



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: EA/02804/2015

**THE IMMIGRATION ACTS**

Heard at Field House  
On 19 March 2018

Decision Promulgated  
On 31 July 2018

Before

UPPER TRIBUNAL JUDGE O'CONNOR  
UPPER TRIBUNAL JUDGE CANAVAN

Between

MODUPE [A]

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

**Representation:**

For the appellant: In person

For the respondent: Ms A. Brocklesby-Weller, Senior Home Office Presenting Officer

**DECISION AND REASONS**

1. The appellant is a Nigerian citizen and the mother of a 14-year-old Irish citizen ("Z"). She appealed the respondent's decision dated 14 October 2015 to refuse to issue a residence card recognising a derivative right of residence as the primary carer of a self-sufficient EEA national child.
2. First-tier Tribunal Judge Widdup dismissed the appeal in a decision promulgated on 06 February 2017. On 05 December 2017 the Upper Tribunal set aside the First-tier

Tribunal decision (annexed). The appeal was listed for remaking before a panel of the Upper Tribunal.

3. The appellant appeals under regulation 26 of The Immigration (European Economic Area) Regulations 2006 (“the EEA Regulations 2006”) on the ground that the decision breaches rights under the EU Treaties in respect of entry to or residence in the United Kingdom.

## **LEGAL FRAMEWORK**

### **Rights of European citizens**

4. Article 20 of the Treaty on the Functioning of the European Union (TFEU) (ex Article 17 TEC) sets out rights arising from citizenship of the Union.

“1. Citizenship of the Union is hereby established. Every person holding the nationality of a Member State shall be a citizen of the Union. Citizenship of the Union shall be additional to and not replace national citizenship.

2. Citizens of the Union shall enjoy the rights and be subject to the duties provided for in the Treaties. They shall have, *inter alia*:

- (a) the right to move and reside freely within the territory of the Member States;

...

These rights shall be exercised in accordance with the conditions and limits defined by the Treaties and by the measures adopted thereunder.”

5. Article 21 (ex Article 18 TEC) states:

“1. Every citizen of the Union shall have the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in the Treaties and by the measures adopted to give them effect. ...”

6. In *Baumbast and R (Free Movement of Persons)* [2002] EUECJ C-413/99 the Court of Justice of the European Union (CJEU) outlined the underlying importance of the rights arising from European citizenship even if the citizen was not exercising rights of free movement as a worker.

“94. The answer to the first part of the third question must therefore be that a citizen of the European Union who no longer enjoys a right of residence as a migrant worker in the host Member State can, as a citizen of the Union, enjoy there a right of residence by direct application of Article 18(1) EC. The exercise of that right is subject to the limitations and conditions referred to in that provision, but the competent authorities and, where necessary, the national courts must ensure that those limitations and conditions are applied in compliance with the general principles of Community law and, in particular, the principle of proportionality.”

7. The principle was summarised by Mrs Justice Lang in *R (on the application of Gureckis) v SSHD* [2018] EWHC 3298 (Admin).

“89. Freedom of movement for workers was one of the founding principles of the EU, now found in Article 45 TFEU. Its primary purpose was to promote the economic objective of a common market, together with the freedom of movement of goods, services and capital. This was reflected in the earlier cases relied upon by Mr Eadie QC, such as Case 53/81 *DC Levin v Secretary of State for Justice* [1982] 2 CMLR 454, at [17]. However, since the Treaty of Maastricht, which introduced the notion of EU citizenship, the concept of freedom of movement has broadened into a right to freedom of movement and residence for EU citizens, and their families, without a requirement to be economically active, provided that they do not seek social assistance from the host Member State. Articles 20 and 21 of TFEU grant EU citizens “the right to move and reside freely within the territory of the Member States”, subject to the limitations and conditions laid down in the Treaties and Directives. These principles are reflected in Recitals (1), (2), (3), (5) and (11) to the Directive. See also Case C-413/99 *Baumbast v Secretary of State for the Home Department* [2002] 3 CMLR 23 at [81] – [84].”

8. Article 7 of the Charter on Fundamental Rights of the European Union protects the right to respect for ‘private and family life’. Article 51 of the Charter makes clear that the provisions of the Charter apply in the following circumstances:

“The provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers and respecting the limits of the powers of the Union as conferred on it in the Treaties.”

### **Rights of free movement**

9. The Directive on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States (2004/38/EC) (“the Citizens’ Directive”) governs the rights of free movement of European citizens.
10. Article 7 of the Citizens’ Directive states:

“(1) All Union citizens shall have the right of residence on the territory of another Member State for a period of longer than three months if they:

- (a) are workers or self-employed persons in the host Member State; or
- (b) have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State during their period of residence and have comprehensive sickness insurance cover in the host Member State; or
- (c) – are enrolled at a private or public establishment, accredited or financed by the host Member State on the basis of its legislation or administrative practice, for the principal purpose of following a course of study, including vocational training; and
  - have comprehensive sickness insurance cover in the host Member State and assure the relevant national authority, by means of a

declaration or by such equivalent means as they may choose, that they have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State during their period of residence; or

(d) are family members accompanying or joining a Union citizen who satisfies the conditions referred to in points (a), (b) or (c).

(2) The right of residence provided for in paragraph 1 shall extend to family members who are not nationals of a Member State, accompanying or joining the Union citizen in the host Member State, provided that such Union citizen satisfies the conditions referred to in paragraph 1(a), (b) or (c)."

11. Recital (29) of the Citizens' Directive states that the Directive should not affect more favourable national provisions.

### **Self-sufficient European national children**

12. In *Zhu and Chen* [2004] ECR I-9925 the CJEU considered the position of an Irish national child (born in Belfast) who lived in the UK with her mother, who was a third country national. The court noted that the referring court had observed that, as an Irish national, the child was free to move within the Common Travel Area of the United Kingdom. The court considered the child's underlying rights as a European citizen and concluded:

"In circumstances like those of the main proceedings, Article 18 EC and Council Directive 90/364/EEC of 28 June 1990 on the right of residence confer on a young minor who is a national of a Member State, is covered by appropriate sickness insurance and is in the care of a parent who is a third-country national having sufficient resources for that minor not to become a burden on the public finances of the host Member State, a right to reside for an indefinite period in that State. In such circumstances, those same provisions allow a parent who is that minor's primary carer to reside with the child in the host Member State."

13. Regulation 15A(2) of the EEA Regulations 2006 sets out the requirements to show a derivative right of residence as the primary carer of a self-sufficient child:

'(1) A person ("P") who is not an exempt person and who satisfies the criteria in paragraph (2), (3), (4), (4A) or (5) of this regulation is entitled to a derivative right to reside in the United Kingdom for as long as P satisfies the relevant criteria.

(2) [A person] satisfies the criteria in this paragraph if -

(a) P is the primary carer of an EEA national ("the relevant EEA national"); and

(b) the relevant EEA national -

(i) is under the age of 18;

(ii) is residing in the United Kingdom as a self-sufficient person;

(iii) would be unable to remain in the United Kingdom if P were required to leave.'

## 14. Regulation 4 defines a “self-sufficient person”:

- ‘(1)(c) “self-sufficient person” means a person who has –
- (i) sufficient resources not to become a burden on the social assistance system of the United Kingdom during his period of residence; and
  - (ii) comprehensive sickness insurance cover in the United Kingdom;
- ...
- (4) For the purposes of paragraphs (1)(c) and (d) and paragraphs (2) the resources of the person concerned and, where applicable, any family members, are to be regarded as sufficient if –
- (a) they exceed the maximum level of resources which a United Kingdom national British citizen and his family members may possess if he is to become eligible for social assistance under the United Kingdom benefit system; or
  - (b) paragraph (a) does not apply but, taking into account the personal situation of the person concerned and, where applicable, any family members, it appears to the decision maker that the resources of the person or persons concerned should be regarded as sufficient.
- (5) For the purpose of regulation 15A(2) references in this regulation to “family members” includes a “primary carer” as defined in regulation 15A(7).’

## 15. The current Home Office Policy Guidance (Free Movement Rights: derivative rights of residence – Version 4.0. 27 February 2018) outlines the policy regarding assessment of the income from the primary carer:

“A child may show that they are self-sufficient by relying upon the income of their primary carer. However, any work undertaken in the UK will only be considered acceptable where this is lawful employment. For example, if the primary carer currently has leave to remain under another part of the Immigration Rules which entitles them to work, they can use any income from those earnings to show they are self-sufficient.

Before 16 July 2012, when Chen was given effect under the Immigration (European Economic Area) Regulations 2006 (the 2006 regulations), paragraph 257C of the Immigration Rules did not grant primary carers of EEA self-sufficient children the right to work.

Since 16 July 2012, the 2006 regulations (as amended) and now the 2016 regulations, enable the primary carer with a derived right of residence to work lawfully in the UK regardless of whether a document has been issued to them in that capacity. This means there may be cases where the primary carer seeks to rely on this work to meet the self-sufficiency requirement when applying for a document. You must, therefore, consider whether the EEA national child was self-sufficient before the primary carer started employment in a Chen capacity. This is because the EEA national child must be self-sufficient first in order for the

primary carer to derive a right of residence, and so be able to work lawfully in the UK.

In cases where self-sufficiency has already been established (for example, the applicant has already been issued a document under the 2006 regulations or the 2016 regulations on the basis of Chen) and the primary carer has begun working in exercise of their Chen right, then funds from that employment can be relied upon to support a further application on the basis of Chen.”

16. In *Liu v SSHD* [2007] EWCA 1275 the Court of Appeal summarised the findings made by an earlier constitution of the court in *W (China) and X (China)* [2006] EWCA Civ 1494 [12].

- “i) Applying paragraph 45 of Chen, the right of residence of a minor could only be effectively asserted with the presence and support of a carer or guardian, and that, if the requirements of the Directives are fulfilled, creates a right for the parent to reside with the child, (W (China) [6]);
- ii) All of the minor EU citizen and his non-EU citizen carers have to fulfil the Directive requirements of (a) sickness insurance; (b) sufficiency of means: (W (China) [8]);
- iii) Those conditions are pre-conditions to the existence of the article 18 right in any given case, and thus the right does not exist until those conditions are fulfilled: (W (China) [16]);
- iv) The pre-condition of sufficiency of means cannot be fulfilled by funds derived from employment that is precarious because it is unlawful: (W (China) [14]);
- v) The member state is under no obligation to adjust its domestic law in order to make available to the EU citizen resources that will enable him to fulfil the pre-condition to the existence of the Article 18 right: (W (China) [16]).”

17. Lord Justice Buxton went on to consider whether the circumstances in the case of *Liu* could be distinguished from the case of *W (China)*. In *W (China)* the appellants obtained the resources to support the children by working illegally. In *Liu* the appellants relied on the fact that they had been given permission to work, which was only extant because of the ongoing proceedings. Lord Justice Buxton made the following findings:

“20. The third submission affects all of the appellants, but it is of particular relevance to the Mouloungui appeal: which because of the continual unlawfulness of the presence in the United Kingdom of Mr Mouloungui would fail in any event if W (China) were applied to it. This submission was that the court should indeed look to the future, during the period of long-term residence, and ask whether, if granted permission to remain on Article 18 grounds, the adult claiming to provide the resources would indeed be able to do so, by taking employment if so permitted. The past experience was relevant to that question. Wang and Mr and Mrs Ahmed continue in their present employment; and Mr Mouloungui, although currently forbidden to work, had a "job offer". Permission to remain must therefore be provided in order to enable a parent to fulfil the resources requirement of the Directive, and thus make a reality of the child's right of residence as an EU citizen.

21. This approach fails for the reasons that have already been set out. By a combination of Article 18 read with the requirements of the Directives, the right to

reside only exists once the requirements of the directives are fulfilled: see paragraph 12(iii) above. The member state therefore is not obliged to adjust its domestic law to create for the EU citizen the resources that he needs in order to create his right to reside: see sub-paragraph 12(v) above. In the present cases, Mr Mouloungui as a failed asylum seeker; and Ms Wang and Mr and Mrs Ahmed as overstayers; are forbidden to work save for the quirk provided by their participation in these proceedings; and there is no reason at all to think that that position will change. But the present applications demand that the United Kingdom creates for them a right to work outside the normal rules in order to provide resources for the respective children.

22. To refuse to take that course, as the Court of Appeal refused to do in *W (China)*, is not in any way inconsistent with *Chen*. In that case Mrs Chen's resources were proved, extant, and not in any way dependent on her taking employment. The case said absolutely nothing about conferring any rights on the parent in order to enable her to *create* the required resources; and I venture to think that the ECJ would have been extremely surprised if told that it had opened the door to any such obligation. Nor is it right to argue that to prevent the adults from working renders the children's EU rights meaningless. The EU right is not unlimited, but is subject to the conditions contained in the Directives. Those conditions include the resources condition, which was fulfilled in *Chen*, but which is not fulfilled in the particular cases such as the present.

23. I therefore conclude that there is no obligation on the member state to adjust its laws, whether its immigration law or any other part of the national legal order, to enable accompanying adults to work in order to provide resources for an EU citizen wishing to reside in that member state. All of the appeals fail on that point."

18. In *Seye (Chen children; employment)* [2013] UKUT 00178 the Upper Tribunal conducted a detailed analysis of the legal framework, including the decisions in *W (China)* and *Liu*, and outlined the following conclusions in the headnote:

- "(1) It is clear that income from illegal employment in the host Member State on the part of a parent of a "Chen" child (Case c-200/02 *Chen* [2004] ECR I-9925) cannot create self-sufficiency for that child (*W (China)* and *X (China)* [2006] EWCA Civ 1494).
- (2) The proposition in *MA & Others (EU national: self-sufficiency; lawful employment)* [2006] UKAIT 00090 and *ER and Others (EU national; self-sufficiency; illegal employment)* [2006] UKAIT 00096 that even lawful employment cannot create such self-sufficiency, where the parent is on limited leave or temporary admission, must be regarded as doubtful, in the light of *Metock and Others* [2008] EUECJ C-127/08 and *Liu and Ors v SSHD* [2007] EWCA Civ 1275.
- (3) It is, however, part of the binding ratio in *Liu* that lawful employment undertaken by a parent whose leave has been extended under section 3C of the Immigration Act 1971 cannot create self-sufficiency for the "Chen" child."

19. The Upper Tribunal declined to come to any firm conclusion as to whether lawful employment could in certain circumstances give rise to the pre-conditions required to derive a right of residence under UK law. It made the following findings:

“51. It seems to us that the preponderance of argument does not exclude the second position being consistent with either Court of Justice or Court of Appeal authority. However, we do not need in this case to resolve definitively which of the two positions described above is correct. As already explained, even assuming that the second position is the correct one under EU law, the claimants in this case could still not establish their case. Under the second position there remains the question of what type of employment could be considered to demonstrate such self-sufficiency in the Union citizen child. Whilst in our opinion the case law of the Court of Justice and Court of Appeal does not exclude employment on the part of a parent or parents in the host Member State being able to create self-sufficiency for their Union citizen child in some circumstances, it clearly does exclude employment that is illegal employment as well as employment that is lawful purely in the sense that the relevant parent has section 3C leave. That is why the appellants Mrs Wang and Mr and Mrs Ahmed lost in *Liu* and why the claimants cannot succeed in the appeal before us.”

20. In *Adzo Domenyo Alokpa v Ministre du Travail de l'Emploi et de l'Immigration* [2013] EUECJ C-86/12 the Court of Justice applied the test outlined in *Chen*:

“27. ...in the context of a case such as that at issue in the main proceedings, in which a Union citizen was born in the host Member State and had not made use of the right to free movement, the Court has held that the expression ‘have’ sufficient resources in a provision similar to Article 7(1)(b) of Directive 2004/38 must be interpreted as meaning that it suffices that such resources are available to the Union citizens, and that that provision lays down no requirement whatsoever as to their origin, since they could be provided, inter alia, by a national of a non-Member State, the parent of the citizens who are minor children at issue (see, to that effect, concerning European Union law instruments pre-dating that directive, Case C-200/02 *Zhu and Chen* [2004] ECR I-9925, paragraphs 28 and 30).”

### **Rights of European citizen children**

21. In *Ruiz Zambrano v Office national de l'emploi* [2011] EUECJ Case C-34/09 the CJEU considered the circumstances of European citizen children living in their country of nationality (Belgium) whose parents were third country nationals. The court noted that the Citizens’ Directive did not apply to the children because they had not exercised rights of free movement. However, the court observed that Article 20 TFEU conferred the status of citizen of the Union on every national of a Member State. As the court had stated on several occasions, including in *Zhu and Chen*, citizenship of the Union is intended to be the fundamental status of nationals of the Member States. In those circumstances, Article 20 TFEU precluded national measures that have the effect of depriving citizens of the Union of the genuine enjoyment of the substance of the rights conferred by virtue of their status as citizens of the Union. Article 20 precluded a Member State from refusing a residence permit to third country national parents in circumstances where the refusal would lead to a situation where the children would have to accompany their parents. The children would be unable to exercise the substance of the rights conferred on them by virtue of their status as citizens of the Union.
22. In *Alfreso Rendón Marín v Administración del Estado* [2016] EUECJ C-165/14 the CJEU considered a case involving a Colombian national who was the sole carer for two



European citizen children (Spanish and Polish citizens). The applicant was refused a residence card on public policy grounds. The CJEU emphasised that, as Union citizens, the children had the right to move and reside freely within the territory of the European Union and that any limitation on that right fell within the scope of EU law. In so far as Mr Marín's situation fell within the scope of EU law, the assessment of his situation must take account of the right to respect for private and family life, as laid down in Article 7 of the Charter, an article which must be read in conjunction with the obligation to take into consideration the children's best interests, recognised in Article 24(2) of the Charter.

23. In *Chavez Vilchez v Raadvanbestuur van der Sociale Verzekeringsbank & others* [2018] QB 103 the CJEU considered a number of cases involving the proposed removal of third country national parents who were the primary carers of European citizen children, where the other European citizen parent was either absent or played a minimal role in the child's life. The court considered what weight should be given to the best interests of the child and concluded:

- "1. Article 20 TFEU must be interpreted as meaning that for the purposes of assessing whether a child who is a citizen of the European Union would be compelled to leave the territory of the European Union as a whole and thereby deprived of the genuine enjoyment of the substance of the rights conferred on him by that article if the child's third-country national parent were refused a right of residence in the Member State concerned, the fact that the other parent, who is a Union citizen, is actually able and willing to assume sole responsibility for the primary day-to-day care of the child is a relevant factor, but it is not in itself a sufficient ground for a conclusion that there is not, between the third-country national parent and the child, such a relationship of dependency that the child would indeed be so compelled were there to be such a refusal of a right of residence. Such an assessment must take into account, in the best interests of the child concerned, all the specific circumstances, including the age of the child, the child's physical and emotional development, the extent of his emotional ties both to the Union citizen parent and to the third-country national parent, and the risks which separation from the latter might entail for the child's equilibrium.
2. Article 20 TFEU must be interpreted as not precluding a Member State from providing that the right of residence in its territory of a third-country national, who is a parent of a minor child that is a national of that Member State and who is responsible for the primary day-to-day care of that child, is subject to the requirement that the third-country national must provide evidence to prove that a refusal of a right of residence to the third-country national parent would deprive the child of the genuine enjoyment of the substance of the rights pertaining to the child's status as a Union citizen, by obliging the child to leave the territory of the European Union, as a whole. It is however for the competent authorities of the Member State concerned to undertake, on the basis of the evidence provided by the third-country national, the necessary enquiries in order to be able to assess, in the light of all the specific circumstances, whether a refusal would have such consequences."

24. The Court of Appeal in *Patel v SSHD* [2017] EWCA Civ 2028 recently considered the effect of *Chavez-Vilchez* and concluded:

“25. It seems clear therefore that the underlying principle in *Zambrano* is undisturbed by *Chavez-Vilchez*, albeit that in the case of a child dependent on one parent who is a third country national with no right of residence, the State must ensure a careful process of enquiry. However, the third-country national bears the evidential burden of establishing that the child citizen will, in practice, be compelled to leave the EU, unless rights of residence are granted to the (principal) carer parent.”

25. The Home Office Policy Guidance (Version 4.0) says that it was amended to reflect the principles outlined by the CJEU in *Chavez-Vilchez*. The guidance says the following about the best interests of children.

“The duty in section 55 of the Borders, Citizenship and Immigration Act 2009 to have regard to the need to safeguard and promote the welfare of children who are in the UK means that consideration of the child’s best interests is a primary consideration in immigration cases.

You must carefully consider all of the information and evidence provided concerning the best interests of a child in the UK when assessing whether a relevant child would be unable to remain, or to continue to be educated, in the UK, if the applicant left the UK for an indefinite period.”

## **DECISION AND REASONS**

### **Background**

26. The First-tier Tribunal judge accepted a large part of the evidence given by the appellant and her witness. He found Dr [O] to be a credible witness although he did not accept that the evidence showed that the level of support he provided was as high as the appellant claimed. We have been given no reason to doubt the appellant’s general credibility.

27. We are satisfied that we can accept the broad course of events outlined in the appellant’s witness statement. The appellant says that she entered the UK on 01 June 2001 with entry clearance as a visitor that was valid for six months. The appellant overstayed the visa and remained in the UK in the knowledge that she had no permission to do so. No further detail is provided about his period. The appellant says that she travelled to the Republic of Ireland in July 2003, where she gave birth to her daughter in October 2003. She returned to the UK in January 2004. The short length of time that the appellant spend in the Republic of Ireland indicates that the likely purpose of her visit was to give birth there in order to establish citizenship rights for the child.

28. The appellant’s daughter is an Irish citizen and therefore a citizen of the Union. We also take note of the fact that Irish citizens have special status in UK law. Section 50(1) of the British Nationality Act 1981 does not include citizens of the Republic of Ireland in the definition of an “alien”. Irish citizens who are ordinarily resident in the UK are treated as though they have settled status although they can still be deported, removed and excluded from the UK. The Common Travel Area (CTA) (see section 1(3) of the

Immigration Act 1971) provides reciprocal rights for Irish and UK citizens including a right to enter and reside in each state without requiring permission, as well as including the right to work and to access education.

29. We are satisfied that the evidence shows on the balance of probabilities that the appellant and her daughter have been resident in the UK since she returned from Ireland in 2004. The appellant says that she relied on the assistance of her friends, Temitayo and Fatimota [M], who accommodated her and her daughter from January 2004 until September 2015. Mr and Mrs [M] wrote a letter dated 29 March 2015 to confirm that they provided accommodation. They also provided witness statements in February 2014, but did not state how long the appellant had been living with them. However, the appellant has produced a number of pieces of correspondence from the school and the NHS addressed to her at Mr and Mrs [M]'s address. The evidence covers a period from around July 2005 to February 2014. When Mr and Mrs [M]'s letter is also taken into account, we are satisfied that the evidence supports the appellant's claim that she and her daughter lived with Mr and Mrs [M] from 2004 to 2015.
30. The appellant says that Mr and Mrs [M] provided accommodation. Another relative, Olubunmi [O], prepared a witness statement to confirm that she provided financial support to the appellant. The appellant was unable to open a bank account, but since her daughter opened an account, Mrs [O] has transferred money directly into that account. In a letter dated 07 September 2012 Mr [M] confirmed that, before the child had an account, money was transferred into his account. Copies of his bank statements and the account statement in the child's name both show regular money transfers from Mrs [O].
31. A further source of financial support was Dr Enitan [O]. The First-tier Tribunal judge found him to be a credible witness. He attends the same church as the appellant. In his statement he confirmed that he provides financial support to the appellant and her daughter. The bundle contains other letters from friends, largely from her church, who confirm that they have provided financial support when needed.
32. We bear in mind that other friends and relatives did not need to provide support to a high level given the fact that Mr and Mrs [M] were providing food and accommodation. We are satisfied that the evidence shows on the balance of probabilities that the appellant and her daughter have been supported by friends and relatives since their arrival in the UK in 2004 without recourse to the social assistance system. The appellant applied for Child Benefit on the understanding that she was entitled to claim, but when told that she was not, has undertaken to repay the money received, which she continues to do. In repaying the funds the appellant has demonstrated that this was a genuine error on her part.
33. The appellant's first application for a residence card was made on 19 March 2011. In accordance with the respondent's policy, the appellant was issued with a 'Certificate of Application' permitting her to work in the UK pending the outcome of the application. There is no evidence to show a further certificate was issued following the application made on 29 September 2012, but it is reasonable to infer that the respondent would continue to follow the stated policy. Another 'Certificate of Application' was issued on 17 July 2015 after the appellant made a further application

for a residence card, the refusal of which is the subject of this appeal. There is also evidence to show that a further 'Certificate of Application' was issued on 23 January 2017.

34. The evidence indicates that despite being given permission to work, the appellant continued to live with Mr and Mrs [M] until around September 2015. She continued to receive financial support from friends and relatives. The appellant says that she did not start work until 2013. She works for the Christ Apostolic Church as a nursery assistant. The appellant produced a copy of her original contract of employment with the nursery dated 07 March 2013 and a copy of the Disclosure and Barring Service certificate she was required to have to undertake the work. She produced a number of payslips covering a period from 2014 to 2017. The payslips show a modest income of between £900-£1,100 a month from employment. It seems clear from the evidence from friends and relatives that the appellant continued to need some financial support to supplement her income, but by September 2015 she was in a position to live independently from Mr and Mrs [M].
35. We are satisfied that the appellant and her daughter remained in the UK from 2004 to 2015 with the assistance and support of friends and relatives who provided accommodation and financial support. The appellant and her daughter were supported without recourse to employment and without becoming a burden on the social assistance system.
36. However, to be self-sufficient within the meaning of regulation 6 of the EEA Regulations 2006 a person must also have comprehensive sickness insurance. The First-tier Tribunal judge was satisfied that the appellant met the requirements for comprehensive sickness insurance at the date of the hearing. There is no evidence to show that the appellant and her daughter had any form of sickness insurance until 2012. There is evidence to show that the appellant took out a policy from 01 October 2012 to 30 September 2013. The next piece of evidence relating to sickness insurance indicates that a policy was renewed in June 2015, but evidence of a previous policy covering 2014 is missing. There is evidence to show that the appellant renewed the policy and was covered until 13 January 2017.
37. The final issue covered by the evidence is the appellant's efforts to enquire about residency in the Republic of Ireland. She contacted the Irish immigration service on 29 January 2018. In a letter dated 06 February 2018 the immigration service responded by saying that an application would have to be made on the correct form. The appellant made an application. She received the following reply on 28 February 2018:

"Given that you are outside the state, the Minister is not prepared to consider this application. However, we would be prepared to re-visit your case in circumstances where both you and your Irish citizen child are ordinarily resident in this State. Therefore, please inform the Department when you re-enter the State and of your intention to apply for permission to remain based on your parentage of this child."
38. The evidence makes clear that the appellant cannot establish derivative residence rights in the Republic of Ireland without leaving the UK. She would have to become

ordinarily resident in Ireland and would have to show that she met the requirements for a derivative right of residence either as the sole carer of a 'Chen child' or with reference to the principles outlined in *Zambrano*.

### **Best interests of the child**

39. The child is a citizen of the Union who is studying in the UK, who is not a burden on the social assistance system and has comprehensive sickness insurance. The circumstances of the case engage the child's rights of free movement under EU law, which must include consideration of the best interests of the child (Article 24(2) Charter) and her right to private and family life (Article 7 Charter): see *Rendón Marín*.
40. Z is an Irish citizen who has a right to reside in the UK. She is 14 years old and has spent almost all her life in the UK. She was an infant when she entered the UK with her mother in early 2004 and knows no other home. It is reasonable to assume that she is well integrated into British society. No mention is made of her father; it is in her interests to remain in the care of her mother. She also has family friends and relatives in the UK. It is reasonable to assume that Z has established a private life outside the family unit through friendships made at school. She is at an age where she is embarking on her GCSE studies, which will begin to determine the course of her future career. Z wrote a letter to the Upper Tribunal in October 2017, in which she outlines her ambition to become a nurse:

“Dear Judge ... I am pleading that you grant myself and my mum permission to stay in the United Kingdom. Please and please because this means so much to me and my mum also for me to be able to achieve my goal and my dream in becoming a nurse and be able to contribute back to this nation UK. I learnt and benefit from this place and to give back and help humanity. I am currently preparing to do my GCSE in the next year. Also I don't want to lose the life and the relationships my mum and I have built in this nation ... Otherwise I will be devastated and sad. Tomorrow is my birthday I will be happy if you grant my request...”

41. It is clear from this letter that Z's wishes are to remain in the UK. The UK is the country where she has close connections and where she has been brought up. All her friends and family live in the UK. In contrast, there is nothing to suggest that the appellant and her daughter have any meaningful connections to the Republic of Ireland. The best interests of the child are a primary consideration. The best interests of the child point clearly to her remaining in the UK, the only home she has ever known. In view of the child's length of residence and strength of connections to the UK, we conclude that it would be unreasonable to expect her to leave the UK solely to require her mother to attempt to establish derivative residence rights in the Republic of Ireland.

### **Findings on the evidence**

42. We are satisfied that the evidence shows that the appellant and her child were self-sufficient in the sense that they were not a burden on the social assistance system in the UK from 2004 until 2015. During that period, they were living with Mr and Mrs [M] and were given additional financial support from friends and relatives. However, to establish a right of permanent residence the child would have to show that she was

residing in accordance with the EEA Regulations 2006 for a continuous period of five years. One of the requirements to show residence as a self-sufficient person under regulation 6 is that a person must have comprehensive sickness insurance. There is no evidence to show that the appellant obtained comprehensive sickness insurance cover for 2014. Despite her length of residence, the evidence does not show that the child was residing in accordance with the EEA Regulations 2006 for a continuous period of five years to acquire a permanent right of residence.

43. Since 2013 the appellant began to receive an income from employment, albeit that she remained dependent on Mr and Mrs [M] and other friends and relatives for additional support. The appellant was given permission to work because of the residence card application. The Secretary of State's policy is to grant permission to work by issuing a 'Certificate of Application'. At the date of the hearing the appellant is relying on income from employment and still receives some financial support from friends and relatives because her income is not sufficient to meet their living expenses.
44. We are bound to follow the principles outlined in the decisions of the Court of Appeal in *W (China)*, which concluded that the pre-condition of self-sufficiency could not be met by earnings derived from unlawful employment. A Member State is under no obligation to adjust its domestic law to make available to the EU citizen resources that would enable her to fulfil the pre-conditions for self-sufficiency: see *Liu*.
45. The appellant is working lawfully with permission of the Secretary of State, but only as a result of the Secretary of State's policy to grant permission to work pending the outcome of a residence card application. In *Seye* the Upper Tribunal concluded that lawful employment undertaken by a parent while their leave was extended under section 3C of the Immigration Act 1971 could not create the conditions for self-sufficiency under EU law. The Tribunal did not exclude the possibility that in some circumstances lawful employment might be sufficient to demonstrate self-sufficiency but did not outline what those circumstances might be.
46. The Upper Tribunal is required to consider the position at the date of the hearing. The difficulty in which the appellant finds herself is that the income she derives from lawful employment at the current time involves the kind of circularity that the Court of Appeal in *W (China)* and *Liu* found was not sufficient to engage European law. The only reason that she is now less dependent on friends and family for financial support is because the Secretary of State provided the conditions for her to work. At the date of the hearing, that work cannot found the basis of a derivative right of residence if the pre-condition of self-sufficiency would not otherwise be satisfied.
47. It is open to a Member State to apply a more generous policy. In this case, the respondent's policy states that if the pre-condition of self-sufficiency is satisfied before the primary carer started employment in a '*Chen* capacity' then the parent might be able to rely on income derived from that work in a subsequent application for a derivative residence card. However, we note that the policy indicates that discretion will be exercised in cases where the person has already been issued with a derivative residence card and is applying for an extension. The appellant has never been issued with a residence card in a '*Chen* capacity'.

48. We are satisfied that the evidence shows that the appellant met the requirements for a derivative right of residence in 2012. She was dependent upon friends and relatives for support and there is evidence to show that they also had comprehensive sickness insurance at the time. It is unclear why the initial application for a residence card was refused. In light of the findings made by this Tribunal, it is a matter for the Secretary of State to consider whether, given the appellant met the pre-conditions for a derivative residence card in 2012 before she started to work in a 'Chen capacity' in 2013, discretion should be exercised to issue a residence card with reference to the policy. However, the application of the respondent's policy is not a matter that can be determined by the Upper Tribunal within the scope of the only ground of appeal available to the appellant, which is whether the decision breaches her rights under the EU Treaties. On the face of it, the policy represents a permissible extension of EU principles that is separate from rights arising under the EU Treaties.
49. We take into account the fact that derivative rights of residence arise from the underlying rights of citizens of the Union rather than from the wording of the Citizens' Directive. In *Chen*, the child was born in Belfast, but by operation of law, was also a citizen of the Republic of Ireland. The child moved to England with her mother. She did not exercise rights of free movement. The mother fell outside the scope of the Citizens' Directive. The case was considered by reference to rights as a citizen of the Union. Similarly, the children in *Zambrano* had not moved from their country of origin and the case was considered by reference to their rights as citizens of the Union.
50. The Court of Appeal in *Patel* recently found that the principles in *Zambrano* remain the same. To establish a derivative right of residence as the primary carer of a European citizen child, a parent must show that the child would be compelled to leave the area of the EU and therefore lose the benefits deriving from their status as a citizen of the Union. In this case, the child is a citizen of the Republic of Ireland. The appellant has been unable to establish, from her position in the UK, that she would not be able to obtain a derivative right of residence either as a *Chen* parent or on *Zambrano* grounds in the Republic of Ireland. However, it is clear from the correspondence from the Irish immigration authorities that the appellant and her daughter would have to leave the life they have developed in the UK over the past 14 years to establish a derivative right of residence in the Republic of Ireland. In theory, it would be possible for the appellant and her daughter to seek to establish residence rights in the Republic of Ireland. There would be no compulsion to leave the area of the EU so the principles established in *Zambrano* do not apply on the facts of this case.
51. We have not been referred to, and are not aware of, any case based on similar facts heard by the CJEU. The facts in *Rendón Marín* gave rise to the possibility of the family relocating to another EU country, but the court did not give guidance on the issue. Basic principles of EU law can be derived from the decision in *Baumbast*. In that case, as in this, the citizen of the Union did not meet the requirements for residence as a worker. The court considered the applicant's underlying rights as a citizen of the Union and made clear that any limitations and conditions on the rights of a citizen of the Union must still be applied in compliance with the general principles of EU law, and in particular, the principle of proportionality.

52. The best interests of the child are a primary consideration. Section 55 of the Borders, Citizenship and Immigration Act 2009 states that the Secretary of State has a duty to safeguard and promote the welfare of children who are in the UK. We have found that the best interests of the child in this case are to remain in the UK with her mother. Z has lived in the UK for 14 years and is well integrated here. She is about to embark on GCSE courses. She is at an important stage of her education. But for the fact that the Secretary of State granted the appellant permission to work, no doubt she would have remained reliant on friends and family to support her as she had done for many years previously. The appellant and her daughter are not a burden on the social assistance system and have comprehensive sickness insurance.
53. In contrast, there is no evidence to suggest that the family has any connection to the Republic of Ireland save for the fact of the child's nationality. Even if the child would not be compelled to leave the area of the EU, we conclude that it would be disproportionate to expect her to leave the UK, which she would be required to do if her mother had to return to Ireland in order to establish a derivative right to reside in the EU. As an Irish citizen the child has an additional right to reside under UK law. After having considered the circumstances of this case in the round, we conclude that it would be disproportionate to expect the child to leave the UK to require the appellant to seek to establish a derivative right of residence in the Republic of Ireland. To enable the child to realise her rights as a citizen of the Union, the appellant derives a right of residence under European law as the child's primary carer.
54. For the reasons given above we find that the decision to refuse to issue a residence card breaches the appellant's rights under the EU Treaties in respect of her entry to or residence in the United Kingdom.

### **DECISION**

The appeal is ALLOWED

Signed  Date 25 July 2018

Upper Tribunal Judge Canavan



[ANNEX]



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: EA/02804/2015

THE IMMIGRATION ACTS

Heard at Field House  
On 18 October 2017

Decision Promulgated

.....

Before

UPPER TRIBUNAL JUDGE CANAVAN

Between

MODUPE [A]

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

**Representation:**

For the appellant:

In person

For the respondent:

Mr E. Tufan, Senior Home Office Presenting Officer

**DECISION AND REASONS**

1. Ms [A] appealed against the Secretary of State's decision to refuse to issue a residence card recognising a derived right of residence as the primary carer a self-sufficient EEA national child.

2. The evidence does not set out a clear picture of Ms [A]'s immigration history. The background outlined by the Secretary of State in her bundle suggests that Ms [A] claimed that she entered the UK on 31 May 2001, but there was no evidence of legal entry. It seems clear that Ms [A] must have lived in Ireland at some point because her daughter's passport shows that she was born in Ireland on 19 October 2003. Part C of the current application form indicates that it is likely that Ms [A] and her daughter entered the UK on 11 July 2010.
3. The Secretary of State records that an application for leave to remain was refused on 19 July 2011, but there is no further information about the nature of the application or the reasons for refusal. Ms [A] applied for a residence card recognising a derived right of residence on 29 September 2012. The application was refused on 25 September 2013. Ms [A] made a further application for a residence card recognising a derived right of residence on 19 June 2015.
4. The Secretary of State refused the application in a decision dated 12 October 2015. She was not satisfied that Ms [A] met the requirements of The Immigration (European Economic Area) Regulations 2006 ("the EEA Regulations 2006"). The Secretary of State was not satisfied that Mrs [A] and her child had an adequate level of sickness insurance or that the child was 'self-sufficient' for the purpose of the regulations.
5. First-tier Tribunal Judge Widdup ("the judge") dismissed the appeal in a decision promulgated on 06 February 2017. The judge was satisfied that Ms [A] had produced sufficient evidence to show that she had comprehensive sickness insurance for the purpose of regulation 1(c)(ii). The judge assessed the evidence and made findings about the level of income Ms [A] derived from lawful employment in the UK (permission to work was only granted by way of a Certificate of Application because she had made an application for an EEA residence card) and from friends who also provided financial support. The judge assessed her monthly income from employment and friends at about £1,130 and concluded that it was insufficient for the purpose of the regulations. The judge noted that the decision letter did not outline any risk of removal that might require Ms [A] and her child to leave the UK.
6. With the assistance of her previous legal representative, Ms [A] appealed on the ground that the judge erred in failing to assess whether the Ms [A]'s income was sufficient for the purpose of the regulations with reference to relevant income support levels.

### **Legal Framework**

7. Article 7 of the Directive 2004/38/EC states:

“(1) All Union citizens shall have the right of residence on the territory of another Member State for a period of longer than three months if they:

- (a) are workers or self-employed persons in the host Member State; or
- (b) have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State during their period of residence and have comprehensive sickness insurance cover in the host Member State; or

- (c) – are enrolled at a private or public establishment, accredited or financed by the host Member State on the basis of its legislation or administrative practice, for the principal purpose of following a course of study, including vocational training; and
  - have comprehensive sickness insurance cover in the host Member State and assure the relevant national authority, by means of a declaration or by such equivalent means as they may choose, that they have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State during their period of residence; or
- (d) are family members accompanying or joining a Union citizen who satisfies the conditions referred to in points (a), (b) or (c).

(2) The right of residence provided for in paragraph 1 shall extend to family members who are not nationals of a Member State, accompanying or joining the Union citizen in the host Member State, provided that such Union citizen satisfies the conditions referred to in paragraph 1(a), (b) or (c)."

8. Regulation 15A(2) of EEA Regulations 2006 sets out the requirements to show a derived right of residence as the primary carer of a self-sufficient child:

- (1) A person ("P") who is not an exempt person and who satisfies the criteria in paragraph (2), (3), (4), (4A) or (5) of this regulation is entitled to a derivative right to reside in the United Kingdom for as long as P satisfies the relevant criteria.
- (2) [A person] satisfies the criteria in this paragraph if –
  - (a) P is the primary carer of an EEA national ("the relevant EEA national"; and
  - (b) the relevant EEA national –
    - (i) is under the age of 18;
    - (ii) is residing in the United Kingdom as a self-sufficient person;
    - (iii) would be unable to remain in the United Kingdom if P were required to leave.

9. Regulation 4 defines a "self-sufficient person":

- (1)(c) "self-sufficient person" means a person who has –
  - (i) sufficient resources not to become a burden on the social assistance system of the United Kingdom during his period of residence; and
  - (ii) comprehensive sickness insurance cover in the United Kingdom;

...

- (4) For the purposes of paragraphs (1)(c) and (d) and paragraphs (2) the resources of the person concerned and, where applicable, any family members, are to be regarded as sufficient if –

- (a) they exceed the maximum level of resources which a United Kingdom national British citizen and his family members may possess if he is to become eligible for social assistance under the United Kingdom benefit system; or
  - (b) paragraph (a) does not apply but, taking into account the personal situation of the person concerned and, where applicable, any family members, it appears to the decision maker that the resources of the person or persons concerned should be regarded as sufficient.
- (5) For the purpose of regulation 15A(2) references in this regulation to “family members” includes a “primary carer” as defined in regulation 15A(7).
10. These provisions were included in the EEA Regulations 2006 to reflect the decision of the Court of Justice of the European Union (CJEU) in *Zhu and Chen* [2004] ECR I-9925. The Immigration (European Economic Area) Regulations 2016 ("the EEA Regulations 2016") continue to provide for derived rights of residence as the primary carer of a self-sufficient child. The current Home Office Policy Guidance (Free Movement Rights: derivative rights of residence – Version 3.0. 11 April 2017) outlines the policy regarding assessment of the income from the primary carer:
- “A child may show that they are self-sufficient by relying upon the income of their primary carer. However, any work undertaken in the UK will only be considered acceptable where this is lawful employment. For example, if the primary carer currently has leave to remain under another part of the Immigration Rules which entitles them to work, they can use any income from those earnings to show they are self-sufficient.
- Before 16 July 2012, when *Chen* was given effect under the Immigration (European Economic Area) Regulations 2006 (the 2006 regulations), paragraph 257C of the Immigration Rules did not grant primary carers of EEA self-sufficient children the right to work.
- Since 16 July 2012, the 2006 regulations (as amended) and now the 2016 regulations, enable the primary carer with a derived right of residence to work lawfully in the UK regardless of whether a document has been issued to them in that capacity. This means there may be cases where the primary carer seeks to rely on this work to meet the self-sufficiency requirement when applying for a document. You must, therefore, consider whether the EEA national child was self-sufficient before the primary carer started employment in a *Chen* capacity. This is because the EEA national child must be self-sufficient first in order for the primary carer to derive a right of residence, and so be able to work lawfully in the UK.
11. In *Liu v SSHD* [2007] EWCA 1275 the Court of Appeal summarised the findings made by an earlier constitution of the court in *W (China) and X (China)* [2006] EWCA Civ 1494 in interpreting the relevant provisions of European law [12].
- “i) Applying paragraph 45 of *Chen*, the right of residence of a minor could only be effectively asserted with the presence and support of a carer or guardian,

and that, if the requirements of the Directives are fulfilled, creates a right for the parent to reside with the child, (W (China) [6]);

- ii) All of the minor EU citizen and his non-EU citizen carers have to fulfil the Directive requirements of (a) sickness insurance; (b) sufficiency of means: (W (China) [8]);
- iii) Those conditions are pre-conditions to the existence of the article 18 right in any given case, and thus the right does not exist until those conditions are fulfilled: (W (China) [16]);
- iv) The pre-condition of sufficiency of means cannot be fulfilled by funds derived from employment that is precarious because it is unlawful: (W (China) [14]);
- v) The member state is under no obligation to adjust its domestic law in order to make available to the EU citizen resources that will enable him to fulfil the pre-condition to the existence of the Article 18 right: (W (China) [16])."

12. Lord Justice Buxton went on to consider whether the circumstances in the case of *Liu* could be distinguished from the case of *W (China)*. In *W (China)* the appellants obtained the resources to support the children by working illegally. In *Liu* the appellants relied on the fact that they had been given permission to work, which was only extant because of the ongoing proceedings. Lord Justice Buxton made the following findings:

"20. The third submission affects all of the appellants, but it is of particular relevance to the Mouloungui appeal: which because of the continual unlawfulness of the presence in the United Kingdom of Mr Mouloungui would fail in any event if W (China) were applied to it. This submission was that the court should indeed look to the future, during the period of long-term residence, and ask whether, if granted permission to remain on Article 18 grounds, the adult claiming to provide the resources would indeed be able to do so, by taking employment if so permitted. The past experience was relevant to that question. Wang and Mr and Mrs Ahmed continue in their present employment; and Mr Mouloungui, although currently forbidden to work, had a "job offer". Permission to remain must therefore be provided in order to enable a parent to fulfil the resources requirement of the Directive, and thus make a reality of the child's right of residence as an EU citizen.

21. This approach fails for the reasons that have already been set out. By a combination of Article 18 read with the requirements of the Directives, the right to reside only exists once the requirements of the directives are fulfilled: see paragraph 12(iii) above. The member state therefore is not obliged to adjust its domestic law to create for the EU citizen the resources that he needs in order to create his right to reside: see sub-paragraph 12(v) above. In the present cases, Mr Mouloungui as a failed asylum seeker; and Ms Wang and Mr and Mrs Ahmed as overstayers; are forbidden to work save for the quirk provided by their participation in these proceedings; and there is no reason at all to think that that position will change. But the present applications demand that the United Kingdom creates for them a right to work outside the normal rules in order to provide resources for the respective children.

22. To refuse to take that course, as the Court of Appeal refused to do in W (China), is not in any way inconsistent with Chen. In that case Mrs Chen's resources were proved, extant, and not in any way dependent on her taking

employment. The case said absolutely nothing about conferring any rights on the parent in order to enable her to *create* the required resources; and I venture to think that the ECJ would have been extremely surprised if told that it had opened the door to any such obligation. Nor is it right to argue that to prevent the adults from working renders the children's EU rights meaningless. The EU right is not unlimited, but is subject to the conditions contained in the Directives. Those conditions include the resources condition, which was fulfilled in Chen, but which is not fulfilled in the particular cases such as the present.

23. I therefore conclude that there is no obligation on the member state to adjust its laws, whether its immigration law or any other part of the national legal order, to enable accompanying adults to work in order to provide resources for an EU citizen wishing to reside in that member state. All of the appeals fail on that point."

13. In *Seye (Chen children; employment)* [2013] UKUT 00178 the Upper Tribunal conducted a detailed analysis of the legal framework, including the decisions in *W (China)* and *Liu*, and outlined the following conclusions in the headnote:

- (1) It is clear that income from illegal employment in the host Member State on the part of a parent of a "Chen" child (Case c-200/02 *Chen* [2004] ECR I-9925) cannot create self-sufficiency for that child (*W (China)* and *X (China)* [2006] EWCA Civ 1494).
- (2) The proposition in *MA & Others (EU national: self-sufficiency; lawful employment)* [2006] UKAIT 00090 and *ER and Others (EU national; self-sufficiency; illegal employment)* [2006] UKAIT 00096 that even lawful employment cannot create such self-sufficiency, where the parent is on limited leave or temporary admission, must be regarded as doubtful, in the light of *Metock and Others* [2008] EUECJ C-127/08 and *Liu and Ors v SSHD* [2007] EWCA Civ 1275.
- (3) It is, however, part of the binding ratio in *Liu* that lawful employment undertaken by a parent whose leave has been extended under section 3C of the Immigration Act 1971 cannot create self-sufficiency for the "Chen" child.

14. The Upper Tribunal declined to come to any firm conclusion as to whether lawful employment could in certain circumstances give rise to the pre-conditions required to derive a right of residence under UK law. It made the following findings:

"51. It seems to us that the preponderance of argument does not exclude the second position being consistent with either Court of Justice or Court of Appeal authority. However, we do not need in this case to resolve definitively which of the two positions described above is correct. As already explained, even assuming that the second position is the correct one under EU law, the claimants in this case could still not establish their case. Under the second position there remains the question of what type of employment could be considered to demonstrate such self-sufficiency in the Union citizen child. Whilst in our opinion the case law of the Court of Justice and Court of Appeal does not exclude employment on the part of a parent or parents in the host Member State being able to create self-sufficiency for their Union citizen child in some circumstances, it clearly does exclude employment that is illegal employment as well as employment that is lawful purely in the sense that the relevant parent has section 3C leave. That is why the appellants Mrs Wang and Mr and Mrs Ahmed lost in Liu and why the claimants cannot succeed in the appeal before us."

15. In *Adzo Domenyo Alokpa v Ministre du Travail de l'Emploi et de l'Immigration* [2013] EUECJ C-86/12 the court applied the test outlined in *Chen*:

“27. ... in the context of a case such as that at issue in the main proceedings, in which a Union citizen was born in the host Member State and had not made use of the right to free movement, the Court has held that the expression ‘have’ sufficient resources in a provision similar to Article 7(1)(b) of Directive 2004/38 must be interpreted as meaning that it suffices that such resources are available to the Union citizens, and that that provision lays down no requirement whatsoever as to their origin, since they could be provided, inter alia, by a national of a non-Member State, the parent of the citizens who are minor children at issue (see, to that effect, concerning European Union law instruments pre-dating that directive, Case C-200/02 *Zhu and Chen* [2004] ECR I-9925, paragraphs 28 and 30).”

### Decision and reasons

16. At paragraph 20 of the decision the judge recorded that he asked the Home Office Presenting Officer “...how I was to assess whether a particular figure was sufficient.” This comment appears to indicate that the judge was unsure how to assess whether the child was a “self-sufficient person” for the purpose of the regulations. The test is set out in regulation 4(4). The judge was required to consider whether the level of income was sufficient with reference to whether (i) “they exceed the maximum level of resources which a United Kingdom national British citizen and his family members may possess if he is to become eligible for social assistance under the United Kingdom benefit system”; or (ii) “taking into account the personal situation of the person concerned and, where applicable, any family members, it appears to the decision maker that the resources of the person or persons concerned should be regarded as sufficient.” It was at least arguable that the level of monthly income identified by the judge might exceed the minimum levels for social assistance and/or that the evidence showed that Ms [A] and her daughter were in fact able to support themselves adequately without recourse to the social assistance system. The judge’s failure to make findings within the relevant legal framework amounts to an error of law.
17. On behalf of the Secretary of State Mr Tufan argued that the error of law was not material because the appeal would have been dismissed in any event because Ms [A]’s income from employment should not have been taken into account (in light of what was said in *W (China)* and *Liu*).
18. I see the force of the argument, but I am satisfied that there are relevant issues of European law that still need to be determined. Given that they involve the fundamental rights of a European citizen it is necessary to set aside the First-tier Tribunal decision in so far as it relates to the issues of self-sufficiency (the finding relating to comprehensive sickness insurance is sustainable). The Upper Tribunal will set down a new hearing date to remake the decision based on any further evidence filed by the parties.
19. I am conscious of the fact that Ms [A] attended the hearing without a legal representative so I will set out the legal issues that may need to be determined at the resumed hearing:
  - (i) *Meaning of “self-sufficient”* - The legal framework outlined above is likely to disclose the answer, but it will be necessary to determine whether Ms [A] can rely on income from lawful employment, which was only granted by way of a

Certificate of Application while the application for a residence card is being decided.

- (ii) *Home Office Policy Guidance* - Recital (29) of Directive 2004/38/EC states that nothing in the Directive shall affect more favourable national provisions. The Secretary of State's policy, as outlined above, on the face of it, would appear to take into account income derived from lawful employment granted by way of a Certificate of Application as long as there is evidence to show that the child was self-sufficient within the meaning of the regulations at the date of the application. Further arguments as to the underlying rationale and the extent and nature of the policy will assist the Tribunal.
- (iii) '*Zambrano*' issues - Although the judge thought that there was no immediate risk of removal the decision letter made clear that action to enforce Ms [A]'s removal may follow. No consideration has been given to other aspects of European law, including whether the effect of removal in consequence of the decision would force Ms [A] to leave the area of the European Union with an EEA national child. The relevant legal issues were outlined by the CJEU in *Ruiz Zambrano* [2011] EUECJ C-34/09. The question is whether, if Ms [A] does not have a derived right of residence in the UK, she can return to Ireland and establish a derived right of residence there. Although the decision letter stated that further submissions would be considered, including any human rights issues, it is appropriate for the Tribunal to consider any relevant issues of European law as part of this appeal including the best interests of the child.

## DIRECTIONS

20. The resumed hearing shall be listed on the first available date **after three months**.

### *The appellant*

- 21. Ms [A] should attempt to obtain as much evidence as she can regarding the issues outlined below. Any further evidence should be served on the Upper Tribunal (Field House, 15 Breems Buildings, London EC4A 1DZ) and the Specialist Appeals Team (Home Office Presenting Officers Unit, 5<sup>th</sup> Floor, Fleetbank House, 2-6 Salisbury Square, London EC4Y 8JX) **at least three weeks** before the next hearing.
  - (i) A supplementary witness statement outlining in as much detail as possible her circumstances before the Home Office granted permission to work, detailing her full immigration history, where she was staying, whether she was reliant on friends or family members for support, and if so, to what level and extent.
  - (ii) Any evidence to support what is said in the witness statement and any up to date evidence of current levels of income and support.
  - (iii) In relation to the third issue outlined above, Ms [A] may want to take steps to contact the Irish authorities to find out whether it would be possible for her to derive a right of residence in Ireland with her daughter and to document any response in writing.
- 22. If Ms [A] is able to instruct a legal representative (perhaps with the assistance of her supportive friends) it is likely to assist her and the Upper Tribunal given the complex



issues of European law involved. If she is not in a position to do so she might consider approaching the Bar Pro Bono Unit. In any event, the Upper Tribunal has a duty to assist Ms [A] to understand the proceedings and the relevant law.

*The respondent*

23. The Secretary of State shall file a skeleton argument dealing with the legal issues outlined above, and in particular, the second issue relating to the policy guidance, **at least seven days** before the next hearing.

### **DECISION**

The First-tier Tribunal decision involved the making of an error on a point of law

The decision is set aside and the appeal will be listed for a resumed hearing

Signed  Date 30 November 2017

Upper Tribunal Judge Canavan