High Court of Ireland Decisions

Judgment

Title:	AGA & anor -v- The Minister for Justice, Equality & Law Reform.
Neutral Citation:	[2015] IEHC 469
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THE HIGH COURT

JUDICIAL REVIEW

[2014 No. 477 J.R.]

BETWEEN

A.G.A. AND B.A. (A MINOR SUING BY HER MOTHER AND NEXT FRIEND A.G.A.)
APPLICANTS

AND

THE MINISTER FOR JUSTICE, EQUALITY AND DEFENCE

RESPONDENT

JUDGMENT of Ms. Justice Stewart delivered on the 16th day of July, 2015

1. This is a hearing for judicial review seeking orders of *certiorari* to quash the decision of the first named respondent dated the 8th July, 2014, whereby she refused the first named applicant's application for residency. The applicants further seek a declaration by way of an application for judicial review that the second named applicant is entitled to have her mother, the first named applicant, reside in the State without restriction pursuant to European law.

BACKGROUND

2. The first named applicant is a Nigerian national who entered the State on the 28th September, 2007, on foot of a visitor visa. She subsequently travelled to the United Kingdom where she entered a relationship with Mr. A.F.A. She subsequently gave birth to their daughter, the second named applicant, on the 8th July, 2011. The second named applicant was born in the United Kingdom and is a British citizen. The first named applicant subsequently ceased her relationship with the second named applicant's father and they are no longer in contact.

3. The first named applicant returned to Ireland in 2012 together with the second named applicant and began a relationship with a Mr. A.A., an Irish national. The couple do not reside together but state that they plan to live together and ultimately marry. Mr. A.A. is an Irish citizen and works as a carer in a residential respite day care centre in Dublin. He pays the second named applicant's day care costs and provides the first named applicant with €50 per week, occasionally increasing the amount to €75 per week dependent on her needs. Mr. A.A. swore an affidavit on the 25th July, 2014, undertaking to continue to provide for the applicants.

4. The first named applicant submitted an application for residency on the 24th January, 2014, based, *inter alia*, on the decision of the Court of Justice of the European Union (CJEU) in C-34/09 *Zambrano*. By letter dated the 26th July, 2013, on behalf of the first named respondent, an official of the Irish Naturalisation and Immigration Services (INIS) provided reasons by way of a letter to the applicant's solicitors, for the refusal of the aforementioned application, as follows and as is exhibited at p. 162 of the booklet of pleadings:

> "The Minister for Justice and Equality corresponded with your office on the 1st March 2013 informing [you] the Zambrano ruling only applies to non-EEA parents of Irish born citizen children. Given that Ms A[…]'s child does not hold Irish citizenship, the Zambrano ruling would have no effect on her current immigration status or residency rights in the State.
>
> On the 2nd May, 2013 Ms A[…] was informed that she entered and remained in the State without the permission of the Minister for Justice and Equality, the Minister was proposing to make a deportation order in respect of her under the power given to him by section 3 of the Immigration Act, 1999 (as amended).
>
> Please advise your client that she may make written representations to the Minister, setting out reasons as to why a deportation order should not be made against her. Your client is further required to inform the Minister of her immigration history in this State, including how she entered the State without the necessary visa."

IMPUGNED DECISION

5. By letter dated the 11th December, 2013, the first named applicant applied for residency based upon, *inter alia*, article 20 of the Treaty on the Functioning of the European Union and the decision of the CJEU in *Zhu and Chen* case C-200/02 [2004] ECR 1-9925. That application, as supplemented by further documentation, made representations and presented evidence as follows:

- The second named applicant in these set of proceedings is a national of the United Kingdom residing in this State.

- The first named applicant is the primary parental carer of the second named applicant.

- The applicants are residing with a named person.

- Both applicants have comprehensive private sickness insurance cover.

- The first named applicant's partner, an Irish national, has sufficient resources to provide for the applicants and he makes financial provision for them.

6. The applicants also base their application on the fact that, in accordance with UK Border Agency rules, the first named applicant has no automatic entitlement to enter and reside in the UK. The Court notes that while this statement was made in the application and was repeated before this Court, no evidence has been adduced to explain and/or substantiate this claim.

7. By letter dated the 8th July, 2014, from the EU Treaty Rights Section of the Irish Naturalisation and Immigration Service, the first named applicant was notified of a negative decision on her application for residency. Therein, and at p.112 of the booklet furnished to this Court, the following reasons were provided to the applicant:

> "There is no evidence to show that you, the applicant, has sufficient resources to support yourself and your daughter, B[…]A[…], for the duration of your stay in the State. You have not submitted any bank statements in your name or any evidence that you are in a position to support both you and your daughter without becoming reliant on public funds.
>
> It is noted that you state that you and your daughter are supported by Mr. A[…], [address given] and submitted details of his employment and bank statements in his name however this would not be deemed evidence as residing with sufficient resources.
>
> Accordingly, the Minister is not satisfied that you have submitted satisfactory evidence of residing with sufficient resources in the State."

8. The respondent further issued the first named applicant with the proposal to deport her from the State.

LEAVE

9. By order of the High Court dated the 1st August, 2014, the applicants were granted leave to challenge the decision of the respondent exhibited at p.117-119 of the booklet furnished to this Court.

APPLICANTS' SUBMISSIONS

10. Counsel appearing on behalf of the applicants, Ms. Rosario Boyle S.C., submitted that it is well established that once an EU citizen can provide evidence that she has medical insurance and sufficient resources so that she will not become a burden upon the State,

then her primary carer should be given a residence card. The applicants submitted that the source of the resources for the minor EU citizen is immaterial, as long as they are sufficient to ensure that she does not become a burden upon the State.

11. Counsel relied on article 7(1)(b) Council Directive 2004/38/EC of 29th April, 2004, on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States (L229/3529.6.2004) which states:

> "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."

12. Counsel provided the Court with a summary of the citizenship provisions of the Treaty of the European Union (article 9) as well as the Treaty on the Functioning of the European Union (articles 20, 21, 22, 23, 24, 25). The applicants contended that the first named applicant has a derivative treaty right to reside in the State based upon the right of her union citizen child, who is a dependant, particularly, *inter alia*, because of the *Zhu and Chen* case (supra).

13. Counsel further relied on the decision of Barr J. in *O.A. & anor. v. Minister for Justice Equality and Defence* [2014] IEHC 384, wherein at paras. 81 to 84 he states as follows:

> "81. Having carefully considered the parties' submissions, and the relevant jurisprudence, this court is not convinced that the respondent's interpretation is correct. First, the court notes that in *Alokpa* the CJEU, at para. 27, reiterated its dictum, as set out in Chen, that *'the expression 'have' sufficient resources… 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.'* At no point did the CJEU attempt to limit this broad interpretation by, for example, holding that the resources had to be extant at the time the application was made. On the contrary, the *Chen* decision expressly states that a broad interpretation is to be preferred when interpreting provisions relating to the free movement of persons.
>
> 82. Secondly, the stated objective of Article 7(1)(b) of Directive 2004/38 is to prevent EU migrants from becoming a burden on the social assistance system of the host Member State during their period of residence. If an applicant can satisfy the sufficient resources requirement with income that will be derived from employment, such a person could not be said to be a burden on the host member state. I therefore consider that the imposition of a condition as to the origin of the resources, such as that as posited by the respondent - namely that they be extant at the time of the application - is not necessary for the attainment of the objective pursued, i.e. the protection of the public finances of the Member States. Moreover, it seems to me that there would be very few cases where, based on wealth acquired and in the possession of the primary carer at the time that the application is first made, and independently of the primary carer's earnings, a minor EU citizen would be able to show 'sufficient resources'. I am, therefore, of the view that the restrictive interpretation urged on this court by the

respondent would constitute a disproportionate interference with the exercise of the fundamental right of freedom of movement, which is a central tenet of EU law enshrined in Article 21 TFEU, and would be inconsistent with the CJEU's preference for a broad interpretation of the freedom of movement provisions, as clearly expressed in *Chen*.

83. For these reasons, and bearing in mind the CJEU's ruling that Directive 2004/38 'lays down no requirement whatsoever' as to the origin of the resources, I have concluded that the following extract from the Advocate General's opinion in Alokpa is an accurate statement of EU law:

> *'28. …the condition of 'sufficient resources' is capable of being satisfied by the definite prospect of future resources which would stem from a job offer to which a Union citizen or a member of his family responded successfully in another Member State. A different interpretation would deprive the freedom of movement enjoyed by citizens of the Union of its practical effect, whereas the objective of Directive 2004/38 is precisely to strengthen the right to freedom of movement.*
>
> *29. In addition, with regard to the amount of sufficient resources, Article 8(4) of Directive 2004/38 requires Member States to take into account the personal situation of the person concerned. Accordingly, when taking into account the specific situation of a person, the fact that he has been offered a job from which he will be able to derive income enabling him to satisfy the condition laid down in Article 7(1)(b) of Directive 2004/38 cannot be overlooked. Any interpretation to the contrary would lead to the individual situations of Union citizens and their family members being treated unfairly, thus rendering Article 8(4) of that directive meaningless.'*

84. Accordingly, I am of opinion that implicit in the so-called Chen right is the right of the primary carer to work in the host country. Furthermore, it seems to me that the Minister must have regard to the definite prospect of future resources, such as those stemming from an offer of employment, which an applicant has accepted, when considering whether the requirements of Article 7(1)(b) of Directive 2004/38/EC are met."

14. Although the situation in the preceding case is not factually the same as the applicants' case, counsel contended that it supports the applicants' position that a wide interpretation should be taken by the minister when looking at the source of the resources available. In this regard, the applicants relied further on the judgment of CJEU in *Commission v. Belgium* Case C-408/03 [2006] ECR I-2647. In light of the foregoing, the applicants argued that the minister erred in law in her decision that the source of funds could not come from a partner of the EU citizen child's mother.

15. The applicants submitted that if the minister was, in fact, satisfied with the source of the resources but not with the sufficiency in failing to make that clear the minister failed in her obligations to give reasons for the refusal of the residence card. The reason should have been made explicit so that the first named applicant could deal with whatever those issues were: failing to afford her that opportunity is a breach of fair procedures as per the Supreme Court decisions in *Mallak v. Minister for Justice, Equality and Law Reform* [2012] IESC 59 and *Meadows v. Minister for Justice, Equality and Law Reform* [2010] IESC 3, according to the applicants. The applicants further relied on the decision of McDermott J. in *T.A.R. & I.H. v. Minister for Justice, Equality and Defence* [2014] IEHC 385, where at

para. 25 he stated as follows:

> "It is well established that the reasons given for a particular decision must be clear and cogent. They should give the applicants such information as is necessary to enable them to consider whether they have a reasonable chance of appeal or judicially reviewing the decision. The decisions should enable the applicants to arm themselves for such a hearing or review and understand whether the decision-maker had directed his mind adequately to the issue which he had to consider or was obliged to consider, and also to enable the courts to review the decision. The respondent repeatedly emphasised that it was open to the applicants to reapply with additional evidence for a visa. However, in order to know how they might address any suggested deficiencies in their proofs, they would need to know how they fell short of establishing their case if they were to have any prospect of future success. In order to submit a further application, a more detailed explanation of the evidential shortfall would be required if the applicants were to have any prospect of establishing an intention to return home to the standard of probability required by the respondent. In that regard, the court should be circumspect about allowing material gaps in the decision to be filled by evidence or the submissions of counsel made on judicial review (see *Mulholland v. An Bord Pleanála (No.2)* [2006] 1 I.R. 453 and *R. v. Westminster City Council* [1996] 2 All. E.R. 302 per Hutchinson L.J. at pp. 309 and 312)."

16. The applicants submitted that because the first named applicant has no automatic rights of residency in the UK, and should she not be permitted to reside in Ireland with their daughter, it could result in the UK citizen child having to leave the territory of the EU. Counsel submits that the CJEU has made it clear that these are matters that should be considered by the host member state before refusing a residence card in this instance. The applicants relied on the case of *Alokpa* C-86/12 [2013] ECR 1-000. Therefore, the applicants contended, the decision is rendered unlawful because the minister failed to take these matters into consideration when deciding the applicants' case.

RESPONDENT'S SUBMISSIONS

17. Counsel for the respondent, Mr. Tim O'Connor B.L., submitted that the decision is not grounded in one reason; two reasons, counsel argued, are given in the decision, namely:

> (i). The first named applicant does not have sufficient resources in her own right to provide for herself and her daughter for the duration of her stay in the State; and
>
> (ii). The third party documents are not sufficient evidence of having sufficient resources.

18. The respondent argued that the test with regard to resources is a prospective test: one cannot depend on mathematical certainty in this regard. The issue is not the source of the funds but rather the reasonable likelihood that these funds will be available to the applicants in the future. The respondent argued that the first named applicant failed to submit adequate evidence to show that these resources would be sufficient in the future, and this is the correct test that should be applied in these cases.

19. The respondent submitted that no doubt has been expressed by the minister as to the fact that a relationship exists between the first named applicant and Mr. A.A. but that the issue lies in the fact that the situation between the couple lacks any certainty. They live apart and there is no evidence that he is directly supporting the applicants. The documentary evidence furnished by Mr. A.A. does not show that the applicants have been directly supported by him. This, the respondent contended, is not enough for the minister

to rely upon and it is within the minister's discretion to require that evidence be submitted of the support beyond the statement of Mr. A.A. that he would continue to support the applicants into the future. The respondent submitted that the issues to be considered by the minister are amount, availability and adequacy of the resources into the future and the first named applicant failed to provide adequate evidence to satisfy this.

THE LAW

20. Article 9 of the Treaty on the European Union provides as follows:

> "In all its activities, the Union shall observe the principle of the equality of its citizens, who shall receive equal attention from its institutions, bodies, offices and agencies. Every national of a Member State shall be a citizen of the Union. Citizenship of the Union shall be additional to national citizenship and shall not replace it."

21. The Treaty on the Functioning of the European Union (TFEU) , provides, *inter alia*, as follows:

> "Article 20
>
> (ex Article 17 TEC)
>
> 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;
>
> b) the right to vote and to stand as candidates in elections to the European Parliament and in municipal elections in their Member State of residence, under the same conditions as nationals of that State;
>
> c) the right to enjoy, in the territory of a third country in which the Member State of which they are nationals is not represented, the protection of the diplomatic and consular authorities of any Member State on the same conditions as the nationals of that State;
>
> d) the right to petition the European Parliament, to apply to the European Ombudsman, and to address the institutions and advisory bodies of the Union in any of the Treaty languages and to obtain a reply in the same language.
>
> These rights shall be exercised in accordance with the conditions and limits defined by the Treaties and by the measures adopted thereunder."

22. Article 21 (formerly Article 18 of the TEC provides as follows):

> "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.

2. If action by the Union should prove necessary to attain this objective and the Treaties have not provided the necessary powers, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may adopt provisions with a view to facilitating the exercise of the rights referred to in paragraph 1.

3. For the same purposes as those referred to in paragraph 1 and if the Treaties have not provided the necessary powers, the Council, acting in accordance with a special legislative procedure, may adopt measures concerning social security or social protection. The Council shall act unanimously after consulting the European Parliament."

23. Council Directive 90/364 and Article 1 thereof provides as follows:

"1. Member States shall grant the right of residence to nationals of Member States who do not enjoy this right under other provisions of Community law and to members of their families as defined in paragraph 2, provided that they themselves and the members of their families are covered by sickness insurance in respect of all risks in the host Member State and have sufficient resources to avoid becoming a burden on the social assistance system of the host Member State during their period of residence.

The resources referred to in the first subparagraph shall be deemed sufficient where they are higher than the level of resources below which the host Member State may grant social assistance to its nationals, taking into account the personal circumstances of the applicant and, where appropriate, the personal circumstances of persons admitted pursuant to paragraph 2."

Where the second subparagraph cannot be applied in a Member State, the resources of the applicant shall be deemed sufficient if they are higher than the level of the minimum social security pension paid by the host Member State.

2. The following shall, irrespective of their nationality, have the right to install themselves in another Member State with the holder of the right of residence:

(a) his or her spouse and their descendants who are dependants;

(b) dependent relatives in the ascending line of the holder of the right of residence and his or her spouse."

24. Council Directive 90/364 was repealed by Council Directive 2004/38/EC dated the 29th April, 2004 and provides as follows:

"(1) Citizenship of the Union confers on every citizen of the Union a primary and individual right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in the Treaty and to the measures adopted to give it effect.

(2) The free movement of persons constitutes one of the fundamental freedoms of the internal market, which comprises an area without internal frontiers, in which freedom is ensured in accordance with the provisions of

the Treaty.

(3) Union citizenship should be the fundamental status of nationals of the Member States when they exercise their right of free movement and residence. It is therefore necessary to codify and review the existing Community instruments dealing separately with workers, self-employed persons, as well as students and other inactive persons in order to simplify and strengthen the right of free movement and residence of all Union citizens.

(4) With a view to remedying this sector-by-sector, piecemeal approach to the right of free movement and residence and facilitating the exercise of this right, there needs to be a single legislative act to amend Council Regulation (EEC) No 1612/68 of 15 October 1968 on freedom of movement for workers within the Community, and to repeal the following acts: Council Directive 68/360/EEC of 15 October 1968 on the abolition of restrictions on movement and residence within the Community for workers of Member States and their families 2 , Council Directive 73/148/EEC of 21 May 1973 on the abolition of restrictions on movement and residence within the Community for nationals of Member States with regard to establishment and the provision of services, Council Directive 90/364/EEC of 28 June 1990 on the right of residence, Council Directive 90/365/EEC of 28 June 1990 on the right of residence for employees and self-employed persons who have ceased their occupational activity and Council Directive 93/96/EEC of 29 October 1993 on the right of residence for students.

(5) The right of all Union citizens to move and reside freely within the territory of the Member States should, if it is to be exercised under objective conditions of freedom and dignity, be also granted to their family members, irrespective of nationality. For the purposes of this Directive, the definition of "family member" should also include the registered partner if the legislation of the host Member State treats registered partnership as equivalent to marriage.

(6) In order to maintain the unity of the family in a broader sense and without prejudice to the prohibition of discrimination on grounds of nationality, the situation of those persons who are not included in the definition of family members under this Directive, and who therefore do not enjoy an automatic right of entry and residence in the host Member State, should be examined by the host Member State on the basis of its own national legislation, in order to decide whether entry and residence could be granted to such persons, taking into consideration their relationship with the Union citizen or any other circumstances, such as their financial or physical dependence on the Union citizen.”

The Directive goes on to provide as follows:

“Article 2

Definitions

For the purposes of this Directive:

1) "Union citizen" means any person having the nationality of a Member State;

2) "Family member" means:

(a) the spouse;

(b) the partner with whom the Union citizen has contracted a registered partnership […]

(c) the direct descendants who are under the age of 21 or are dependants and those of the spouse or partner as defined in point (b);

(d) the dependent direct relatives in the ascending line and those of the spouse or partner as defined in point (b);

3) "Host Member State" means the Member State to which a Union citizen moves in order to exercise his/her right of free movement and residence.

Article 3

Beneficiaries

1. This Directive shall apply to all Union citizens who move to or reside in a Member State other than that of which they are a national, and to their family members as defined in point 2 of Article 2 who accompany or join them.

2. Without prejudice to any right to free movement and residence the persons concerned may have in their own right, the host Member State shall, in accordance with its national legislation, facilitate entry and residence for the following persons:

a. any other family members, irrespective of their nationality, not falling under the definition in point 2 of Article 2 who, in the country from which they have come, are dependants or members of the household of the Union citizen having the primary right of residence, or where serious health grounds strictly require the personal care of the family member by the Union citizen;

b. the partner with whom the Union citizen has a durable relationship, duly attested.

The host Member State shall undertake an extensive examination of the personal circumstances an shall justify any denial of entry or residence to these people."

25. Article 7 of the Directive provides as follows:

"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 […]

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)."

CASE LAW

26. *Zambrano v. Office National de l'Emploi*, judgment of the European Court of Justice (Grand Chamber) 8th March 2011 Case C-34/09, widely referred to as the *Zambrano* ruling and while the case was included in the book of authorities before the Court, and is of interest, it is not relevant to the decision which this Court has to make in relation to the first and second named applicants. It is accepted by both parties that the *Zambrano* ruling is confined to a right of residence in the member state of residence and nationality of a union citizen who is a child dependent upon his or her parents.

27. The main authority relied on by the parties in this case is the decision of the CJEU in Case C-200/02 *Zhu and Chen v. Secretary of State for the Home Department*, decision on the 19th October, 2004. That case was commenced in 2002 and the relevant council directive at the time was Council Directive 90/364 EEC (28th June, 1990) on the right of residence. As was clear from the treaty provisions set out above, that directive was subsequently repealed by Council Directive 2004/38/EC. The substance of the provisions, however, has not changed and therefore the ruling of the CJEU in the *Zhu and Chen* case is relevant and applicable to the matter to be decided by this Court. The CJEU decided that article 18 EC and directive 90/364 conferred on a minor who is a national of a member state, who is covered by appropriate sickness insurance and who 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.

28. In the decision of the CJEU in case C-40/11, *Iida v. Stadt Ulm*, the court (Third Chamber) on the 8th November, 2012, stated from para. 49 onwards under the heading 'Interpretation of Directive 2004/38':

"49 Paragraph 1 of Article 3, 'Beneficiaries', of Directive 2004/38 provides that the directive is to apply to all Union citizens who move to or reside in a Member State other than that of which they are a national, and to their family members as defined in Article 2(2) who accompany or join them.

50 Under Article 2(2)(a) and (d) of Directive 2004/38, the persons to be regarded as a 'family member' of a Union citizen for the purposes of that directive are the spouse and the dependent direct relatives in the ascending line and those of the spouse or partner as defined in Article 2(2)(b).

51 Thus not all third-country nationals derive rights of entry into and

residence in a Member State from Directive 2004/38, but only those who are a 'family member' within the meaning of Article 2(2) of that directive of a Union citizen who has exercised his right of freedom of movement by becoming established in a Member State other than the Member State of which he is a national […]

52 In the dispute in the main proceedings, both the spouse and the daughter of Mr. Iida are beneficiaries of Directive 2004/38, in that they moved to and reside in a Member State other than that of which they are nationals, namely Austria.

53 As regards the possible status of 'family member' within the meaning of Article 2(2) of Directive 2004/38 of the claimant in the main proceedings, a distinction must be drawn between his links with his daughter and his links with his spouse.

54 In the first place, as regards the relationship between the claimant in the main proceedings and his daughter, it is apparent from Article 2(2)(d) of Directive 2004/38 that a direct relative in the ascending line of the Union citizen concerned must be 'dependent' on that citizen in order to be regarded as a 'family member' within the meaning of that provision.

55 According to the case-law of the Court, the status of 'dependent' family member of a Union citizen holding a right of residence is the result of a factual situation characterised by the fact that material support for the family member is provided by the holder of the right of residence, so that, when the converse situation occurs and the holder of the right of residence is dependant on a third-country national, the third-country national cannot rely on being a 'dependent' relative in the ascending line of that right-holder, within the meaning of Directive 2004/38, with a view to having the benefit of a right of residence in the host Member State (see, in relation to the similar provisions of the instruments of European Union law prior to Directive 2004/38, *Zhu and Chen*, paragraphs 43 and 44 and the case-law cited).

56 It follows that the claimant in the main proceedings cannot be regarded as a 'family member' of his daughter within the meaning of Article 2(2) of Directive 2004/38."

29. The judgment continues at para. 66 under the heading 'Interpretation of Articles 20 TFEU and 21 TFEU':

"66 First of all, the Treaty provisions on citizenship of the Union do not confer any autonomous right on third-country nationals.

67 Like the rights conferred by Directive 2004/38 on third-country nationals who are family members of a Union citizen who is a beneficiary of that directive, any rights conferred on third-country nationals by the Treaty provisions on Union citizenship are not autonomous rights of those nationals but rights derived from the exercise of freedom of movement by a Union citizen (see, to that effect, Case C-434/09 *McCarthy* [2011] ECR I-3375, paragraph 42, and *Dereci and Others*, paragraph 55).

68 As stated in paragraph 63 above, the purpose and justification of those derived rights are based on the fact that a refusal to allow them would be such as to interfere with the Union citizen's freedom of movement by discouraging him from exercising his rights of entry into and residence in

the host Member State.

69 Thus it has been held that a refusal to allow the parent, whether a national of a Member State or of a third country, who is the carer of a minor child who is a Union citizen to reside with that child in the host Member State would deprive the child's right of residence of any useful effect, since enjoyment by a young child of a right of residence necessarily implies that the child is entitled to be accompanied by the person who is his primary carer and accordingly that the carer must be in a position to reside with the child in the host Member State for the duration of such residence (*Zhu and Chen*, paragraph 45)."

30. The court (Third Chamber) finally concluded in the *Iida* case that:

"Outside the situations governed by Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC and where there is no other connection with the provisions on citizenship of European Union law, a third-country national cannot claim a right of residence derived from a Union citizen."

31. The CJEU (Second Chamber) on the 10th October, 2013, in the case of *Alokpa & ors. v. Ministre du Travail, de l'Emploi et de l'Immigration*, considered a reference from the Cour administrative (Luxembourg) seeking a preliminary ruling under Article 267 of TFEU concerning the interpretation of Article 20 TFEU and 21 TFEU and Directive 2004/38 of EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States.

"On 21st November, 2006, Mrs. Alokpa, a citizen of Togo, applied to the Luxembourg authorities for international protection for the purposes of the Luxembourg Law of 5th May, 2006, on the right of asylum and complementary forms of protection. That application was rejected by the authorities and their decision was confirmed by the Luxembourg court.

Subsequently, Mrs. Alokpa applied for discretionary leave to remain. Although her application was initially rejected, it was reconsidered and discretionary leave was granted to her on 1st December, 2008, as a result of the fact that she had given birth to twins on 17th August, 2008, in Luxembourg and that the latter required care due to their premature birth.

Mrs. Alokpa's children were recognised, when the birth certificates were drawn up by a Mr. Moudoulou, a French national. Therefore the children were French nationals and were issued with French passports and national identity cards on 15th May, and 4th June, 2009, respectively.

In the meantime, an application for extension of her discretionary leave to remain was made by Mrs. Alokpa and was rejected by the Luxembourg authorities who, however, granted her a suspension of removal valid until 5th June, 2010 and which was not subsequently extended.

On 6th May, 2010, Mrs. Alokpa applied for resident permit in accordance with the law on free movement. In response to requests for further information from the minister, Mrs. Alokpa stated that she was unable to settle with her children in France or reside with their father on the ground that she had no relations with the latter and that those children required follow up medical treatment in Luxembourg as a result of their premature

birth. By decision of 14th October, 2010, the minister rejected that application.

According to that decision, since the right of residence of EU citizens' family member is restricted to dependent relatives in the direct descending line Mrs. Alokpa does not satisfy that condition. Secondly, Mrs. Alokpa's children also fail to satisfy the conditions set out in Article 6(1) of the Law on free movement. Furthermore, that decision held that those children's follow-up medical treatment could easily be provided in France and that Mrs. Alokpa also failed to satisfy the necessary conditions for eligibility for another category of residence permit referred to in that law.

Mrs. Alokpa brought, in her own name and in that of her two children, an action for annulment of the decision of the minister before the Tribunal administrative. That application was dismissed as unfounded Mrs subsequently appealed against that judgment before the referring court.

That court held that it is not disputed that Mrs. Alokpa's children never enjoyed a family life with their father, who limited himself to declaring their birth and to enabling the issue of the French identity documents relating to them. Likewise, that court held that Mrs. Alokpa and her children have in fact led a common family life in a hostel, following the children's extended stay in maternity care, and that the latter have not genuinely exercised their right to free movement.

In those circumstances, the Cour administrative decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

> 'Is Article 20 TFEU - if necessary, read in conjunction with Articles 20, 21, 24, 33 and 34 of the Charter of Fundamental Rights [of the European Union], or with one or more of those provisions read separately or in conjunction - to be interpreted as precluding a Member State from refusing a third-country national, with sole responsibility for his or her minor children who are citizens of the European Union, residence in the Member State of residence of the children, where they have been living with that person since birth, without having that nationality, while refusing the third-country national a residence permit, or even a work permit?
>
> Are such decisions to be regarded as being in the nature of decisions depriving those children, in their country of residence, in which they have lived since birth, of effective enjoyment of the substance of the rights attaching to the status of citizen of the European Union also in the situation where their other direct ascendant, with whom they have never shared family life, is resident in another Member State of the European Union, of which that person is a national?'."

33. Advocate General Mengozzi, delivered his opinion in relation to the reference on 21st March, 2013. It is clear from the background set out in both the opinion of the Advocate General and the subsequent decision of the CJEU that Mrs. Alokpa's children did not have any means of subsistence and that, in fact, Mrs. Alokpa and her children, the applicant in the proceedings, were dependent upon the Grand Duchy of Luxembourg. However, Mrs. Alokpa, it was accepted, had never intended to be burden on the Luxembourg state and she had been offered a job for an indefinite period in Luxembourg, subject to the sole

condition that she obtained the residence permit and a work permit in Luxembourg. Much of the consideration of the Advocate General and the court was taken up with the relevance of that job offer and, therefore, to the possibility of taking into account resources which are resources that are not current but rather future or potential for the purpose of satisfying the condition of 'sufficient resources' laid out in article 7(1)(b) of Directive 2004/38. The Advocate General considered that the condition of sufficient resources is capable of being satisfied by the definite prospect of future resources which would stem from a job offer to which a union citizen or member of his family responded successfully in another member state. A different interpretation would deprive the freedom of movement for employment, for citizens of the union, of its practical effect, whereas the objective of Directive 2004/38 is precisely to strengthen the right to freedom of movement. The Advocate General continued from para. 30:

> "30. The referring court should therefore, in principle, examine the job offer for an indefinite period made to Ms. Alokpa with a view to determining whether her children, who are citizens of the European Union, have 'sufficient resources' within the meaning of Directive 2004/38.
>
> 31. Such examination could, however, fall foul of national procedural rules to the extent that, as I have already observed, that offer was produced only in the course of proceedings in the context of the action for annulment brought by Ms. Alokpa and her children before the Luxembourg administrative courts. In order to carry out that examination, the referring court should therefore be authorised to review the legality of the decisions contested before it in the light of facts subsequent to the adoption of those decisions.
>
> 32. Furthermore, as the German Government rightly pointed out at the hearing, Directive 2004/38 does not contain any specific provision which allows national procedural rules to be set aside.
>
> 33. It is therefore for the referring court to assess whether those rules afford it the possibility of taking into account the job offer produced in the course of proceedings by Ms Alokpa, having regard to the well-established principles of equivalence and effectiveness.
>
> 34. If that is not the case and, as a result, the conditions laid down in Article 7(1)(b) of Directive 2004/38 are not satisfied, consideration could nevertheless be given to the possibility that the provisions of the Charter of Fundamental Rights to which the national court makes reference might result in those conditions being relaxed or even disregarded, in particular with a view to ensuring that account is taken of the child's best interests (Article 24 of the Charter) and respect for family life (Articles 7 and 33 of the Charter).
>
> 35. Nevertheless, it appears difficult to envisage such a possibility, since this would mean disregarding the limits laid down by Article 21 TFEU on the right of citizens of the Union to move and reside freely within the territory of the Member States, and would therefore, in my opinion, result in the modification of the powers and tasks defined in the Treaties, in breach of Article 51(2) of the Charter […]
>
> 43. However, in *Iida*, the Court interpreted the right derived by a national of a non-Member State who is a non-dependent direct relative in the ascending line of a Union citizen who is a minor, as covered by Zhu and Chen, as falling outside the scope of Directive 2004/38 and being based solely on Article 21 TFEU.

44. In my opinion, that approach makes more consistent the legal framework applicable to nationals of non-Member States who are non-dependent, direct relatives in the ascending line of Union citizens who are minors and beneficiaries of the provisions of Directive 2004/38. Indeed, if it is ruled out that such direct relatives in the ascending line satisfy the condition of being 'dependent' on the Union citizen and they therefore fall outside the scope of persons covered by Directive 2004/38, it is unclear why the derived right of residence from which they may benefit in the host Member State should be based on the provisions of that directive.

45. It is therefore more logical, as the Court acknowledged in *Iida*, to base such a derived right of residence directly and exclusively on primary European Union law, that is to say, Article 21 TFEU."

34. The decision of the CJEU in the *Alokpa* case was delivered on 10th October, 2013, and provided, *inter alia*, as follows:

"20 At the outset, it should be noted that, even though, formally, the referring court has limited its questions to the interpretation of Article 20 TFEU, such a situation does not prevent the Court from providing the referring court with all the elements of interpretation of European Union law which may be of assistance in adjudicating on the case before it, whether or not that court has specifically referred to them in the questions (see, to that effect, Case C-434/09 *McCarthy* [2011] ECR I-3375, paragraph 24 and the case-law cited).

21 Therefore, question referred by the national court must be construed as seeking to ascertain, in essence, whether, in a situation such as that at issue in the main proceedings, Articles 20 TFEU and 21 TFEU must be interpreted as meaning that they preclude a Member State from refusing to allow a third-country national to reside in its territory, where that third-country national has sole responsibility for her minor children who are citizens of the European Union, and who have resided with her in that Member State since their birth, without possessing the nationality of that Member State and having made use of their right to freedom of movement.

22 In that regard, it should be recalled that any rights conferred on third-country nationals by the Treaty provisions on Union citizenship are not autonomous rights of those nationals but rights derived from the exercise of freedom of movement by a Union citizen. The purpose and justification of those derived rights, in particular rights of entry and residence of family members of a Union citizen, are based on the fact that a refusal to allow them would be such as to interfere with freedom of movement by discouraging that citizen from exercising his rights of entry into and residence in the host Member State (see, to that effect, Case C-87/12 *Ymeraga and Ymeraga-Tafarshiku* [2013] ECR, paragraph 35 and the case-law cited).

23 Likewise, it must be pointed out that there are situations characterised by the fact that, although they are governed by legislation which falls *a priori* within the competence of the Member States, namely legislation on the right of entry and stay of third-country nationals outside the scope of provisions of secondary legislation which, under certain conditions, provide for the attribution of such a right, they none the less have an intrinsic connection with the freedom of movement of a Union citizen, which prevents the right of entry and residence being refused to those nationals in the Member State of residence of that citizen, in order not to interfere

with that freedom (see *Ymeraga and Ymeraga-Tafarshiku*, paragraph 37).

24 In this case, it must be observed, in the first place, that Mrs Alokpa cannot be regarded as a beneficiary of Directive 2004/38, within the meaning of Article 3(1) thereof.

25 It is clear from the case-law of the Court that the status of 'dependent' family member of a Union citizen holding a right of residence is the result of a factual situation characterised by the fact that material support for the family member is provided by the holder of the right of residence, so that, when the converse situation occurs and the holder of the right of residence is dependent on a third-country national, the third-country national cannot rely on being a 'dependent' relative in the ascending line of that right-holder, within the meaning of Directive 2004/38, with a view to having the benefit of a right of residence in the host Member State (Case C-40/11 *Iida* [2012] ECR, paragraph 55).

26 In the present case, it is the holders of the right of residence, namely, Mrs Alokpa's two sons, who are effectively dependant on her, so that she cannot rely on being a relative in the ascending line dependant on them, within the meaning of Directive 2004/38.

27 However, 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).

28 Consequently, it has been held that a refusal to allow a parent, whether a national of a Member State or of a third country, who is the carer of a minor child who is a Union citizen to reside with that child in the host Member State would deprive the child's right of residence of any useful effect, since enjoyment by a young child of a right of residence necessarily implies that the child is entitled to be accompanied by the person who is his primary carer and accordingly that the carer must be in a position to reside with the child in the host Member State for the duration of such residence (see *Zhu and Chen*, paragraph 45, and Iida, paragraph 69).

29 Thus, while Article 21 TFEU and Directive 2004/38 grant a right to reside in the host Member State to a minor child who is a national of another Member State and who satisfies the conditions of Article 7(1)(b) of that directive, the same provisions allow a parent who is that minor's primary carer to reside with the child in the host Member State (see, to that effect, *Zhu and Chen*, paragraphs 46 and 47).

30 In the present case, it is for the referring court to ascertain whether Mrs. Alokpa's children satisfy the conditions set out in Article 7(1) of Directive 2004/38 and have, therefore, the right to reside in a host Member State on the basis of Article 21 TFEU. In particular, that court must

> determine whether those children have, on their own or through their mother, sufficient resources and comprehensive sickness insurance cover, within the meaning of Article 7(1)(b) of Directive 2004/38.
>
> 31 If the conditions set out in Article 7(1) of Directive 2004/38 are not satisfied, Article 21 TFEU must be interpreted as meaning that it does not preclude Mrs. Alokpa from being refused a right of residence in Luxembourg."

35. The court concluded that in a case such as that at issue in the main proceedings , article 20 TFEU and 21 TFEU must be interpreted as meaning that they do not preclude a member state from refusing to allow a third country national to reside in its territory, where that third country national has sole responsibility for her minor children who are citizens of the European Union, and who have resided with her in that member state since their birth, without possessing the nationality of that member state and making use of that right of freedom of movement, insofar as those union citizens do not satisfy the conditions set out in Directive 2004/38/EC of the European Parliament and of the Council Directive of 29th April, 2004, on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation, *inter alia*, 90/364/EEC, or such a refusal does not deprive those citizens of effective enjoyment of the substance of the rights conferred by virtue of the status of European Union citizenship, a matter which is to be determined by the referring court.

36. In Case C-408/03, *Commission v. Belgium*, the CJEU (Grand Chamber) in its judgment delivered on 23rd March, 2006, considered the question of sufficient resources, as required by Article 1(1) of the Directive 90/364. The court found, *inter alia*, from para. 40:

> "40. In paragraphs 30 and 31 of its judgment in Case C-200/02 *Zhu and Chen* [2004] ECR I-9925, the Court held that according to the very terms of the first subparagraph of Article 1(1) of Directive 90/364, it is sufficient for the nationals of Member States to 'have' the necessary resources, and that provision lays down no requirement whatsoever as to their origin. The correctness of that interpretation is reinforced by the fact that provisions laying down a fundamental principle such as that of the free movement of persons must be interpreted broadly.
>
> 41. The Court therefore held that an interpretation of the condition concerning the sufficiency of resources within the meaning of Directive 90/364 to mean that the person concerned must himself have such resources and may not rely on the resources of a member of the family accompanying him would add to that condition, as formulated in that directive, a requirement as to the origin of the resources which, not being necessary for the attainment of the objective pursued, namely the protection of the public finances of the Member States, would constitute a disproportionate interference with the exercise of the fundamental right of freedom of movement and of residence upheld by Article 18 EC (*Zhu and Chen*, paragraph 33).
>
> 42. According to that case-law, the condition concerning the sufficiency of resources laid down in the first subparagraph of Article 1(1) of Directive 90/364 is met where the financial resources are provided by a member of the family of the citizen of the Union.
>
> 43. It must be examined whether the same conclusion is called for where a citizen of the Union intends to rely on the income of his partner who resides

in the host Member State.

44. Consideration of that question essentially focuses on the source of such income, as the authorities of the host Member State are, in any event, entitled to undertake the necessary checks as to its existence, amount and availability."

DECISION

37. The second named applicant was born on 8th July, 2011, and is a citizen of the European Union. The first named applicant, who was born on 22nd October, 1983, is a non-EU national and is the mother of the second named applicant. The first named applicant seeks a right of residence as a derivative right under the Treaty on the Functioning of the European Union as the primary parental carer of the second named applicant who is dependent upon her mother. The second named applicant is a UK national, having been born in the UK and whose father is a UK citizen. The first named applicant has asserted that she is not entitled to enter into or reside in the UK. However, no explanation or reason has been put forward as to why this is the case. Instead, the first named applicant asserts that if she is forced to leave this State, the second named applicant will be forced to leave also and that would be contrary to her rights as a union citizen and the provisions of the European treaties. The first named applicant would have a right to reside in the UK with the second named applicant pursuant to the *Zambrano* ruling (*supra*). Instead, however, the first named applicant seeks a right to reside in Ireland as a mother of the second named applicant who is a national of another member state and is residing in this State, the host country. It does seem to me that it cannot be stated with any certainty that the effect of the respondent's decision to refuse the first named applicant's right of residence in this jurisdiction will automatically result in the second named applicant being forced to leave the territory of the union. The second named applicant is entitled to reside in the UK, the country of her birth, and may or may not be entitled to reside in another member state of the union. Therefore, I am not convinced that the effect of the denial to the first named applicant of a right of residence in this jurisdiction automatically results in the second named applicant being forced to leave the union territory.

38. The letter of the respondent dated 8th July, 2004, notifying the decision in respect of the first named applicant's application for a right of residence and the decision to refuse same was addressed to the first named applicant. As stated above, the second named applicant was born on 8th July, 2011, and was three years of age at the date of that letter/decision. It seems to me that it was a common sense and practical approach taken by the respondent to address the letter to the first named applicant and I can find no substance in the complaint that the letter was addressed to the first named applicant or with regard to the language used in the letter. The practicality of the infant applicant's situation is that she has no resources of her own, and such resources that may be imputed to her will have to be supplied to her by her primary parental carer, i.e. her mother, the first named applicant. The difficulty arises in this case because the first named applicant has no apparent resources of her own and is dependent in turn upon the support of third parties. The first applicant is dependent on the support of Mr. A.A. who, it is stated, provides her with €50 per week (sometimes rising to €75) and pays day care for the second named applicant. In addition, the first named and second named applicants reside with a Mrs. [named] where she apparently resides rent free and is dependent on the goodwill of her host.

39. The question arises: is the minister entitled to look at the source of the resources available to the first and second named applicants? First of all, it is clear from the directive and treaty provisions set out above, and the case law referred to above, that the sufficient resources must be available to the second named applicant, i.e. the union

citizen. As the second named applicant, the union citizen, is a young child she is dependent on the first named applicant. The authorities establish that in such a situation the primary parental carer of a union citizen is entitled to reside with the union citizen, provided there are sufficient resources available. In effect the situation is reversed and the national state is entitled to look at the resources available to the primary parental carer.

40. In this situation the primary parental carer, the first named applicant, has no resources available of her own. Instead she has support and promises of ongoing support from Mr. A.A. and her purported ongoing free accommodation courtesy of Mrs. [named]. While the decision in *Zhu and Chen*, *Alokpa* and *Commission v. Belgium*, suggests that the resources are available and that, the national state cannot designate that they come from a particular source; however, it is also clear, particularly from the decision in *Commission v. Belgium*, that the national state is entitled to satisfy itself as to the existence, amount and availability of the alleged resources.

41. In this case, the third party supplying the resources by way of both financial support and a place of residence, are not in any way related to the second named applicant, the union citizen, do not supply any resources directly to the child but apparently supplies them to the first named applicant. It seems to me that the respondent was entitled to make enquiries and to seek to satisfy herself in respect of the existence, amount and availability of the suggested resources.

42. I can find no basis in the applicants' assertion that the minister and her department failed to adequately or properly consider the applicants' case. It is quite clear that sufficient resources should be available to the member national in this case, the child who is the union citizen. It is clear that none are available directly to the child. It is also clear that the resources of the mother could be imputed to the child and this position has been recognised in the decision of this Court in *O.A. & O.P.A v. Minister for Justice* (Barr J., Unreported, High Court, 30th July, 2014). However, what was at issue in that case was the prospect of a job offer which was available to the mother of an infant union citizen. I accept the submission of the respondent that the decision, the subject matter of these proceedings, addressed whether the first named applicant has sufficient resources that the second named applicant, having access to the resources of the first named applicant, may have adequate resources so as to entitle the second named applicant to a right of residence, from which the first named applicant may, in turn, derive a dependent right. It should be borne in mind that the second named applicant does not have an automatic right of residence in this jurisdiction for longer than three months unless she can satisfy the national authorities that she has sufficient resources and comprehensive sickness insurance cover, as set out in article 7(1)(b) of Council Directive 2004/ 38/ EC.

43. It seems to me that the CJEU in the *Commission v. Belgium (supra)* accepted that regard may be had to the nature of the resources proposed of being adequate and accepted that such resources may be checked.

44. I do not accept the applicants' submission that any potential source of resources from any source or sources constitutes sufficient resources and I accept the respondent's submission that such a view would be incompatible with the qualification from Advocate General Mengozzi and the statement of the CJEU that national authorities are entitled to check its existence, amount and availability.

45. Article 14(2) of the directive and regulation 11 of the S.I. no. 656 of 2006 (Freedom of Movement Regulations) provide that checks as to adequacy may be carried out. I do not accept that the only action that may be taken by a national state is retrospective use of the provisions when previously nominated resources have become inadequate. A

member state must be entitled to investigate those resources at the outset.

46. The decision clearly states that there has not been adequate evidence submitted as to the sufficiency of resources, i.e. as to the existence, amount and availability contemplated by the European Court of Justice. It seems to me that these are matters to which the decision-maker is entitled to have regard.

47. In the light of the foregoing, I can find no reason to interfere with the decision of the respondent made on 8th July, 2014.

48. The applicants' counsel had further contended that the decision of the respondent should be quashed in that it did not adequately set out its reasons or make clear the reasons for the decision reached at and relied on the decisions of *Mallak* and *Meadows* in this regard *(supra).*

49. I can find no substance to this and I am satisfied that the basis on which the decision was reached by the respondent is clear from the substance of the letter of 8th July, 2014. I would accordingly refuse this ground of challenge to the decision. For the reasons set out above, I would therefore refuse the relief sought.