutional and thus no further consideration of the matter is necessary or desirable.**
- (viii) Alternatively, and without prejudice to the foregoing, the Respondent/Appellant should not be granted leave to appeal on all of the grounds advanced; many of which, self-evidently, do not involve matters of general public importance and in respect of which it is not in the interests of justice, necessary that they be appealed to this Honourable Court.**

In the case of an application for leave to appeal to which Article 34.5.4° of the Constitution applies (i.e. where it is sought to appeal to the Supreme Court from the High Court)-

- *the decision in respect of which leave to appeal is sought does not involve a matter of general public importance
- *it is not, in the interests of justice, necessary that there be an appeal to the Supreme Court
- there are no exceptional circumstances warranting a direct appeal to the Supreme Court.

5. Respondent's reasons for opposing appeal if leave to appeal is granted

Please list (as 1, 2, 3 etc in sequence) concisely the Respondent's grounds of opposition to the ground(s) of appeal set out in the Appellant's notice of appeal (Section 6 of the notice of appeal):

- (i) Contrary to the assertions of the Appellant, the Court of Appeal did not treat Child Benefit as the legal entitlement of the child, the Court of Appeal expressly held otherwise (see para. 17), latterly simply stating the obvious by noting that the payment was 'designed for the benefit of the child' (see para. 36).
- (ii) Contrary to the assertions of the Appellant, the Court of Appeal did not fail to consider whether like persons were being treated alike. The Court of Appeal correctly applied Supreme Court case law and found that Victoria (the first named Applicant/Respondent), as an Irish citizen, was entitled to equal treatment with every other Irish citizen child in the absence of a high degree of justification, which was not present (see paras. 28-44)
- (iii) Contrary to the assertions of the Appellant, the Court of Appeal did not err in fact and/or in law in finding, at para. 32, that 'The State thereby has acknowledged its interest in making an important contribution to the welfare of all children resident in this jurisdiction, regardless of parental circumstances.' The Court of Appeal correctly stated that Child Benefit was payable to parents of children of low income families and wealthy families and thus payable 'regardless of parental circumstances.'
- (iv) Contrary to the assertions of the Appellant, the Court of Appeal did not err in law in finding, at para. 70, that the relevant provisions of s. 246 of the Social Welfare Consolidation Act 2009 (as amended) were incompatible with Art. 41.1 of the Constitution. The Court of Appeal correctly applied relevant Supreme Court case law and correctly determined, at para. 43, that the State could not provide an objective justification 'for what in substance is the statutory exclusion of Victoria from eligibility for child benefit prior to the grant of status to her mother in January 2016, so that this exclusion must be adjudged to be a breach of Article 40.1 of the Constitution.'
- (v) Contrary to the assertions of the Appellant, the Court of Appeal did not err in law in failing to consider/attach any weight to the extensive body of domestic and EU law jurisprudence which supports the proposition that a habitual residence condition is an acceptable and recognized feature of social welfare systems. Firstly, there is a legal distinction between having a right of residence and being habitually resident. The former is a legal test, while the latter is, ostensibly, a factual test. The Appellants/Respondents have conflated the two, in their Application for Leave. The second named Applicant/Respondent was prohibited, by the relevant provisions of s. 246 of the Social Welfare Consolidation Act 2009 (as amended), from being granted Child benefit for so long as she did not have recognized status in the State (such as *inter alia* Stamp 4). As is normal, upon being granted Stamp 4, the Applicant was granted Child Benefit, as she was deemed to have a right to reside. A person cannot be habitually resident without first having a right to reside. Secondly, the finding of unconstitutionality does not affect the habitual residence provisions, which constitute an entirely lawful exercise of the State's right to protect its social welfare system, under both domestic and EU law. Thirdly, some of the domestic case law, concerning the *right to reside*, relied upon extensively by the Appellants/Respondents had already

been overturned by a judgment of the Court of Justice of the EU on foot of a Preliminary Reference from the Court of Appeal.

- (vi) Contrary to the assertions of the Appellant, the Court of Appeal did not err in law in failing to attach any weight to the State's entitlement to limit the payment of social security payments on the basis of an individual's immigration permission. The Court of Appeal expressly considered the submissions of the Appellants/Respondents in this regard (see para. 31) and correctly found that such additional payments as were made to, and in respect of, persons in Direct Provision were also made to persons in the general population and yet those persons were not deprived of Child Benefit (see para. 32).

Name of counsel or solicitor who settled the grounds of opposition (if the respondent is legally represented), or name of respondent in person:

Derek Shortall B.L.

6. Additional grounds on which decision should be affirmed

Set out here any grounds other than those set out in the decision of the Court of Appeal or the High Court on which the Respondent claims the Supreme Court should affirm the decision of the Court of Appeal or the High Court:

The Applicants/Respondents are not appellants in the within proceedings, insofar as they do not wish to alter the order of the Court of Appeal (see *McEnery v Commissioner of An Garda Síochána* [2016] IESC 26). However, strictly in the event that this Honourable Court allows the Respondents/Appellants' appeal and overturns the Court of Appeal's finding of unconstitutionality, the Applicants/Respondents will argue for the upholding of the substantive decision of the Court of Appeal on the following bases, which were properly before the Court of Appeal, but which the Court of Appeal did not feel necessary to address in light of the finding of unconstitutionality (see *McEnery v Commissioner of An Garda Síochána* [2016] IESC 26):

- (i) That the second named Applicant/Respondent derives a right to reside pursuant to Art. 20 TFEU and the jurisprudence of the CoJEU (see *Zambrano*, Case C-34/09, EU:C:2011:124), from the date of birth of her daughter, the first named Applicant/Respondent, Victoria, an citizen Irish child.

It is submitted that, as Zambrano rights are derived from EU law: Members States enjoy only an administrative role in recognising the existence of Zambrano rights which does not detract from the entitlement to those rights or from the compulsory nature of the granting of those rights; the recognition of Zambrano rights is declaratory of a pre-existing right; alternatively, that the refusal of Child Benefit constitutes a negative consequence which warrants retrospective recognition of lawful residence.

- (ii) In the alternative and without prejudice to the foregoing, a Declaration that inter alia s. 246(5), s. 246(7)(a) and/or s. 246(7)(d) and s. 246(8) of the Social Welfare Consolidation Act 2005 (as amended) are incompatible with the ECHR Act 2003, in the premises that inter alia the said sections have the

effect of discriminating against the second named Applicant by treating her unequally before the law with other Irish citizen children in an unjustified manner and; are disproportionate, arbitrary and contrary to reason and fairness and/or interfere with the Applicants Private Life rights, insofar as the sections wholly prohibit the payment of a social welfare payment intended for the first named Applicant's benefit.

(iii) That there is a constitutional lacuna in the impugned legislation.

Are you asking the Supreme Court to:

depart from (or distinguish) one of its own decisions?

Yes

No

If Yes, please give details below:

make a reference to the Court of Justice of the European Union?

Yes

No

If Yes, please give details below:

- (i) In the event that this Honourable Court allows the Respondents/Appellants' appeal and overturns the Court of Appeal's finding of unconstitutionality. The second Applicant/Respondents will seek to have this Court determine the question of whether or not the Applicant/Respondent derives a right to reside pursuant to Art. 20 TFEU and the jurisprudence of the CoJEU (see *Zambrano*, Case C-34/09, EU:C:2011:124), from the date of birth of the first named Applicant/Respondent, Victoria, an citizen Irish child. As this question has not yet been determined by the CoJEU, a Preliminary Reference is necessary.

This issue was properly before the Court of Appeal.

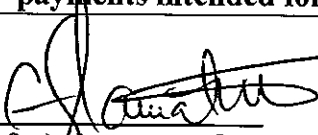
Will you request a priority hearing?

Yes

No

If Yes, please give reasons below:

- (i) The case concerns the rights of parents of vulnerable minors to receive essential payments intended for the benefit of the minors.

Signed: 
(Solicitor for) the respondent

Cristina Stamatescu Solicitors
Suite 8, Second Floor, Iceland House,
Smithfield, Dublin 7.
www.cssolicitors.com

Please submit your completed form to:

**The Office of the Registrar to the Supreme Court
The Four Courts
Inns Quay
Dublin**

This notice is to be lodged and served on the appellant and each other respondent within 14 days after service of the notice of appeal.