

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT IN BIRMINGHAM

Birmingham Civil Justice Centre
33 Bull Street, Birmingham, B4 6DS

Date: 10/04/13

Before:

MR JUSTICE HICKINBOTTOM

Between:

**THE QUEEN on the application of
JAMIL SANNEH**

Claimant

- and -

**(1) THE SECRETARY OF STATE FOR
WORK AND PENSIONS**

**(2) THE COMMISSIONERS FOR HER
MAJESTY'S REVENUE AND CUSTOMS**

Defendants

- and -

BIRMINGHAM CITY COUNCIL

Interested Party

Stephen Knafler QC and Desmond Rutledge (instructed by **Birmingham Law Centre**)
for the **Claimant**

Jason Coppel and Julia Smyth (instructed by **the Treasury Solicitor**) for the **Defendants**
Jonathan Cowen (instructed by **Birmingham City Council Legal Services**)
for the **Interested Party**

Hearing dates: 11-12 March 2013
Further written submissions: 14-15 March 2013

Judgment

Mr Justice Hickinbottom:

Introduction

1. The Claimant Jamil Sanneh is a Gambian national. She arrived in the United Kingdom in 2006, aged 24, on a student visa which did not permit her to work or to have recourse to benefits or other public funds.
2. During the currency of her visa, the Claimant met Badou Bah, also originally Gambian, but a British citizen by marriage. He had separated from his wife before he met the Claimant, his divorce being finalised in mid-2009. On 17 September 2009, a daughter, Awa, was born to the Claimant and Mr Bah. Through her father, Awa is a British citizen. Unfortunately, the Claimant and Mr Bah split up before Awa was a month old. For all intents and purposes, the Claimant has been Awa's sole carer since.
3. The Claimant's student visa expired in December 2009, but she overstayed. However, although she otherwise has no entitlement to be in the United Kingdom, the Claimant contends that she has the right to reside, as the primary carer of a dependent British citizen, Awa, who would otherwise be forced to leave the European Union ("EU") and would thereby be deprived of the opportunity to enjoy her rights as an EU citizen, a derivative right recognised by the Court of Justice of the European Union ("the European Court") in Ruiz Zambrano v Office National de l'Emploi [2011] EUECJ C-34/09, [2012] QB 265 ("Zambrano") and the domestic regulations made to give effect to that judgment.
4. The Claimant is unemployed. She has made various applications for mainstream social security benefits, namely income support, child tax credit and child benefit. So far as relevant, those have all been refused by the First Defendant Secretary of State who is responsible for the administration of income support, and by the Second Defendant Commissioners ("HMRC") who are responsible for the administration of child tax credit and child benefit. There is a right of appeal against those refusals, to the First-tier Tribunal and thence to the Upper Tribunal and the Court of Appeal, a right which the Claimant has exercised. In those proceedings, in which the Claimant's substantive entitlement to the benefits will be determined, the Claimant contends that, on the basis of the principles set out in Zambrano, the denial of access to those benefits creates a situation in which she will be forced to leave the United Kingdom due to lack of means; with the result that her daughter will also be compelled to leave the United Kingdom to follow her mother, who is her primary carer. It is only by the grant of those benefits to the Claimant that her daughter's right as an EU citizen to reside in the territory of the EU can be enjoyed.
5. In this claim, the Claimant challenges the refusal of the Defendants to make interim payments pending final resolution of her entitlement to those benefits.

The Relevant European Law

6. By article 4(3) of the Consolidated Treaty on European Union, each member state is required to take appropriate measures to ensure fulfilment of its obligations arising out of the Treaty on the Functioning of the European Union ("the TFEU"). It is well-established that, so long as the result is compliance, the means by which EU obligations are met are entirely a matter for each member state. That principle applies irrespective of the source of the EU obligation, which might be, for example, one of the relevant treaties, directives, or a European Court judgment.

7. Reflecting rights first enunciated in the Maastricht Treaty, articles 20 and 21 of the TFEU provide that every national of a member state shall be a citizen of the EU, and shall have the right to move and reside freely within the territory of the member states, a right developed in EC Directive 2004/38/EC (“the Citizens Directive”). The Citizens Directive grants rights to EU citizens, and to any “family member” of such citizens defined as a spouse or partner of the EU citizen, or direct minor and/or dependent descendant or direct dependent ascendant relative of the EU citizen or his/her spouse or partner – but not a non-dependent ascendant relative. As a matter of domestic law, the Citizens Directive is given effect by the Immigration (European Economic Area) Regulations 2006 (SI 2006 No 1003) (“the EEA Regulations”).
8. Zambrano concerned the issue of whether non-EU family members could derive rights under EU law from the rights of residence conferred on EU citizens by articles 20 and 21 of the TFEU. Mr Zambrano, his wife and child were Colombian nationals, who were refused asylum in Belgium but nevertheless stayed there. Despite not having a work permit, he obtained full-time employment. Two further children were born who were, by reason of their place of birth, Belgian nationals and hence EU citizens. Mr Zambrano lost his job, having completed the requisite working days that would otherwise have qualified him for unemployment benefit; but he was denied that benefit because the Belgian legislation in respect of employment of foreign workers took out of count days worked without a work permit. Before a Belgian employment tribunal, he argued that articles 20 and 21 required Belgium as a member state to grant him, as an ascendant relative upon whom minor children who were EU citizens depended, an exemption from the national requirement for a work permit.
9. The Grand Chamber of the European Court agreed. They said:
 - “41. As the Court has stated several times, citizenship of the European Union is intended to be the fundamental status of nationals of member states...
 42. In those circumstances, article 20 [of the TFEU] precludes national measures which have the effect of depriving citizens of the [EU] of the genuine enjoyment of the substance of their rights conferred by virtue of their status as citizens of the [EU]....
 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 [EU], would have to leave the territory of the [EU] 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 result in the children, citizens of the [EU], having to leave the territory of the [EU]. In those circumstances, those citizens of the [EU] 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 [EU].

45. Accordingly, the answer to the question referred is that article 20 [of the 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 [EU] 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, insofar as such decisions deprive those children of the genuine enjoyment of the substance of their rights attaching to the status of [EU] citizen.”

10. In Zambrano, the Court was therefore exclusively concerned about the rights of the EU children, conferred as a matter of European law by articles 20 and 21 of the TFEU, to reside freely within the territory of the EU. Without conferring on Mr Zambrano, a non-EU citizen, a right of residence and a right to work in Belgium, he would have been compelled to leave Belgium and his children would have been compelled to leave with him, thereby depriving them of the opportunity of genuinely enjoying the substance of their rights of residence by virtue of their status as EU citizens. His rights were therefore truly derivative, being conferred solely to ensure his children were enabled to enjoy their rights of residence as EU citizens.
11. That focus has been emphasised by the European Court and domestic courts and tribunals in subsequent cases. I was referred particularly to four cases which have specifically considered Zambrano.
12. In Dereci v Bundesministerium für Inneres [2011] EUECJ C-256/11, [2012] All ER (EC) 373 (“Dereci”), Mr Dereci was a Turkish national, who entered Austria illegally and married an Austrian national, by whom he had three children who, by their mother, were Austrian nationals. The family lived together in Austria. However, the children were not dependent on Mr Dereci for their subsistence, which was or could have been provided by his Austrian wife.
13. The European Court held that, in these circumstances, the children’s rights under articles 20 and 21 of the TFEU would not be jeopardised by their father’s removal from Austria. The Grand Chamber said:

“64. ...[T]he court has held that article 20 of [the] TFEU precludes national measures which have the effect of depriving Union citizens of the genuine enjoyment of the substance of the rights conferred by virtue of that status (see Ruiz Zambrano, paragraph 42).

65. Indeed, in the case leading to that judgment, the question arose as to whether 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 a refusal to grant such a person a work permit have such an effect. The court considered in particular that such a refusal

would lead to a situation where those children, who are citizens of the Union, would have to leave the territory of the Union in order to accompany their parents. In those circumstances, those citizens of the Union would, in fact, be unable to exercise the substance of the rights conferred on them by virtue of their status as citizens of the Union (see Ruiz Zambrano paragraphs 43 and 44)).

66. It follows 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, 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.

....

74. In the light of the foregoing observations the answer to the first question is that European Union law and, in particular, its provisions on citizenship of the Union, must be interpreted as meaning that it does not preclude a member state from refusing to allow a third country national to reside on its territory, where that third country national wishes to reside with a member of his family who is a citizen of the Union residing in the member state of which he has nationality, who has never exercised his right to freedom of movement, provided that such refusal does not lead, for the Union citizen concerned, to the

denial of the genuine enjoyment of the substance of the rights conferred by virtue of his status as a citizen of the Union, which is a matter for the referring court to verify.”

14. Dereci therefore emphasised that, as a matter of European law, what mattered was the practical protection of the right of residence of the relevant EU citizens, which might be jeopardised if an ascendant non-EU relative upon whom an EU child depended was, in fact, compelled to leave the territory of the EU – because the dependent EU child might, in practice, be compelled to follow. As emphasised in paragraph 69, whether family members had other rights (e.g. rights to respect for family life under article 8 of the European Convention on Human Rights) was a different issue, not bearing upon the determination of rights (including derivative rights) under articles 20 and 21.
15. The facts of Dereci (and the analysis and result) were materially similar to those in the subsequent case of O and S v Maahanmuuttovirasto (Immigration Office) [2012] EUECJ C-356/11 and C-356/12 (“O and S”), in which the applicants were non-EU nationals married to Finnish EU citizens with children of whom the applicant was not the father, and with whom he did not live.
16. The third case to which I was referred is from the Court of Appeal. In Harrison (Jamaica) & AB (Morocco) v Secretary of State for the Home Department [2012] EWCA Civ 1736 (“Harrison”), the appellants were each the subject of a deportation order. They each had children by women who were EU citizens; and by virtue of whom the children were also EU citizens. In respect of each appellant, it was common ground that, if the appellant were to be removed from the United Kingdom, then the children would not, in fact, be compelled to follow him and themselves leave the territory of the EU. It was however contended that it was at least arguable that, if the non-EU national were to be removed, then that would adversely affect the quality of life of the children, such that article 20 and “the Zambrano principle” would be engaged. If arguable, then it was not *acte clair*; and, it was submitted on behalf of the appellants, the issue should consequently be referred by the Court of Appeal to the European Court for a definitive ruling.
17. Having referred to Dereci (and, in particular, to the European Court’s confirmation in that case that the principles recognised in Zambrano are triggered by neither the fact that the right to family life is adversely affected nor the fact that the presence of the non-EU citizen is desirable for economic reasons), Elias LJ, giving the judgment of the court, held that the proposition relied upon by the appellants was not arguable. He said:

“63 ... [T]here is really no basis for asserting that it is arguable in the light of the authorities that the Zambrano principle extends to cover anything short of a situation where the EU citizen is forced to leave the territory of the EU. If the EU citizen, be it the child or wife, would not in practice be compelled to leave the country if the non-EU family member were to be refused the right of residence, there is in my view nothing in these authorities to suggest that EU law is engaged. Article 8 rights may then come into the picture to protect

family life as the court recognised in Dereci, but that is an entirely distinct area of protection.

...

66. ... Even if the non-EU national is not relied upon to provide financial support, typically there will be strong emotional and psychological ties within the family and separation will be likely significantly to rupture those ties, thereby diminishing the enjoyment of life of the family members who remain. Yet it is plainly not the case, as Dereci makes clear and Mr Drabble [Counsel for the appellant] accepts, that this consequence would be sufficient to engage EU law. Furthermore, if Mr Drabble's submission were correct, it would jar with the description of the Zambrano principle as applying only in exceptional circumstances, as the Court in Dereci observed. The principle would regularly be engaged.

67. As to the submission that EU law might develop in that direction, I accept that it is a general principle of EU law that conduct which materially impedes the exercise of an EU law right is in general forbidden by EU law in precisely the same way as deprivation of the right. But in my judgment it is necessary to focus on the nature of the right in issue and to decide what constitutes an impediment. 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. Of course, to the extent that the quality or standard of life will be seriously impaired by excluding the non-EU national, that is likely in practice to infringe the right of residence itself because it will effectively compel the EU citizen to give up residence and travel with the non-EU national. But in such a case the Zambrano principle would apply and the EU citizen's rights would have to be protected (save for the possibility of a proportionate deprivation of rights). Accordingly, to the extent that the focus is on protecting the substance of the right, that formulation of the principle already provides protection from certain interferences with the enjoyment of the right."

Harrison is of course binding on me. However, even if it were not, with much gratitude I would adopt Elias LJ's perceptive and illuminating analysis of the principles derived from Zambrano and Dereci.

18. The fourth and final case is Secretary of State for Work and Pensions v RR [2013] UKUT 21 (AAC), which is a decision of the Upper Tribunal. In the light of the three post-Zambrano cases to which I have referred, it confirms that EU law is only engaged when the consequence of denying a derivative right to a non-EU national

will have “the practical effect that the [EU citizen] children will be required to leave the territory of the Union as a whole” (paragraph 63). In that case, derivative rights did not arise, because, although there was evidence of “a shortage of funds”, there was no question of the ascendant parent, upon whom the relevant children were dependent, being compelled to leave the United Kingdom (paragraph 68).

19. From those authorities, the following propositions, relevant to the claim before me, can be derived.
- i) All nationals of all member states are EU citizens. It is for each member state to determine how nationality of that state may be acquired, but, once it is acquired by an individual, that individual has the right to enjoy the substance of the rights that attach to the status of EU citizen, including the right to reside in the territory of the EU. That applies equally to minors, irrespective of the nationality of their parents, and irrespective of whether one or both parents have EU citizenship.
 - ii) An EU citizen must have the freedom to enjoy the right to reside in the EU, genuinely and in practice. For a minor, that freedom may be jeopardised if, although legally entitled to reside in the EU, he is compelled to leave EU territory because an ascendant relative upon whom he is dependent is compelled to leave. That relative may be compelled to leave by dint of direct state action (e.g. he is the subject of an order for removal) or by virtue of being driven to leave and reside in a non-EU country by force of economic necessity (e.g. by having insufficient resources to provide for his EU child(ren) because the state refuses him a work permit). The rights of an EU child will not be infringed if he is not compelled to leave. Therefore, even where a non-EU ascendant relative is compelled to leave EU territory, the article 20 rights of an EU child will not be infringed if there is another ascendant relative who has the right of residence in the EU, and who can and will in practice care for the child.
 - iii) It is for the national courts to determine, as a question of fact on the evidence before it, whether an EU citizen would be compelled to leave the EU to follow a non-EU national upon whom he is dependent.
 - iv) Nothing less than such compulsion will engage articles 20 and 21 of the TFEU. In particular, EU law will not be engaged where the EU citizen is not compelled to leave the EU, even if the quality or standard of life of the EU citizen is diminished as a result of the non-EU national upon whom he is dependent is (for example) removed or prevented from working; although (a) diminution in the quality of life might engage EU law if (and only if) it is sufficient in practice to compel the a relevant ascendant relative, and hence the EU dependent citizen, to leave, and (b) such actions as removal or prevention of work may result in an interference with some other right, such as the right to respect for family life under article 8 of the European Convention on Human Rights.
 - v) Although such article 8 rights are similar in scope to the EU rights conferred by article 7 of the Charter of Fundamental Rights of the European Union, the provisions of the Charter are addressed to member states only when they are

implementing EU law. If EU law is not engaged, then the domestic courts have to undertake the examination of the right to family life under article 8; but that is an entirely distinct area of protection.

- vi) The overriding of the general national right to refuse a non-EU national a right of residence, by reference to the effective enjoyment of the right to reside of a dependent EU citizen, is described in both Dereci (paragraph 67) and Harrison (paragraph 66) as “exceptional”, meaning (as explained in the latter), as a principle, it will not be regularly engaged.

The Relevant Domestic Law

Income Support

- 20. By section 115 of the Immigration and Asylum Act 1999, anyone who is “subject to immigration control” is excluded from access to most non-contributory benefits, including income support. The definition of “a person subject to immigration control” includes a non-EU national who requires leave to enter or remain in the United Kingdom but has no such leave (section 115(9)).
- 21. The general conditions of entitlement to income support are prescribed by section 124 of the Social Security Contributions and Benefits Act 1992, and the Income Support (General) Regulations 1987 (SI 1987 No 1967) (“the IS (General) Regulations”).
- 22. Generally, for a person with no income, section 124(4)(a) provides that the entitlement is to “the applicable amount” as calculated in accordance with regulation 17. However, regulation 17 is subject to regulation 21 and paragraph 17 of schedule 7 to the IS (General) Regulations, which provide that, for a “Person from abroad”, the applicable amount is “Nil”.
- 23. “Person from abroad” is defined, in a somewhat convoluted manner, in regulation 21AA. It means a claimant who is not habitually resident in the United Kingdom, the Channel Islands, the Isle of Man or the Republic of Ireland; but, by regulation 21AA(2), no claimant is to be treated as habitually resident if he has a right to reside which exists only by virtue of the provisions identified in regulation 21AA(3) which include specific provisions within the EEA Regulations, which themselves give effect to the Citizens Directive (see paragraph 7 above).
- 24. Until November 2012, the relevant excluded right to reside deriving from the EEA Regulations was restricted to that arising from regulation 13 (those with an initial right of residence) and regulation 14 (EU nationals who are jobseekers or a family member of a jobseeker). Neither of those provisions is directly relevant to this claim.
- 25. From 8 November 2012, the relevant excluded right to reside was amended by regulation 2 of the Social Security (Habitual Residence) (Amendment) Regulations 2012 (SI 2012 No 2587) by the insertion into regulation 21AA of a new paragraph (3)(bb), to include a right existing by virtue of regulation 15A(1) of the EEA Regulations “but only in a case where the right exists under that regulation because the claimant satisfies the criteria in regulation 15A(4A) of those Regulations”.

26. Regulation 15A of the EEA Regulations concerns “Derivative rights of residence”. Such rights are afforded to (for example) the children of an EEA national who were installed in a member state during the exercise by their parent of rights of residence as a migrant worker, to enable those children to complete their education there (a right recognised by the European Court in Teixera v London Borough of Lambeth [2010] EUECJ C-480/08) (regulation 15A(3)); and to primary carers of minor EEA nationals who are self-sufficient and who would be required to leave the United Kingdom if that primary carer were required to leave (a right recognised in Chen v Secretary of State for the Home Department [2004] EUECJ C-200/02, [2005] QB 325) (regulation 15A(2)). Those with such derivative rights are generally entitled to income support, although those with the derivative right of residence recognised by Chen are not entitled to the benefit in practice because such individuals must have sufficient resources to ensure that his or her child is self-sufficient..
27. However, those who derive the right of residence solely from regulation 15A(4A) are not. That regulation (inserted, with effect from 8 November 2012, by regulation 3(b) of the Immigration (European Economic Area) (Amendment) (No 2) Regulations 2012 (SI 2012 No 2560)), provides:

“P satisfies the criteria in this paragraph if –

- (a) P is the primary carer of a British citizen (‘the relevant British citizen’);
- (b) the relevant British citizen is residing in the United Kingdom; and
- (c) the relevant British citizen would be unable to reside in the UK or in another EEA State if P were required to leave”;

Those criteria are intended to cover a person with a right of residence on the basis of the principles set out in Zambrano.

28. Since 8 November 2012, the Claimant’s underlying complaint has been in relation to regulation 21AA(3)(bb) of the IS (General) Regulations, in that it excludes from access to income support those with a derivative right of residence in the United Kingdom under the principles of Zambrano. The Claimant contends that that exclusion is unlawful.

Child Tax Credit

29. There is a parallel regime for child tax credits.
30. Mirroring section 115 of the Immigration and Asylum Act 1999, section 42 of the Tax Credits Act 2002 and regulation 3(1) of the Tax Credits (Immigration) Regulations 2003 (SI 2003 No 653) exclude those “subject to immigration control” from access to tax credits, including child tax credit. The definition of “a person subject to immigration control” is the same as that in section 115(9) of the 1999 Act (section 42(2) of the 2002 Act).

31. For the purposes of entitlement to child tax credit under Part 1 of the 2002 Act, the claimant is required to be “in the United Kingdom”, which is defined by regulation 3(1) of the Tax Credits (Residence) Regulations 2003 (SI 2003 No 654) generally in terms of ordinary residence. However, reflecting regulation 21AA(3)(bb) of the IS (General) Regulations applicable to income support, by regulations 5 and 6 of the Child Benefit and Child Tax Credit (Miscellaneous Amendments) Regulations 2012 (SI 2012 No 2612), also effective from 8 November 2012, regulation 3(5)(b)(ii) was added to the 2003 Regulations to provide that a person shall not be treated as being in the United Kingdom for the purposes of Part 1 of the 2002 Act if he merely has the right to reside under regulation 15A(4A) of the EEA Regulations.
32. In respect of child tax credit, it is regulation 3(5)(b)(ii) of the 2003 Regulations which is the focus of the Claimant’s underlying complaint. It is that provision which excludes the Claimant from access to child tax credit.

Child Benefit

33. The position is substantively the same with regard to child benefit.
34. Section 115 of the Immigration and Asylum Act 1999 applies to child benefit. It is a requirement of the benefit that both the claimant and the child for whom the benefit is claimed are “in Great Britain” (section 146(1) and (2) of the Social Security Contributions and Benefits Act 1992). Regulation 23 of the Child Benefit (General) Regulations 2006 (SI 2006 No 223) sets out circumstances in which a person shall not be treated as being in Great Britain for those purposes. By regulation 23(4)(b)(i) (inserted by regulations 2 and 3 the Child Benefit and Child Tax Credit (Miscellaneous Amendments) Regulations 2012), also effective from 8 November 2012) those include a person who has a right to reside merely by virtue of regulation 15A(4A) of the EEA Regulations.
35. Again, it is regulation 23(4)(b)(i) of the 2006 Regulations which is the focus of the Claimant’s underlying complaint in relation to child benefit, being the provision which deprives her of access to that benefit.

Interim Payments

36. Where a person has claimed income support, under regulation 2 of the Social Security (Payments on Account, Overpayments and Recovery) Regulations 1988 (SI 1988 No 644) (“the Payments on Account Regulations”) the Secretary of State has the power to make interim payments pending determination of the claim, in the following terms (so far as material to this claim):

“(1) Subject to paragraph (1A), the Secretary of State may, in his discretion, make an interim payment, that is to say a payment on account of any benefit to which it appears to him that a person is or may be entitled..., in the following circumstances –

- (a) ...

- (b) a claim for that benefit has been so made, but it is impracticable for it or an application or which relates to it to be determined immediately; or
- (c) ...

(1A) Paragraph (1) shall not apply pending the determination of an appeal.”

37. As the title to the Regulations implies, this is a power to make payments on account of benefit which it appears to the Secretary of State that a claimant is or may be entitled. Unless it appears to the Secretary of State that the claimant is or may be entitled to the benefit, the power to make an interim payment does not arise. In any event, it is a true payment on account, in the sense that, if the claimant’s claim for benefit ultimately succeeds, then payments made are taken into account in the assessment of the benefit he is due; and, if his claim ultimately fails, then he is liable to make a repayment.
38. Paragraph (1A) was amended by regulation 10(3)(b) of the Social Security, Child Support and Tax Credits (Miscellaneous Amendments) Regulations 2005 (SI 2005 No 337), which removed the following italicised words:

“(1A) Paragraph (1) shall not apply pending the determination of an appeal *unless the Secretary of State is of opinion that there is entitlement to benefit.*”

Of this amendment, paragraph 7.14 of the Explanatory Memorandum, prepared by the Department of Work and Pensions and laid before Parliament with the draft Regulations, stated:

“Regulation 10(3)(b)... amends the legislation to confirm the policy intention that ‘interim payments’ are available where there is a delay in, or disruption to, the normal processes of making a claim, determining an award or making a payment of benefit. They are not a device to circumvent the normal decision-making process where the result is unfavourable to the claimant. Thus a redundant provision which suggests that interim payments may be available when an appeal is outstanding is removed.”

39. The provisions for interim payments of child benefit are substantively the same. Regulation 22(1) and (1A)(c) of the Child Benefit and Guardian’s Allowance (Administration) Regulations 2003 (SI 2003 No 492) provides that HMRC may make an interim payment of child benefit where a claim has been made but it is impracticable for it, or an application or appeal relating to it, to be determined immediately; and it appears to them that the claimant is or may be entitled to the benefit. Regulation 22(2) removes that power pending the determination of an appeal.
40. There is no legislative power to make interim payments of child tax credit.

Suspension of Benefit Payments

41. Regulation 16(1) and (3) of the Social Security and Child Support (Decisions and Appeals) Regulations 1999 (SI 1999 No 991) gives the Secretary of State a power to suspend payment of income support if (so far as relevant to this claim) it appears to him that an issue arises as to the fulfilment of conditions for entitlement (regulation 16(3)(a)) or where an appeal by him is pending against a decision of the First-tier Tribunal, the Upper Tribunal or a court (regulation 16(3)(b)).
42. The Secretary of State has issued guidance for the exercise of the discretion to suspend benefit payments, namely “Suspension and Termination Guide” (April 2010). Paragraph 1052 provides:

“If suspending payment will result in hardship, a decision to suspend should not be made. If an existing suspension is causing hardship, the payment of benefit must be re-instated immediately....”

The draft letters appended to the guidance invite the claimant to contact the relevant office if he considers hardship will be caused by the suspension. The guidance requires a decision-maker to consider each case carefully on its merits (paragraph 1050), emphasising that:

“In all cases, the final determining factor about whether hardship will or will not occur, must be the particular circumstances of the individual customer” (paragraph 1351).

Paragraph 2051 requires the decision-maker to consider that adverse effects suspension might have upon children of the claimant; but the decision-maker is also required to consider “the actual benefit position” (paragraph 2301).

Local Authority Support for Children and Families

43. Section 17 of the Children Act 1989 imposes upon every local authority a general duty to safeguard and promote the welfare of children within their area who are in need, by providing services (which may include accommodation, and/or giving assistance in kind or in cash) appropriate to those children’s needs. That general obligation is developed in the form of specific duties. For example, section 20 requires a local authority to provide accommodation for children in their area who are in need, when it appears that the person caring for the child is prevented (whether or not permanently) from providing him with suitable accommodation or care. Given the child’s necessary dependence upon carers and his rights to family life, this obligation to provide accommodation to a child in need effectively extends to relevant family members, including primary carers. These provisions are designed for the provision of temporary accommodation only. As Lord Hope explained in R (G) v Barnet London Borough Council [2003] UKHL 57 at [92]:

“... [T]he provision of residential accommodation to rehouse a child in need so that he can live with his family is not the principal or primary purpose of this legislation. Housing is the function of the local housing authority, for the acquisition and management of whose housing stock detailed provisions are

contained in the Housing Acts. Provisions of that kind are entirely absent from this legislation.”

44. The general duty on a local authority to ensure its functions are discharged having regard to the need to safeguard and promote the welfare of children is more broadly stated in section 11 of the Children Act 2004. That reflects the yet wider obligation set out in article 3 of the United Nations Convention on the Rights of the Child (“the UNCRC”) which provides:

“In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.”

This has been described as the most important relevant obligation on the state in respect of children (ZH (Tanzania) v Secretary of State for the Home Department [2011] UKSC 4 (“ZH (Tanzania)”) per Baroness Hale at [23]).

45. There is no doubt that, in exercising its obligations under sections 17, a local authority is bound to consider the article 8 rights to respect for family life of all relevant family members, but particularly the child in need; and it is bound to do so “through the prism of article 3(1)” of the UNCRC (HH v Deputy Prosecutor of the Italian Republic, Genoa; F-K v Polish Judicial Authority [2012] UKSC 25 at [155] per Lord Wilson).
46. It is more debateable whether the Secretary of State or HMRC has a similar obligation in respect of decisions relating to welfare benefits. It is well-established that article 8 does not impose any positive obligation on the state to provide financial assistance to support a person’s family life or to ensure that individuals enjoy a family life to the full or in any particular manner (see R (Carson) v Secretary of State for Work and Pensions [2003] EWCA Civ 797 at [26]-[29] per Laws LJ, and the cases there referred to). I did not hear argument on this issue. However, for the purposes of this claim, I accept that individual decisions as to whether to make interim payments of benefit should be made or whether payments of benefit should be suspended are at least capable of engaging article 8.

Factual Background

47. The factual and procedural history of this claim is lengthy and complex. I will deal with it as succinctly as I can. As there are a number of overlapping strands, it will be more helpful if I deal with events other than in strictly chronological order.
48. As I have already indicated, the Claimant was born and brought up in Gambia. She arrived in the United Kingdom in January 2006, on a student visa which prohibited her from working and from having recourse to benefits or other public funds. She relied upon financial support from her uncle. In circumstances to which I have already alluded, the Claimant had a relationship with a British citizen, Mr Bah, with whom she had a daughter, Awa, in September 2009. By virtue of her father’s nationality, Awa is a British citizen. The Claimant has always been Awa’s primary carer. The Claimant’s relationship with Mr Bah ended very shortly after Awa’s birth.

Mr Bah has never cared for the child, nor is it realistic to suppose that he would be prepared or able to do so in the foreseeable future.

49. The Claimant's visa expired in December 2009. She applied for an extension, but this was refused: although she satisfied the academic requirement, she failed the financial requirement because her uncle would no longer financially support her.
50. As I have said, the Claimant was prohibited from working. Her only income was £36 per week child maintenance, which she obtained from Mr Bah through the Child Support Agency. The Claimant suggests that Mr Bah has been less than enthusiastic about paying, but generally he has made payments and the arrears from time-to-time have been small.
51. In addition, Mr Bah received both child tax credit and child benefit in respect of Awa, but initially he did not pass any of this money on to the Claimant. In November 2010, the Claimant contacted the relevant HMRC office, to say that she was Awa's primary carer. She completed the appropriate form, and from that month started to receive both child tax credit and child benefit, an aggregate of £78.15 per month.
52. The European Court gave judgment in Zambrano on 8 March 2011. On 13 June 2011, the Claimant made a claim for income support under the principles set out in Zambrano, on the basis that she was entitled to that benefit as the primary carer of Awa, an EU citizen. On 12 July 2011, the Secretary of State refused that claim on the ground that the Claimant did not have leave to enter or remain in the United Kingdom, and was thus a person subject to immigration control for the purposes of section 115 of the Immigration and Asylum Act 1999. She was therefore not entitled to income support. On reconsideration, that decision was confirmed on 20 July. On 11 August 2011, the Claimant appealed to the First-tier Tribunal against the refusal of her claim for income support.
53. In the meantime, on 14 July 2011, the Claimant made a request to the Secretary of State for interim payments of the benefit pending her appeal to the First-tier Tribunal. That application was refused on 28 July 2011, on the ground that, as the claim had been refused, it did not appear to the decision-maker on behalf of the Secretary of State that the Claimant was or may have been entitled to the benefit. As a result of regulation 2(1) of the Payments on Account Regulations, there was consequently no power to make an interim payment.
54. There being no right of appeal against that particular decision, on 7 September 2011, the Claimant commenced these proceedings, in which she sought to challenge the 28 July 2011 refusal to make interim payments. That challenge has run in parallel with the Claimant's challenge to the refusal of her substantive income support claim, as follows.
55. On 22 September, an application for interim relief in the judicial review was refused; and, on 2 November 2011, Lindblom J refused permission to proceed on the papers. On 30 April 2012, His Honour Judge Purle QC sitting as a judge of this court refused the renewed application for permission to proceed; but, on appeal, Maurice Kay LJ granted permission on 22 August 2012.

56. Meanwhile, on 28 November 2011, the First-tier Tribunal allowed the Claimant's substantive income support appeal: but on 15 December the Secretary of State indicated that income support would be suspended whilst he obtained and considered the reasons for the tribunal's decision. On 12 March 2012, the Secretary of State, having made no payment to date, confirmed that he was continuing to suspend payment of the benefit because he considered the First-tier Tribunal's decision to be wrong in law and was appealing. The First-tier Tribunal granted permission to appeal to the Administrative Appeals Chamber of the Upper Tribunal on 19 March 2012.
57. That appeal was determined on 7 January 2013 by Upper Tribunal Judge Jacobs, who allowed the appeal (Case No CIS/1371/2012).
58. Judge Jacobs was of course concerned with the legality of 28 July 2011 refusal of the Claimant's claim for income support. He departed from the First-tier Tribunal in two significant respects. First, on the basis of Zambrano, the First-tier Tribunal had assumed that refusing a right to reside to a parent would lead to the child having to leave EU territory; whereas, referring to O and S (see paragraph 15 above), Judge Jacobs held that assumptions have no role to play, the question being whether, in fact, it is necessary to give the non-EU parent a right to reside to ensure the EU child is not denied the genuine enjoyment of his rights as an EU citizen (paragraph 11 and 12). Second, the First-tier Tribunal had found that, without income support, the Claimant's presence in the United Kingdom was not viable: ultimately, she would have to leave the United Kingdom and take Awa with her. However, Judge Jacobs considered that that was the wrong focus. The tribunal were bound (by section 12(8)(b) of the Social Security Act 1998) to decide the appeal on the circumstances obtaining at the time of that decision. The focus therefore had to be on the Claimant's position as at July 2011; and the evidence was that the Claimant had survived in the United Kingdom since 2006 without any significant public assistance, and, in July 2011, she was "surviving" and her departure from the United Kingdom was not imminent. At the time of the decision, the Claimant's daughter had exercised her rights as an EU citizen and was continuing to exercise them: the First-tier Tribunal had therefore erred by proceeding on the false basis that, as at July 2011, entitlement to income support was essential if the Claimant was to remain in the United Kingdom. Events subsequent to July 2011 had (he said) shown that that was not correct, either at in July 2011 or later (see, generally, paragraphs 14-16). He concluded that, on the basis of Zambrano and O and S, it was not necessary to grant the Claimant a right of residence (or a right of access to income support) to ensure that her EU child was not denied the genuine enjoyment of her rights as an EU citizen.
59. Judge Jacobs refused permission to appeal to the Court of Appeal on 23 January 2013. An application for permission is currently pending in the Court of Appeal.
60. To complete this part of the story, on 22 January 2013, the Claimant sought interim payments of income support pending her appeal to the Court of Appeal. That was refused on 28 January, on the basis that regulation 2(1A) of the Payments on Account Regulations expressly prohibits interim payments pending such an appeal.
61. However, whilst this was happening in the two sets of proceedings, the Claimant's position had deteriorated. She had been living with her daughter in the second bedroom of a flat owned by a man she did not know well, who required her to pay £250 per month rent as well as contributions to the council tax and services bills. In

October 2011, this man was himself given notice to quit by 11 January 2011. He did not tell the Claimant until shortly before Christmas, when he asked her to leave by 6 January 2012.

62. The Claimant applied to the Council for accommodation and support under section 17 of the Children Act 1989, and since 6 January 2012 they have been housed by the Council, under that provision, first in bed-and-breakfast establishments in Smethwick and, since August 2012, in a two-bedroomed house in the same area.
63. In January 2012, HMRC also began making enquiries of the Claimant about her entitlement to child tax credit. On 2 April 2012, they notified her that she was not entitled to this benefit, and had in fact been overpaid £2,863.04. The benefit was withdrawn. As I understand it, that decision was appealed on 23 May 2012, and is still with the First-tier Tribunal for determination. On 28 August 2012, HMRC notified the Claimant that she was not entitled to child benefit, that that benefit would be stopped from 18 October 2012, and that she had overpaid £1,989.40 (although a decision had been taken not to seek repayment). That decision has also been appealed.
64. Following earlier requests in September, on 5 October 2012 solicitors for the Claimant wrote to HMRC seeking interim payments of child tax credit and child benefit, pending final resolution of her substantive claim for those benefits. That was refused on 26 October 2012, on the grounds that (i) there is no power to make interim payments of child tax credit, and (ii) whilst there is power for HMRC to make interim payments of child benefit, it did not appear to the decision-maker that the Claimant was or may have been entitled to the benefit, and so the conditions for interim payments had not been met.
65. On 3 July 2012, the Claimant asked for the suspension of income support to be lifted because of the termination of her award of child tax credit. That was refused by the Secretary of State the same day, on the basis that there was insufficient evidence of hardship.
66. By that stage, the Claimant's only income was the child maintenance payments, which had risen to about £43 per week. On 10 September 2012, a further request was made to lift the suspension of income support. On 14 September, a decision-maker responded, refusing to lift the suspension for the period to 2 September 2012 but lifting it from that date on the basis that it would cause the Claimant hardship not to pay her income support. Income support at £71 per week was thereafter paid.
67. On 12 October 2012, the UK Border Agency on behalf of the Secretary of State for the Home Department sent the Claimant a Certificate of Application in respect of her application for a Residence Card made on 1 September. That certificate enabled the Claimant to work. However, she apparently did not receive that letter; and has not in fact sought work. A copy of the Certificate of Application was provided to the Claimant's legal representatives at the hearing before me, and a copy was received by the Claimant in the post the following day, under cover of a letter dated 12 March 2013.
68. From 8 November 2012, the new regulation 21AA(3)(bb) of the IS (General) Regulations forbade the payment of income support in the Claimant's circumstances

(see paragraphs 25-27 above). As a result, by letter of 7 November 2012 effective the following day, the Secretary of State issued a new decision, under the new legislative provisions, refusing the Claimant income support. That decision is the subject of a separate appeal to the First-tier Tribunal, the hearing of which is currently adjourned whilst test cases on the post-8 November 2012 regime are identified and brought forward. The 7 November 2012 decision superseded the 28 July 2011 decision, and the suspension or non-suspension of income support payable by virtue of the First-tier Tribunal determination allowing the Claimant's appeal against the July 2011 was no longer a live issue. The Claimant has not been paid income support since 8 November 2012, as a result of the 7 November 2011 decision.

69. The Claimant applied for interim payments pending the outcome of that further appeal. On 29 November 2012, the Secretary of State issued a decision refusing to make any interim payments pending an appeal, on the basis that regulation 2(1A) of the Payments on Account Regulations expressly prohibits such interim payments.
70. Although provisions parallel to regulation 21AA(3)(bb) of the IS (General) Regulations were introduced from 8 November 2012 for child tax credit (see paragraph 31 above) and child benefit (paragraph 34 above), no new decision has been made in respect of interim payments of those benefits since the introduction of those changes.

The Challenged Decisions

71. The Claimant contends that the following decisions of the Secretary of State relating to interim payments of income support and suspension of an award of income support were wrong in law:
 - i) 28 July 2011: the refusal to make interim payments pending the Claimant's appeal of the Secretary of State's decision of 12 July 2011 decision to refuse income support to the First-tier Tribunal.
 - ii) 15 December 2011: the suspension of the award following the Claimant's successful appeal to the First-tier Tribunal, pending the Secretary of State's appeal to the Upper Tribunal.
 - iii) 12 March 2012: the continued suspension of the award, following reconsideration.
 - iv) 3 July 2012: the continued suspension of the award, following reconsideration.
 - v) 29 November 2012: the refusal to make interim payments pending the Claimant's appeal of the Secretary of State's decision of 7 November 2012 to refuse income support to the First-tier Tribunal.
 - vi) 28 January 2013: the refusal to make interim payments pending the Claimant's appeal from the Upper Tribunal to the Court of Appeal, in respect of the Secretary of State's decision of 12 July 2011 to refuse income support.
72. However, Mr Knafler indicated during the course of debate that the Claimant did not seek any back interim payments – she only sought interim payments of the benefits

going forward. I need not say anything further about the claim in this action for back interim payments, other than to note that I see the wisdom of that concession.

73. In respect of future interim payments of income support, they are the subject of only one decision by the Secretary of State, i.e. that of 29 November 2012 which is referable to the refusal of the substantive claim for income support on 7 November 2012 under the new regime effective from the following day. All of the other decisions in respect of interim payments and suspensions of income support are referable to the now-superseded substantive decision to refuse income support dated 12 July 2011, made under the pre-8 November 2012 legislative scheme. Challenges to those decisions are now academic. In these proceedings, the primary relief that the Claimant seeks money going forward in the form of an order requiring the Secretary of State to make her interim payments on account of income support to which she claims she is entitled. Declarations as to decisions which do not go to providing her with money in the future provide only empty relief – and Mr Knafler did not press for any relief in respect of those historic decisions. In respect of the income support claim in these proceedings, the relevant decision of which complaint is made is that of 29 November 2012 refusing interim payments pending the outcome of the appeal proceedings in relation to the 7 November 2012 refusal of income support.
74. In respect of child tax credit and child benefit, the only operative decision is that of 26 October 2012 to refuse interim payments. Unlike the position with regard to the Claimant's claim for income support, as I have indicated, no further decision has been made by HMRC as to the Claimant's entitlement since the legislative changes effective from 8 November 2012.
75. Consequently, the relevant challenged decisions in the scope of this claim are only two, namely:
 - i) The Secretary of State's decision of 29 November 2012 to refuse to make interim payments to the Claimant pending her appeal of the Secretary of State's decision of 7 November 2012 to refuse her substantive claim for income support to the First-tier Tribunal.
 - ii) HMRC's decision of 26 October 2012 to refuse to make interim payments of child tax credit and child benefit to the Claimant, pending her appeal of HMRC's decision of 2 April 2012 to refuse her substantive claim for those benefits to the First-tier Tribunal.
76. There is no doubt that, as a matter of domestic law, those decisions were lawful. In relation to child tax credit, HMRC do not have any power to make interim payments (see paragraph 40 above). In relation to income support, the Secretary of State is expressly prohibited by regulation 2(1A) of the Payments on Account Regulations from making interim payments whilst an appeal against the refusal of a claim for income support is pending, as there was in this case as at 29 November 2012 (paragraph 36 above). Similarly, in relation to child benefit, HMRC are expressly prohibited, by regulation 22(2) of the Child Benefit and Guardian's Allowance (Administration) Regulations 2003, from making interim payments whilst an appeal against the refusal of a claim for child benefit is pending, as there was in this case as at 26 October 2012 (paragraph 39 above). Mr Knafler did not suggest that either of these challenged decisions was unlawful as a matter of domestic law. Nor could he.

77. The only means of challenge open to the Claimant is on the basis that, to give effect to the right of the Claimant's daughter as an EU citizen to reside in the United Kingdom, this court should grant relief in the form of an order quashing the Defendants' decisions refusing to make interim payments to the Claimant, and a final mandatory order requiring the Defendants to make interim payments pending the ultimate outcome of the outstanding statutory appeals.

The Parties' Contentions

The Claimant's Contentions

78. In summary, Mr Knafler submissions were based upon three propositions, namely:
- i) the failure of the Defendants to pay the Claimant the three benefits pending the ultimate resolution of her entitlement puts her daughter's rights as an EU citizen to reside in the United Kingdom in jeopardy;
 - ii) this court has not only the power but an obligation under EU law to protect those rights; and
 - iii) this court should protect those rights by ordering the Defendants to make the interim payments from now until the ultimate resolution of the Claimant's entitlement to the benefits, which they have refused to make.
79. He submitted that the exclusion of the Claimant from mainstream benefits is in breach of the Zambrano principle, in that denial of access to those benefits creates a situation in which she will be forced to leave the United Kingdom due to lack of means – just as much as the lack of a work permit in Mr Zambrano's case created the same situation for him – and the Claimant's EU citizen daughter would be bound to accompany her, as she is her daughter's primary carer and there is no available alternative carer. In paragraph 44 of Zambrano (quoted in paragraph 9 above), the court said that it must be assumed that, without giving a non-EU ascendant relative upon whom an EU child is dependent a right of residence and the ability to work, the parent and hence the child will be driven to leave EU territory. Similarly, Mr Knafler submitted, where a such a parent cannot work (for either legal or practical reasons), it must be assumed that without a right of residence and an entitlement to mainstream non-contributory benefits, such a result will equally follow. That assumption, he submitted, is irrebutable. In particular, Mr Knafler (particularly, on this point, supported by Mr Cowen for the Council) submitted that it was no answer for the Secretary of State to say that the Zambrano principle does not apply because the Claimant's via her daughter can access support from the Council under section 17 of the Children Act 1989, which will mean that realistically neither will be compelled to leave the United Kingdom in the foreseeable future; because that provision is designed to prevent destitution for children in need on a residual, temporary, short-term emergency basis only, by providing cover (and only to cover) minimal support under community care legislation. It is inappropriate to use that safety cover in the circumstances of this case. In assessing whether the Claimant and hence the protected EU child will be compelled to leave the United Kingdom, the availability of that section 17 support should be left out of account.

80. Those are, no doubt, the main issues in the various proceedings before the First-tier Tribunal, which concern the Claimant's substantive claims for the three benefits on the basis that the legislative changes introduced on 8 November 2012 (and particularly the application of the residence requirements) are incompatible with EU law.
81. Mr Knafler submitted that EU law rights must be effectively protected, i.e. the exercise of the rights must not be rendered practically impossible or excessively difficult, and it is for member states to ensure that that level of protection is afforded judicial protection (Unibet (London) Ltd v Justitiekanslem [2007] EUECJ C-432/05 ("Unibet"), at paragraphs 37-39 and 43).
82. Interim relief is available for the protection of those rights, he submitted, by virtue of the principle in R v Transport Secretary ex parte Factortame Ltd (No 2) [1991] AC 603 ("Factortame"). The applicants in that case were, essentially, Spanish fishermen. To prevent United Kingdom fishing quotas being plundered by vessels flying the British flag but having no genuine link with the United Kingdom, Part II of the Merchant Shipping Act 1988 and regulations made thereunder required that the vessel be British owned and managed, as a condition for registration as a British fishing vessel. The Commission of the European Communities brought action in the European Court against the United Kingdom that it had breached its Treaty obligations by imposing such nationality requirements. The Spanish fishermen sought interim relief in the English courts, in the form of the suspension of the relevant parts of the Act and regulations, pending determination of the European Court proceedings. As a matter of national law, the English courts did not have jurisdiction to grant the interim relief sought.
83. The European Court held that, in those circumstances, that national rule of law could be set aside:

“20. The Court of Justice has... held that any provision of a national legal system and any legislative, administrative or judicial practice which might impair the effectiveness of Community law by withholding from the national court having jurisdiction to apply such law the power to do everything necessary at the moment of its application to set aside national legislative provisions which might prevent, even temporarily, Community rules from having full force and effect are incompatible with those requirements, which are the very essence of Community law....

21. It must be added that the full effectiveness of Community law would be just as much impaired if a rule of national law could prevent a court seized of a dispute governed by Community law from granting interim relief in order to ensure the full effectiveness of the judgment to be given on the existence of the rights claimed under Community law. It follows that a court which in those circumstances would grant interim relief, if it were not for a rule of national law, is obliged to set aside that rule.”

84. The proper approach in the circumstances of this case, Mr Knafler submitted, is to follow the approach of the House of Lords in Factortame following remittal of the case from the European Court, namely to apply the guidelines set out for interim private remedies in American Cyanamid Co v Ethicon Ltd [1975] AC 396, with appropriate modifications. Therefore, if damage would not be a sufficient remedy (as, he submitted, is the case here), there had to be a balance of convenience exercise, taking into account all relevant circumstances. There is a serious issue to be tried as to entitlement to the benefits, now before the First-tier Tribunal, in respect of which, he contended, the Claimant had a strong case. Particularly given:
- i) the need to avoid a possible breach of the EU rights,
 - ii) the resulting hardship to the Claimant and her daughter by virtue of the denial of income support and the other benefits,
 - iii) the requirement to take account of Awa's best interests as a primary consideration, and the adverse impact of the poverty resulting from an absence of mainstream benefits on her health, welfare and long-term development, and
 - iv) the fact that the total cost of not granting the Claimant access to mainstream benefits is arguably higher than granting her access,

the balance lies firmly on the side of granting the Claimant relief in the form of interim payments of the benefits, pending ultimate resolution of her entitlement through the tribunal system and, if necessary, the higher appeal courts.

85. To pick up on two of those matters relied upon by the Claimant, first, with regard to her daughter's welfare, the Claimant describes the impact of the shortage of money caused by a failure to provide her with mainstream benefits, as follows (15 November 2012 Statement, paragraph 14):

"I receive support from my local Children's Centre and they have been able to provide me with food parcels. I received one this week as it is the only way that I was able to feed my daughter. I am very concerned about Awa's welfare. She is simply not warm enough at home at the moment as I do not have the money to heat the house. This is exacerbated by the poor diet she has at the moment which leaves her feeling cold anyway. I worry about her development and what kind of chances and opportunities she is missing out on. I have not been able to catch a bus for her to see friends recently because I have so little money. Awa also continues to miss out on friends' parties, trips into town, dance lessons or other sports for children and other events because I cannot afford it."

86. Other evidence has been lodged, including the Report of the Parliamentary Inquiry into Asylum Support for Children and Young People (January 2013), and a report by a social worker, Allan Norman, commissioned on behalf of the Claimant, entitled "The Living Conditions of Zambrano Children – A Review of research and Witness Evidence". This suggests, unsurprisingly, that children of unemployed parents who do not have access to mainstream benefits, have a low standard of living and high

levels of anxiety and stress which, if maintained, is at least arguably detrimental to their long-term welfare and development.

87. Second, Mr Knafler (supported by Mr Cowen for the Council) relied upon a calculation prepared by those instructing him which suggests that, if the Claimant were paid full mainstream benefits, that would be cheaper for the state than the current position in which she is effectively supported by the Council's Children's Services Department under section 17. The calculation suggests that the Claimant's entitlement to income support, child benefit, child tax credit, housing benefit and council tax benefit would amount to £281.01 per week; whereas the Council currently provide her with bed and breakfast accommodation costing £240 per week, and a £70 weekly personal allowance. Mr Knafler and Mr Cowen submitted that, in any balance of convenience exercise, it is therefore in the public interest to grant, rather than deny, the Claimant access to full mainstream benefits. There would, they contended, be a saving for the public purse of about £1,500 per year.

The Defendant's Submissions

88. The Defendants do not accept that Zambrano confers any right to means-tested benefits. That is their stance in the substantive proceedings. However, even if the principles of Zambrano were sufficient theoretically to enable the Claimant's claim for benefit, Mr Coppel on their behalf submitted that there were three reasons why those principles did not assist her in this case.
89. First, the EU law right that the Claimant seeks to protect is her daughter's right as an EU citizen to reside in the United Kingdom. On the evidence, that right is not in serious jeopardy and will not be in serious jeopardy in the period it will take to determine the substantive claims for benefit, which is the relevant period for the purposes of this claim. There is, at present and for the foreseeable future, simply no EU law right that requires any form of judicial protection.
90. Second, he submitted that the principles of Factortame were not in any event engaged in this case.
- i) The Claimant's challenge in these proceedings is to a decision of the Secretary of State under regulation 2 of the Payments on Account Regulations (and the parallel provisions relating to child tax credit and child benefit) not to make the Claimant interim payments, pending a challenge, not to those regulations, but to new regulation 21AA(3)(bb) of the IS (General) Regulations (and again the parallel provisions relating to child tax credit and child benefit) introduced on 8 November 2012. In the substantive appeals, the Claimant is challenging the IS (General) Regulations and the parallel provisions for child tax credit and child benefit; but in this claim is seeking relief, not to stay the effect of those Regulations, but by setting aside decisions made under different regulations which are not arguably unlawful. This case is therefore materially different from Factortame.
 - ii) Factortame concerned (and was limited to) the removal of a national obstacle to ensure that a future judgment as to the existence of the rights claimed under EU law would be fully effective. Neither Factortame nor general principles of EU law created new national rights or remedies to ensure full effectiveness

(Unibet). However, even if the prohibition of any interim payments pending an appeal by the claimant in regulation 2(1A) of the Payment on Account Regulations was a bar that could be disapplied, regulation 2(1) contained a precondition for the Secretary of State's discretion arising in respect of interim payments, namely that it appeared to him that the claimant is or may be entitled to the benefit. As, reasonably, it did not appear to the Secretary of State that that was so, the precondition was not satisfied: and the Secretary of State therefore had no power to make interim payments. The same analysis applied to HMRC and child benefit. HMRC had no power at all to make interim payments of child tax credit. In those circumstances, the Claimant could not rely upon Factortame to give her an entirely new remedy; nor could the court grant her something which the Secretary of State/HMRC did not have the right to grant. In short, Factortame did not assist the Claimant in this claim.

91. Third, insofar as Factortame were to apply, Mr Coppel submitted that the balance of convenience lay, firmly, on the side of not granting the relief sought.

Discussion

92. Although the background is lengthy and complex, and the grounds relied upon by each party numerous, in my view the determinative issue in this claim is narrow in scope and simple of resolution.
93. As Elias LJ emphasised in Harrison at [67] (quoted at paragraph 17 above), it is necessary to focus on the nature of the EU right in issue and then on any potential impediment to the full enjoyment of that right.
94. As I have indicated (paragraphs 76-7 above), the only means of challenge to the decisions refusing the Claimant interim payments is on the basis that, to give effect to the right of the Claimant's daughter as an EU citizen to reside in the United Kingdom, this court should grant relief in the form of a final mandatory order requiring the Defendants to make interim payments pending the ultimate outcome of the outstanding statutory appeals. That right of the Claimant's daughter will be compromised if, and only if, her non-EU mother is at risk of being compelled to leave the United Kingdom, and hence EU territory, either by direct action by the state or because, in fact, destitution or similar force of circumstance will compel her to leave. Inevitably, if the Claimant is compelled to leave the United Kingdom, Awa will be compelled to follow. Awa is four years old, the Claimant is her primary carer, and there is no available substitute.
95. In my judgment, the Claimant's claim in these proceedings falls at the first hurdle, because she cannot make good the first proposition upon which the claim is based, namely that the failure of the Defendants to pay the Claimant the benefits pending the ultimate resolution of her entitlement puts her daughter's rights as an EU citizen to reside in the United Kingdom in jeopardy (see paragraph 78(i) above).
96. As I have indicated, it is generally for this court, on the available evidence, to make a finding of fact as to whether the decision to deny the Claimant the three benefits pending resolution of her entitlement to those benefits puts her daughter's rights to reside in jeopardy (paragraph 19(iii) above). If I were required to make a finding on

the evidence, I would unhesitatingly conclude that it does not. The Claimant and her daughter have been in the United Kingdom for nearly four years, for the most part without significant benefit support. Whilst no one would suggest that money is not scarce for the Claimant and her daughter – finances for them are, to say the least, very tight – the Claimant does have (i) accommodation in the form of a two-bedroomed house, provided by the Council; (ii) income, the amount of which (whilst not being entirely clear) appears to include £70 per week from the Council as part of their section 17 support (see paragraph 87 above) and about £50 per week from Mr Bah through the Child Support Agency (the Claimant's 15 November 2012 Statement, paragraph 9); and (iii) the right to work. I accept the Claimant's evidence that she did not receive the Certificate of Application dated 12 October 2012 (referred to in paragraph 68 above); but, whilst that is unfortunate, she knows that she is able to work now. She has management and human resources skills, and is keen and very hopeful of finding work (her 15 November Statement, paragraph 15; and Michael Bates Statement 8 March 2013, paragraph 13). Furthermore, although the ultimate resolution of her entitlement to the benefits may take some time, as the various proceedings move through the judicial system, we are concerned here with a matter of months and not, as Mr Zambrano was, with many years. In any event, all of the evidence points to the Claimant being absolutely determined to stay in the United Kingdom, and there being no realistic possibility of her leaving because of financial circumstances during the currency of the substantive proceedings. On the evidence before Judge Jacobs, that appears to have been his finding. On the evidence before me, it would be my finding too.

97. However, it is not necessary to make such a formal finding, because the Claimant concedes that that is the case. Although Mr Knafler submitted that the Secretary of State and/or HMRC (rather than the Council) should have been supporting the Claimant, the Claimant fully accepts that she will never in practice leave the United Kingdom because of economic pressure, because she will be eligible to receive section 17 support from the Council which will inevitably prevent her and her daughter facing destitution and homelessness (see, e.g., Mr Knafler's skeleton argument, paragraph 46.4). At the hearing before me, Mr Knafler specifically conceded, properly and with good grace, that in October and November 2012 (when the relevant decisions refusing interim payments were made), realistically, the Claimant was not going to leave the United Kingdom in the foreseeable future, because the Council's section 17 support would inevitably ensure that neither EU law nor European human rights law would be breached; and that remains the case.
98. That concession would appear to be fatal to this claim. Mr Knafler sought to save the claim by two, related submissions.
99. First, he submitted that paragraph 44 of Zambrano means that it must be assumed (irrebuttably and hence, essentially, as a matter of law) that a person in the place of the Claimant must be accorded both the right to residence and the right of access to a particular level of funds by way of earnings or benefits. However, I cannot accept that submission.
100. As a matter of principle, EU law creates rights, but it is left to member states as to how those rights should be made effective and effectively protected within their territory. It would be remarkable if the European Court had laid down a particular way adequately to protect the right of residence of a minor with no EU ascendant

carer relatives, which each member state would be bound to implement. That is simply not how the EU works.

101. In fact, as cases such as Dereci and Harrison make clear, Zambrano is not to be construed as Mr Knafler contends. Those cases properly emphasise that the determinative question in right to reside cases based on articles 20 and 21 of the TFEU is whether, as a matter of fact, an EU citizen would be compelled to leave the EU to follow a non-EU national upon whom he is dependent. That does not envisage an irrebutable assumption, but rather a context specific and evidence driven investigation of whether there would or might be such compulsion. In this case, the Claimant concedes that, realistically, she will not be compelled to leave the United Kingdom in the foreseeable future.
102. Second, Mr Knafler submitted that, in all the circumstances of this case, the court is bound to leave out of account that section 17 support. However, I simply do not understand the basis of that proposition. The Council, as much as the Secretary of State and HMRC, is an organ of the state. I well appreciate that section 17 of the Children Act 1989 was not designed for the long-term accommodation of children and their carers, and that the readily available housing stock to satisfy a local authority's section 17 obligation is not ideally suited to long-term accommodation. But this claim is concerned with a temporary situation (whilst the Claimant's entitlement to benefits is determined), and, whilst the Council may consider it is less than ideal that they have to bear the economic burden of ensuring the Claimant and her child are not destitute and are not placed in a position in which they would be compelled to leave the country, any issue as to which authority should bear that burden is not a matter for this court in this case. I am only concerned about the protection of Awa's right to reside in the United Kingdom, as an EU citizen. Mr Knafler conceded that the availability of section 17 support ensured that, in the foreseeable future, there was no realistic prospect of the Claimant being compelled to leave the United Kingdom (or, for that matter, that the article 8 rights of the Claimant and/or her daughter would be breached).
103. For those reasons, I am quite satisfied that the right of the Claimant's daughter as an EU citizen to reside in the territory of the EU is not in jeopardy, and will not be in jeopardy in the period during which the Claimant's entitlement to the benefits will be determined. In those circumstances, EU law is simply not engaged at all: there is no EU law right that requires the protection of this court, now.
104. That is sufficient to dispose of this claim, by dismissing it. I need not determine the other issues between the parties, and do not do so, mainly because, in the light of my findings in relation to the determinative issue, those other issues are to an extent artificial. However, out of deference to the arguments made in respect of them, I would make these comments.
105. First, whilst I see the force in Mr Coppel's argument that this claim in any event falls outside the scope of Factortame, I do not find that issue easy.
106. In support of his submission, Mr Coppel relied upon three authorities. First, he referred to Factortame itself, where, on the return of the case to the House of Lords, Lord Goff (at page 673) stressed the importance of upholding enacted law and indicated that the court should not exercise its discretion to restrain a public authority

by interim injunction from enforcing apparently authentic law unless satisfied, having regard to all of the circumstances, that the challenge to the validity of the law is, prima facie, so firmly based as to justify so exceptional course. Lord Goff, understandably, urged particular caution.

107. Second, and closer to this case, he referred me to R v Secretary of State for Social Security ex parte Grant [1997] EWHC 754 (Admin), a case in which Mr Knafler again appeared for the applicant. That too was an application for judicial review of the Secretary of State's refusal to make interim payments of income support, in circumstances in which a decision-maker (then an adjudicating officer) had decided that the applicant was not habitually resident, and was therefore not entitled to the benefit. The applicant was in the process of appealing that decision to the relevant tribunal, then the Social Security Appeal Tribunal. Leave to judicially review was granted on 17 July 1997 by Scott Baker J, who also ordered expedition. The tribunal refused the substantive appeal on 25 July. The applicant applied for leave to appeal to the Social Security Commissioners on 29 July. That application for leave was undetermined by the time the substantive judicial review came before Harrison J on 31 July 1997.

108. Regulation 2(1) and (1A) of the Payments on Account Regulations was much the same as now, except that paragraph (1A) had the following italicised addition (later removed by regulation 10(3)(b) of the Social Security, Child Support and Tax Credits (Miscellaneous Amendments) Regulations 2005: see paragraph 38 above):

“Paragraph 1 shall not apply pending the determination of an appeal *unless the Secretary of State is of opinion that there is entitlement to benefit.*”

109. The Secretary of State was not of the opinion that the applicant had any entitlement to benefit. Harrison J found that that was reasonable opinion to hold, and, in those circumstances, held (at [22]) that the Secretary of State had no power to make an interim payment. For the court to make an order, would mean ordering the Secretary of State to make a payment outside the statutory scheme. He added this (at [23]):

“That disposes of the application. I should, however, say that, despite Mr Knafler's reference to Factortame, I do not consider that I would have the power to order the Secretary of State to make a payment outside the statutory scheme. The Secretary of State would have no statutory power to make such a payment, and it would plainly be wrong for me to order her to do so. Indeed, I think Miss Lieven (Counsel for the Secretary of State) is right that it would be wholly inappropriate for me to order the Secretary of State to be of the opinion that the applicant is entitled to benefit (if I indeed had the power to do so, which I doubt). In any event, on the primary conclusion that I have reached, it is not necessary for me to reach a final view on that aspect of the matter.”

110. Those comments were, obviously, obiter. However:

- i) Harrison J clearly considered that he could not go behind a reasonable opinion of the Secretary of State that the applicant was not entitled to benefit, which was a condition of the Secretary of State's discretion to grant interim payments: the same logic arguably applies to whether it appears to the Secretary of State that a person is or may be entitled to benefit under regulation 2(1): and
 - ii) Harrison J clearly did not consider that he could order the Secretary of State to make a payment outside the statutory scheme which, given the subsequent changes to the relevant regulations, the Claimant in this case now asks me to do.
111. Third, the Northern Ireland case of Juscik's (Tradeusz) Application (Leave Stage) [2011] NIQB 7 considered a decision of the Northern Ireland Department of Social Development to refuse an applicant interim payments pending determination of his appeals against refusal of Jobseeker's Allowance. The relevant regulations were in the same terms as regulation 2(1) and (1A) of the Payments on Account Regulations. Treacy J held that the court had power to disapply regulation 2(1A), but only where the challenge to the validity of the law was so firmly based as to justify so exceptional course – which he found the challenge in that case not to be. In paragraph 18, he set out a number of potential problems with disapplying regulation 2(1A). He was apparently not addressed on the legal difficulties of disapplying the condition in regulation 2(1).
112. These authorities touch upon some of the difficulties that might be encountered in any order requiring the Secretary of State or HMRC to make interim payments of benefit outside the statutory scheme, because a claimant's appeal is pending and/or because it does not appear to the decision-maker that the claimant is or may be entitled to the benefit. I also appreciate the reminder in paragraph 40 of Unibet that EU law does not intend to create new remedies.
113. However, as a matter of principle, effective judicial protection requires a national court to be able to grant interim relief necessary to ensure EU rights are respected (see, e.g., Unibet at paragraphs 72 and 76; and Factortame at page 659C per Lord Bridge). In those circumstances, I leave open the question of whether relief would be available in an appropriate case (and, if so, what relief that should be) to be considered in a case where that is a live issue, i.e. in a case where EU law is engaged, and EU rights are in jeopardy. For the reasons I have given, that is not this case.
114. Similarly, I do not consider it would be helpful for me to comment on where the balance of convenience might fall if EU law rights were in jeopardy in this case, and if it were consequently necessary to perform that balancing exercise. Such an exercise is necessarily context specific; and it cannot sensibly be performed on the artificial basis that EU law rights are, in some way, in jeopardy, in a case where they are not.

Conclusion

115. In respect of her claim against the Secretary of State, the Claimant has permission to proceed. In respect of the claim against HMRC, she does not, the hearing before me being on a rolled-up basis. I grant permission in that claim.

116. However, for the reasons I have given, I refuse the substantive application for judicial review in both claims.