Neutral Citation [2014] IEHC 384

THE HIGH COURT

JUDICIAL REVIEW

[2012 No. 175 J.R.]

BETWEEN

O. A. AND O. P. A. (A MINOR SUING BY HER MOTHER AND NEXT FRIEND O.A.)

APPLICANTS

AND

MINISTER FOR JUSTICE, EQUALITY AND DEFENCE

RESPONDENT

JUDGMENT of Mr. Justice Barr delivered the 30th day of July, 2014

Introduction

1. This is a judicial review application for an order of *certiorari* quashing the decision of the Minister for Justice, Equality and Defence (the respondent) notified by letter dated 6th February, 2012, to the effect that the first named applicant is not entitled to apply for Stamp 4 residency pursuant to European Union Law; and seeking a declaration that the first named applicant is entitled to apply for Stamp 4 residency pursuant to European Union Law.

Background

2. The first named applicant is a Kenyan national, who arrived in Ireland on 31st March, 2008. She was accompanied by her daughter, O.E.A. The first named applicant and her daughter applied for asylum on 25th April, 2008. She asserted that she had a well founded fear of persecution on account of her political affiliation. The first named applicant stated that on 6th January, 2008, a group of armed men came to her family home in Nairobi, Kenya, and demanded a list of names from her husband who, she said, was a treasurer in the Orange Democratic Movement. When he refused to provide the names, the applicant stated that her husband was beaten and shot dead, along with two of her children. Two days after the murder of her husband and two children, the first named applicant claimed that the men came again at night with guns and other weapons and searched her house. Thereafter, according to the first named applicant's account, they kept coming every night, sometimes shooting into the air. As a result of this, the first named applicant explained that she was very frightened, was unable to sleep or eat, and suffered from headaches, trauma, and nightmares.

3. The first named applicant sought protection in her House Fellowship where she claims to have met a woman called Comfort who helped her travel to Ireland. The first named applicant travelled with her daughter to Ethiopia and then through France to Ireland, where they arrived on 31st March, 2008.

4. In her application for refugee status questionnaire, dated 16th April, 2008, the applicant said that she did not report the murder of her husband and two children to the police because the gang responsible might be working for the authorities and she was afraid that the authorities might leak the secret of her whereabouts. The applicant did not attempt to relocate to another part of Kenya because she said, *"I was afraid the gang would fish me out because my late husband was popular"*. The first named applicant further asserted that she feared that if she and her daughter were returned to Kenya they would both be killed by the gang.

5. The first named applicant was interviewed pursuant to s. 11 of the Refugee Act 1996 (as amended) (hereinafter referred to as the "1996 Act") on 8th September, 2008. On 15th September, 2008, the Refugee Applications Commissioner (hereinafter "the RAC") concluded that the applicant had failed to establish a well founded fear of persecution, as required by s. 2 of the 1996 Act, and recommended that the applicant and her daughter should not be declared refugees. The Refugee Appeals Tribunal (hereinafter "the RAT") affirmed the RAC's recommendation on 20th February, 2009. The applicant then applied for subsidiary protection under the European Communities (Eligibility for Protection) Regulations 2006 (S.I. 518/2006) on 21st April, 2009. According to the affidavit of Mr. Aengus Casey, HEO of the Department of Justice and Equality dated 16th October, 2013, this application is still awaiting determination.

6. In 2008, shortly after her arrival in Ireland, the first named applicant met Mr. A.O., a Nigerian born German national, and they commenced a relationship. The first named applicant became pregnant with Mr. O.'s child and, on 16th June, 2010, the second named applicant, O.P.A., was born. The second named applicant is a German national by descent.

7. The first named applicant states in her affidavit of 27th February, 2012, that her relationship with Mr. O., who also had a family in Germany, ended shortly after the birth of their daughter, but that they maintained contact solely for the purpose of raising their daughter. In a subsequent affidavit sworn on 22nd October, 2013, the first named applicant gave a different version of events. She explained that although the original details she gave to the refugee offices were *"correct to the extent of my knowledge at that time",* her relationship with Mr. O. did in fact break down before she knew that she was pregnant, and she was unable to contact him. This inconsistency in the first named applicant's story was put in issue by the respondent at the hearing of this case. Counsel for the respondent submitted that even if the court were minded to find for the applicant in this matter, judicial review is a discretionary remedy and the court should decline to exercise its discretion in light of the first named applicant's dishonesty.

8. The first named applicant asserted that she believed that Mr. O. was Nigerian, as he was born in Nigeria. Because her relationship with him had broken down before she knew she was pregnant, the applicant was unaware that her daughter was a German national by descent. The first named applicant thus applied for asylum on behalf of her new-born daughter, the second named applicant, on 24th July, 2010. To this end, the first named applicant was interviewed pursuant to s. 11 of the 1996 Act on 20th September, 2010. She claimed that if returned to Kenya, she and her daughter, the second named applicant, would be in danger of being murdered by the same gang who murdered her husband and two other children in January 2008. When asked about the possibility of internal relocation she again claimed that her husband was a popular man and that the people looking for her would be able to locate her. As regards the father of the second named applicant, she stated that he was Nigerian but that they had ceased contact before she

found out that she was pregnant. On 12th October, 2010, the RAC recommended that the second named applicant should not be declared a refugee. The first named applicant appealed this recommendation to the RAT and following hearings in January and February 2011, the RAT affirmed the RAC's recommendation on the basis that the first named applicant had failed to establish a well founded fear of persecution.

9. The second named applicant subsequently applied for subsidiary protection and, according to the affidavit of Mr. Aengus Casey, dated 16th October, 2013, this application is still awaiting determination.

The applicant's present circumstances
10. According to the first named applicant, the second named applicant's father, Mr. 0., continues to live in Ireland and visits their daughter on an informal basis. He also pays maintenance of €30 every two weeks. However, the first named applicant wants to provide for her daughter without Mr. O.'s assistance and, to that end, is anxious to take up employment in Ireland. She has taken a number of courses of education during her time in Ireland, including a FETAC Level 5 course in nursing studies, which she passed with distinction.

11. In her affidavit of 22nd October, 2013, the applicant claimed that this qualification would enable her to take up a nurse's position if she is granted permission to work. This assertion also appeared in the first named applicant's written submissions to the court dated 17th October, 2013. However, in their written submissions dated 18th October, 2013, the respondents point out that a FETAC Level 5 qualification in nursing studies does not entitle the applicant to work as a nurse. In a subsequent affidavit on 23rd October, 2013, the first named applicant clarified that her FETAC qualification will enable her to obtain employment as a healthcare assistant, if she receives permission to work. She claimed that this would further enable her to train as a nurse and obtain a full nursing qualification in due course.

12. The applicant stated in her affidavit dated 23rd October, 2013, that she is confident that she will be able to provide the Minister with written details of job offers as soon as the legal question as to whether she is entitled to Stamp 4 residency has been resolved. She further asserts that through such employment she will be able to provide her daughter with *"sufficient resources"* to reside in the State.

13. By letter dated 10th January, 2012, the first named applicant, through her solicitor, submitted an application for Stamp 4 residency in the State pursuant to Directive 2004/38 EC, which was transposed into Irish law by the European Communities (Free Movement of Persons) Regulations 2006 (hereinafter referred to as "the 2006 Regulations"), based on her parentage of a German citizen child. By letter dated 6th February, 2012, the Minister wrote back requesting the first named applicant to provide further information and documentation. In the course of that letter, the Minister stated *"please note that in the event that your application under Chen is successful, this will provide for a right of residence Stamp 3 only"*. This is at the heart of the dispute between the parties herein. It will be necessary to refer to the two letters in more detail later in this judgment.

Legal issues under domestic law
14. Counsel for the respondent helpfully proposed a number of questions of domestic law that, in his submission, the court must dispose of before considering the EU law aspect of the case. The questions he suggested for the court's consideration are as follows:-

> 1. Did the Minister make a decision in his letter of61h February, 2012?
>
> 2. Have the applicants exhausted all remedies?
>
> 3. Does the statement of grounds support the case now being made by the applicants and if it does not, should there be an application to amend and, if there is an application to amend, should it be granted?
>
> 4. In the event that the court resolves some or all of the above in favour of the applicant, will the court decline to exercise its discretion on the basis of the discrepancy in the applicant's affidavits?

Did the Minister make a decision in his letter dated 6th February, 2012?
15. By letter dated 10th January, 2012, the first named applicant applied for Stamp 4 residency on the basis of her parentage of an EU citizen child pursuant to EU law. This letter was sent by the first named applicant's solicitors and was addressed to the EU Treaty rights section, Irish Naturalisation and Immigration Service (INIS) at its offices in Dublin. The letter was in the following terms:-

> *"10th January, 2012*
>
> *Re: Our Client Ms. O.A.*
>
> *Dear Sirs,*
>
> *We confirm that we represent the above named and enclose herewith her authority and consent.*
>
> *We hereby submit an application for Stamp 4 residency in the State on behalf of Ms. A. based on her German citizen child, O.P.A., pursuant to Directive 2004/38/EC.*
>
> *Please find enclosed the following supporting documentation:*
>
> *1. Form EU 1*
>
> *2. Original German and Kenyan passports*
>
> *3. Original birth certificate of O.P.A. as evidence of relationship*
>
> *4. Two passport photographs each of mother and daughter*
>
> *5. Letter from Bridgestock Facilities Management as evidence of address*

6. O2 utility bill

7. Letter from Refugee Appeals Tribunal as evidence of address

8. Letter from Dr. Michael Brogan which confirms that our client and her child are patients at the Annagh Medical Centre

9. AIB banking user guide

It is our view that subject to Ms. A. 's child being in this State for the purpose of exercising a right under EU Treaty, Ms. A. is entitled to assert, and have recognised his (sic) rights under the provisions of the Directive 2004/38/EC and under Article 20 of the TFEU It is submitted that these rights are rights of substance being fundamental to the proper functioning of community law, and that these rights cannot be negated or defeated by procedural requirements, as is the position here.

A number of significant legal issues now arise in this context. Firstly, in circumstances where the EU spouse or partner is unwilling to facilitate the applicant with documentation supporting any application pursuant to the provisions of Directive 2004/38/EC, to what extent can the Minister rely on his Regulations to refuse to process an application if there is a discrepancy between these Regulations and Directive itself?

Secondly, is the would-be applicant in these circumstances entitled to assert rights under Regulation (EEC) No. 1612/68 of the Council of 15th October, 1968 on Freedom of Movement for Workers within the Community - an earlier framework - if such administrative or evidential requirements are not laid down in domestic law with regard to this particular Regulation?

Thirdly, and of vital importance here is to what extent, a would-be applicant is entitled to assert a right of residence under Article 20 of the TFEU? Certainly, it would be incongruous for the non-EEA parent of an Irish citizen child to be in a position to assert such a right if the non-EEA parent of an EU citizen child is not equally entitled to do so. The obvious answer to this question is that, of course, he can.

We would be obliged if you would kindly acknowledge receipt of this application and confirm that our applicant is entitled to interim Stamp 4 residency while a decision on this application is pending.

Thank you for your assistance in the matter and we await hearing from you at your earliest convenience.

Yours faithfully

Trayers & Company"

16. The Minister replied by letter dated 6th February, 2012. It is necessary to reproduce this letter in full as this letter was central to the proceedings herein:-

"Dear O.A.,

I am directed by the Minister for Justice and Equality to refer to your application for a Residence Card pursuant to the European Communities (Free Movement of Persons) Regulations 2006 and 2008 (the 'Regulations'), which was received in this office on 11/01/2012. Having considered the evidence submitted in detail, I am to advise that the Minister is satisfied that your client is neither a permitted or qualifying family member within the meaning of Regulation 2(1) of the European Communities (Free Movement of Persons) Regulations 2006 and 2008 and Directive 2004/38/EC of the European Parliament and of the Council (the 'Directive'). Accordingly, your client's application cannot be accepted under the Regulations.

On examination of the documentation it appears that your client may be entitled to a right of residence based on the judgment of the Court of Justice of the European Union in the case of Chen [2004]. Accordingly, the Minister now proposes to consider your client's application with regards to the provisions of the judgment.

This letter will be deemed a formal acknowledgment of your application for residence based on the Chen consideration.

I would be obliged if you would submit the following original documents by registered post to EU Treaty Rights Section, Irish Naturalisation and Immigrants Service 13 - 14 Burgh Quay, Dublin 2. Please note that photocopies of documents cannot be accepted Any documents which are not in English must be accompanied by a certified translation.

On the access order for your children, it states that you were never married, however, you have submitted a marriage certificate with the application. Can you please clarify your martial status?

Evidence of the Applicant's being the Primary Carer

For the applicant:

Order of the Court naming the applicant as primary carer, for example, a custody order or joint custody order

Evidence of Resources

For the applicant and minor EU citizen:

Private medical insurance

For the applicant:

Bank statements and other documents showing sufficient resources (this can include evidence of employment, self employment or other resources such as social welfare)

Evidence of relationship with the EU citizen

Written consent from the absent parent/legal guardian permitting the child to reside in the State if only one parent or legal guardian of the child is to reside in the State with the child

Please note that in the event that your application under Chen is successful, this will provide for a right of residence (Stamp 3 only)

The following documents that were submitted with your application are now returned to you.

1. Passport of Kenya in the name of O.A.

2. Passport of Germany in the name of O.P.A.

3. Letter from doctor

4. Letter from letting agent

5. Utility bill in the name of the applicant

6. Birth certificate in the name of the EU citizen with the applicant named as the mother

Yours sincerely

Derek Mangan

EU Treaty Rights Section

Irish Naturalisation and Immigration Service

06-Feb-2012"

17. The first named applicant submitted that the Minister's letter of 6th February, 2012, constituted a decision that she was not entitled to Stamp 4 residency and that, if her application succeeds, irrespective of what information she might provide, this would lead to Stamp 3 residency, i.e. the right to reside only. Counsel for the respondent submitted that the Minister's letter did not constitute a decision. He characterised it merely as an invitation to enter a process. He submitted that in the letter, the Minister looked at three distinct issues. He looked firstly at the application pursuant to the Irish Regulations and he said that the applicant did not come within the Irish Regulations. He stated that this appeared to now be accepted by the applicants. There was then an application for interim Stamp 4 and the applicant was looking for some immediate rights and the Minister said she was not entitled to that. That was the second decision in the letter. But as regards the application pursuant to the EU Treaty rights, the Minister had not come to any decision and accordingly, there was no decision as a result for this Court to quash or set aside.

18. The applicant's counsel submitted that on a plain reading of the letter, the Minister did in fact make a decision to the effect that the applicant was not eligible for Stamp 4 residency and that in the event that she succeeded in her application under *Chen* this would lead to a right of residence only (Stamp 3). This view was supported by the respondent's statement of opposition, wherein it is stated as follows at para. 7:-

> *"The respondent's decision dated 6th February, 2012, refusing the applicant's application for Stamp 4 residency was valid in law and was made according to law. It is denied that it is unlawful. "*

19. In the circumstances, I am satisfied that the Minister did make a decision in relation to the issue of Stamp 4 residency in the said letter and the applicant is entitled to challenge same by way of an application for judicial review.

Have the applicants exhausted all remedies?

20. The second question posed by counsel for the respondents was: if the Minister did in fact make a decision, should the applicants have relied on their appeal rights under the Regulations before invoking judicial review procedures? In addressing this question, counsel for the respondent submitted that the applicants were obliged to exhaust all remedies open to them before seeking judicial review. He pointed out that there was in Regulation 21 a review mechanism for decisions taken pursuant to the Regulations. The respondent submitted that the applicants should have availed of this procedure before instituting the judicial review proceedings.

21. In support of their argument, the respondents referred to *Sheehan v. Minister for Social and Family Affairs & Anor* [2010] IEHC 4. The applicant in that case had had his job seekers allowance payment, as provided under Part 3, chapter 2 of the Social Welfare Consolidation Act 2005, terminated. His application for supplementary welfare allowance was also refused and he sought to have these decisions judicially reviewed. The issue was whether the applicant had furnished the requisite information to the respondents' officials as to whether he was part of a *"couple"* as defined by the Social Welfare Consolidation Act, and whether he had exhausted the alternative remedy of an appeal from the decision that he was seeking to impugn.

22. Counsel for the respondents referred to para. 46 of the judgment of MacMenamin J.:-

> *"A final factor which the Court must bear in mind is the conduct of the applicant. He has not provided information which he was required to provide. He has not exhausted his remedies. His resort to judicial review was precipitate, unjustified, and misconceived He brought proceedings when he should have procured the necessary information, and could have availed of the appeals procedure. Those who seek to assist lay litigants should ensure that such persons are advised on points such as those which arose here and the fact that in the event of failure, an unsuccessful party faces the risk of an adverse award in costs. "*

23. The respondent submitted that the judgment cited was applicable to the present case in a number of ways. Firstly, the Minister had sought information that the applicants did not supply. Secondly, the applicants did not wait for a decision; if they had waited, they would have been obliged to use the internal remedies procedures set out in the 2006 Regulations. The respondents suggested that the facts of this case fell within the analysis of MacMenamin J. in *Sheehan* and submitted, accordingly, that the applicants had resorted to judicial review prematurely.

24. Counsel for the applicants rejected this contention. She submitted that the review mechanism under the Regulations was an internal review, not a review by an external impartial body. Counsel further questioned whether engaging in any sort of review would

have resulted in the Minister changing his position. Counsel cited MacMenamin J. in *Sheehan* at para. 19:-

> *"It is a well established precept of judicial review that in general where the law provides for a code, or appeal mechanism prior to resorting to judicial review an applicant should exhaust his rights of appeal, unless want of jurisdiction or breach of fair procedures or error of law can be shown. (See The State (Abenglen Properties Ltd. v. Dublin Corporation [1984] I.R. 381, in particular the judgment of O'Higgins C.J. at p. 393; Stefan v. Minister for Justice, Equality and Law Reform [2006] 1 I.R. 560.). Failure to exhaust remedies is not necessarily determinative; but will be a significant factor. "*

25. Counsel for the applicants pointed out that the learned judge had made an exception that if what was in issue was an error of law, then judicial review would be the appropriate remedy. She submitted that an error of law was at issue in the present proceedings (namely the Minister's alleged misinterpretation of the *Chen* decision) and that judicial review was therefore the appropriate remedy.

26. Counsel for the applicant referred to *Tomlinson v. Criminal Injuries Compensation Tribunal* [2006] 4 IR 321. In that case, the applicant's husband had died as a result of an assault. This entitled her to seek compensation under the scheme for compensation for personal injuries criminally inflicted. The respondent made an award that included a deduction representing insurance benefits that the estate of the deceased had received by reason of his death. The applicant was advised that this deduction was unauthorised under the scheme and made in excess of jurisdiction. The High Court (O'Higgins J.) granted leave to apply by way of application for judicial review in respect of a number of reliefs including, *inter alia*, a declaration that the deduction was *ultra vires*.

27. In the High Court, Kelly J. refused the application. The learned judge cited the judgment of the Supreme Court in *Garvan v. Criminal Injuries Compensation Tribunal* (Unreported, Supreme Court, 20th July, 1993) as authority for the proposition that the court should be very slow to intervene by way of judicial review to correct a final decision of the respondent. Kelly J. thus determined that the court should not intervene before the process under the scheme had been exhausted.

28. The applicant appealed this decision to the Supreme Court. Denham J. stated that at issue in the appeal was the exercise of judicial discretion in the granting or refusing of leave to apply for judicial review when there is an alternative remedy available to the applicant. Denham J. stated as follows at paras 18- 19:-

> *"18. The respondent, having pleaded to the issue that the deduction was intra vires, there is the appearance that it has reached a decision on this issue. This appears clear for two reasons. First, a member of the respondent has already decided that the deduction should be made. Secondly, the respondent has pleaded in these judicial review proceedings that the respondent was entitled to make the deduction. While I am in no way determining that a three-member tribunal of the respondent would not approach the matter fairly, I consider that it would in the circumstances be perceived as unlikely to be capable of adopting a different view.*
>
> *19. Further, if the court returned the net issue to the respondent, when it appears clear what the decision of the respondent will be, if consistent with the past views of the respondent, this would require the applicant to seek judicial review of the matter at a later stage. "*

29. Counsel for the applicant submitted that if the matter simply went back to the Minister, having regard to his stated views that he was correct in his decision that the applicant was ineligible for Stamp 4 residency, then the applicants would end up having to issue another set of proceedings; and that is exactly what the Supreme Court envisaged when they said that to simply remit the matter to the respondent, when it appeared clear what the decision of the respondent would be, would require the applicant to seek judicial review at a later stage. Counsel for the applicant cited the dictum of Denham J. at para. 23, where she stated:-

> *"The existence of the alternative remedy does not prevent the court from exercising its discretion as to whether or not to grant judicial review. While a court would lean towards requiring that the remedies available under the scheme be exhausted, the ultimate decision depends on the circumstances of the case. In this case, a question of law going to the jurisdiction of the respondent to make the deduction is the issue, the fact that it is a question of law is a factor in favour of a decision by a court, and that it is appropriate that it be decided by a court of law. In addition, given the views on this question of law previously expressed by the respondent, there would appear to be an apparent bias (which of course is not to say that a three member tribunal would actually be biased) in returning the question to the respondent for a decision. "*

30. Counsel for the applicants thus submitted that since what is at issue in the present proceedings is purely a question of law, the correct route for these applicants to take was to seek judicial review. She added that in the light of the Minister's stated position that his decision to refuse Stamp 4 was lawful and valid, the applicant was entitled to take the view that neither letters nor reviews would have changed his mind.

31. Finally, it is worth looking closely at the text of the provision in the Regulations for the review procedure. Regulation 21(1) provides:-

> *"A person to whom these Regulations apply may seek a review of any decision concerning the person's entitlement to be allowed to enter or reside in the State. "*

32. It seems from the oral and written submissions of the applicants and the respondents that both sides are in agreement that the applicant is *"neither a permitted nor a qualifying family member"* and her application could not, therefore, be accepted under the Irish Regulations which implement the Directive. The applicants have conceded in their written submissions that the first named applicant does not qualify for residency as a family member of a Union citizen within the meaning of the Directive. Thus, it would appear that the first named applicant is not, to use the language of Regulation 21(1), *"a person to whom these Regulations apply"*. Accordingly, it appears that she was not in a position to make use of the review procedure outlined in the Regulations.

33. In the circumstances, therefore, I am satisfied that the first named applicant is entitled to seek judicial review, rather than proceed by any alternative means as suggested by the respondents.

Does the statement of grounds support the case now being made by the applicants and if not, should there be an application to amend, and if there is such application, should it be granted?

34. Counsel for the respondent submitted that if the Minister is to face a fair procedures case, which counsel suggested was raised by the applicants on day 1 of the hearing, then that needs to be clearly set out in the statement of grounds if that is to be pursued.

In response, counsel for the applicants referred to the statement of grounds. She referred the court to para. 1 of the relief sought which was in the following terms:-

> *"certiorari by way of application for judicial review that the first named applicant is entitled to apply for 'stamp 4' residency pursuant to European Union law. "*

35. Counsel for the applicant stated that for counsel for the respondent to suggest that the case had been changed into a case about fair procedures was fundamentally incorrect. The applicant reiterated that the issue in this case was that the Minister had clearly asserted that the applicant was not entitled to work in the State. That, counsel submitted, was the essence of the issue being litigated and was expressly set out in the statement of grounds.

36. I am satisfied that the submission made by counsel for the applicants is correct. The applicants have not attempted to widen their claim in this action beyond the grounds set out in the statement of grounds and upon which they were given liberty to seek judicial review by order of Cooke J. made on 5th March, 2012. There was no need to amend the statement of grounds to encompass the case made by the applicants at the hearing of this application.

Inconsistencies in the applicant's affidavits
37. Counsel for the respondent submitted that because of the inconsistencies in the applicant's affidavits, the court should decline to exercise its discretion in her favour. The applicant stated in her affidavit sworn on 27th February, 2012, that her relationship with Mr. 0. ended shortly after the birth of their daughter, but that they maintained contact solely for the purpose of raising their daughter. In a subsequent affidavit dated 22nd October, 2013, the applicant gave a different version of events: she explained that although the original details she gave to the refugee officers were correct to the extent of her knowledge at that time, her relationship with Mr. O. did in fact break down before she knew she was pregnant, and she was unable to contact him.

38. An inaccuracy also arose in the applicant's affidavit of 22nd October, 2013. In this affidavit, the applicant claimed that her FETAC Level 5 qualification in nursing studies would enable her to *"take up a nurse's position"* if she is granted permission to work. This assertion was repeated in the applicant's written submissions dated 17th October, 2013. However, in their written submissions dated 18th October, 2013, the respondents point out that a FETAC Level 5 qualification in nursing studies does not entitle the applicant to work as a nurse. In a subsequent affidavit sworn on 23rd October, 2013, the applicant clarified that her FETAC qualification will enable her to obtain employment as a healthcare assistant if she receives permission to work. She also claimed that this would further enable her to train as a nurse and obtain a full nursing qualification in due course.

39. These inconsistencies in the first named applicant's affidavit were put in issue by the respondent at the hearing of the case. Counsel for the respondent submitted that even if the court were minded to find for the applicant in this matter, judicial review is a discretionary remedy and that the court should decline to exercise its discretion in light of the first named applicant's apparent lack of candour.

40. Counsel for the respondent referred to the *State (Vozza) v. District Justice O'Floinn & Anor* [1957] IR 227, where Davitt P. held that the affidavits upon which the application had been based were not uncandid and painted a picture which was grossly exaggerated, unrealistic and in fact, quite wrong. Counsel for the respondent submitted that in the light of the applicant's dishonesty in her affidavits, the court should decline to exercise its discretion in her favour.

41. In reply, counsel for the applicants referred to *O'Keeffe v. Connellan* [2009] 3 I.R. 643 and to the Supreme Court decision in *Dimbo v. Minister for Justice, Equality and Law Reform* [2008] IESC 26. Counsel submitted that such discrepancies as there were in the applicant's affidavits were not such as to disentitle her to seek the remedy of judicial review.

42. I am satisfied that the inconsistencies and discrepancies as pointed out in the applicant's affidavits, are not material to the application being brought by the applicants. They are not of such magnitude as to disentitle the first named applicant to seek the relief which she seeks herein.

European Law Issues
43. The first named applicant is the mother and primary carer of the second named applicant, who is a German national. Counsel for the applicants submits that second named applicant is exercising her right to freedom of movement by electing to reside in Ireland. The first named applicant claims that she has a right to remain in Ireland with the second named applicant. This right was established in *Zhu and Chen v. Secretary of State for the Home Department* [2004] ECR 1-9925 (hereinafter referred to as *"Chen"*). The second named applicant will be entitled to reside in Ireland if she can satisfy the requirements of Article 7(1)(b) of Directive 2004/38/EC.

44. It is necessary at this juncture to set out the relevant provisions of EU legislation having a bearing on the case. Articles 20 and 21 of the Treaty of the Functioning of the European Union provide as follows:-

"Article 20

> *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.

Article 21

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. "

45. Directive 2004/38/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 provides as follows at Article 7(1)(b):-

"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:

...

(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 ... "

46. Article 8(4) provides as follows:-

"Member States may not lay down a fixed amount which they regard as 'sufficient resources', but they must take into account the personal situation of the person concerned. In all cases this amount shall not be higher than the threshold below which nationals of the host Member State become eligible for social assistance, or, where this criterion is not applicable, higher than the minimum social security pension paid by the host Member State. "

47. Directive 2004/38/EC was implemented in Ireland by S.I. No. 656 of 2006, European Communities (Free Movement of Persons) No. 2 Regulations 2006. Regulation 6(2)(a)(ii) of the Regulations provides:-

"Subject to Regulation 20, a Union citizen may reside in the State for a period longer than 3 months if he or she-

(ii) has sufficient resources to support himself or herself, his or her spouse and any accompanying dependants, and has comprehensive sickness insurance in respect of himself or herself, his or her spouse and any accompanying dependants... "

48. Regulation 2(3) of the Regulations provides:-

"For the purposes of these Regulations, a person shall be regarded as not having sufficient resources to support himself or herself and his or her dependants where he or she would qualify for assistance under Part 3 of the Social Welfare Consolidation Act 2005 (No. 26 of 2005) if a claim were made by or on behalf of the person. "

49. It is undisputed that the second named applicant, as a German national and citizen of the European Union, provided she satisfies the conditions laid down in Article 7(1)(b) of the Directive 2004/38/EC, will have a right to reside in Ireland. It also seems to be undisputed that, in such circumstances, the first named applicant, as the second named applicant's primary carer, would have a derived right to reside pursuant to the judgment of the Court of Justice in *Chen*. The Minister has, therefore, invited the first named applicant to apply for *Chen* residence and has requested that she provide evidence that shows that she meets the sufficient resources and comprehensive sickness insurance requirements under Article 7(1)(b) of the Directive.

50. Where the parties differ, however, is as regards the extent of the first named applicant's derived right of residence, if established. The Minister contends that if successful in her application under *Chen*, the first named applicant will have a right to reside only, i.e. a Stamp 3 residency. The first named applicant submits that the Minister is mistaken in this view, and that *Chen* residence, by implication, encompasses a right to work, i.e. a Stamp 4 residency. The applicants further argue that in determining whether the second named applicant meets the sufficient resources requirement, the Minister must take into account the potential future resources of her primary carer, the first named applicant, such as a job offer.

51. The first named applicant submitted that if she is permitted to work, she will be able to meet the sufficient resources requirement and prevent either herself or her daughter becoming a burden on the Irish Social Welfare system. If she is not permitted to work, then it appears she will not be in a position to satisfy the sufficient resources condition and she and her daughter will not, consequently, qualify for residence in the State. As noted above, if the applicants fail to qualify for residence in Ireland, it appears they will have a right to reside in Germany as per the decision of the CJEU in *Ruiz Zambrano V. Office National de l'Emploi* (Case C-34/09, 8th March, 2011) (hereinafter referred to as *"Zambrano"*), since the second named applicant is a German national.

52. The first named applicant relies on the decision in Chen in support of her claim to be allowed to work in the State. She maintains that implicit in the Chen judgment is a right to work. The respondents disagree and submit that Chen residence only gives a right to the primary carer to reside in the host State.

53. It is necessary to look at the judgment in the *Chen* with some care. The case concerned an application by a Chinese woman, Mrs. Chen, to reside in the United Kingdom along with her Irish citizen daughter, Catherine. Mrs. Chen and her husband, both of Chinese nationality, worked for a Chinese undertaking established in China. Mrs. Chen's husband was a director and majority shareholder of that company. For the purposes of his work, he travelled frequently to various Member States, in particular to the United Kingdom. The court noted that Mrs. Chen and her daughter provided for their needs by reason of Mr. Chen's employment, that the appellants did not rely upon public funds in the United Kingdom and there was no realistic possibility of ever becoming so reliant, and that the

appellants were insured against ill health.

54. The relevant question referred to the Court of Justice in *Chen* was:-

> *"whether Directive 73/148, Directive 90/364 or Article 18 EC, if appropriate, read in conjunction with Articles 8 and 14 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), confer, in circumstances such as those of the main proceedings, upon a young minor who is a national of a Member State, and is in the care of a parent who is a national of a non-member country, the right to reside in another Member State where the minor receives child-care services. If such right be conferred, the national court wishes to ascertain whether those same provisions consequently confer a right of residence on the parent concerned. "*

55. The court rejected the contention that Catherine had to possess the resources personally. It stated at para 30:-

> *"According to the very terms 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. "*

56. The court went on to consider whether Mrs. Chen had a right of residence in the United Kingdom derived from the rights of her daughter, an EU citizen. Having pointed out that Mrs. Chen did not come within the terms of Directive 90/364, the court held at para. 45 *et seq*:-

> *"45. On the other hand, a refusal to allow the parent, whether a national of a Member State or a national of a non-member country, who is the carer of a child to whom Article 18 EC and Directive 90/364 grant a right of residence, to reside with that child in the host Member State would deprive the child's right of residence of any useful effect. It is clear that 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 or her 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, mutatis mutandis , in relation to Article 12 of Regulation No 1612/68, Baumbast and R , paragraphs 71 to 75).*
>
> *46. For that reason alone, where, as in the main proceedings, Article 18 EC and Directive 90/364 grant a right to reside for an indefinite period in the host Member State to a young minor who is a national of another Member State, those same provisions allow a parent who is that minor's primary carer to reside with the child in the host Member State.*
>
> *47. The answer to be given to the national court must therefore be that, in circumstances like those of the main proceedings, Article 18 EC [now Article 21] and Directive 90/364 [replaced by Directive 2004/38/EC] 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."*

57. In their written submissions, the applicants concede that the Court of Justice did not explicitly hold that Mrs. Chen's right of residence in the United Kingdom included a right to work, since this question was not referred to it. Nevertheless, the applicants submitted that having regard to the nature of the residence permit sought by Mrs. Chen, as well as the fact that her employment was the means by which her Irish daughter had sufficient resources to reside in the United Kingdom, it is implicit that the right declared in that judgment did not contemplate any restriction on the right of residence of the primary parental carer which would exclude an entitlement to work.

58. The applicants also relied on the CJEU's decision in *Zambrano*. In that case, Mr. Zambrano, who was a father and primary carer to two Belgian children, was refused a right to reside or work in Belgium. Arising from this, a preliminary reference was made by the Belgian Tribunal to the CJEU. This question was reformulated by the Court of Justice, at para. 36, in the following terms:-

> *"Whether the provisions of the TFEU on European Union citizenship are to be interpreted as meaning that they confer on a relative in the ascending line who is a third country national, upon whom his minor children, who are European Union citizens, are dependent, a right of residence in the Member State of which they are nationals and in which they reside, and also exempt him from having to obtain a work permit in that Member State. "*

59. The applicants in the present proceedings relied to a significant extent on the *Zambrano* judgment in support of their contention that *Chen* residence must include a right to work. They emphasised the following portion of the CJEU's judgment:-

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

60. The respondents argued that the decision in *Zambrano* was not applicable to the facts arising in the present case. They submitted that in *Zambrano*, Belgian national children residing in Belgium with their Columbian father, faced the prospect of having to leave the territory of the Union altogether when their father was refused a right to reside and work in Belgium. Counsel for the respondent referred to the CJEU's judgment, at para. 44, where it is stated that if a work permit were not granted to a person in Mr. Zambrano's position *"he would risk not having sufficient resources to provide for himself and his family, which would also result in the children, citizens of the Union, having to leave the territory of the Union"*. The respondent submitted that these were not the circumstances which pertained in the present case: if the first named applicant is denied a right to reside or work in Ireland, she has the option of taking up residence in Germany since her daughter, the second named applicant, is a German national. The respondent

submitted that in those circumstances, which would be analogous to the circumstances in *Zambrano*, the first named applicant would be able to assert a right to reside and work in Germany along with her German national daughter.

61. The effect of the *Zambrano* judgment was considered by Cooke J. in *Gilani v. Minister for Justice and Equality* [2012] IEHC 193. Having quoted paras. 41 -45 of the *Zambrano* decision, the learned judge held at paras. 15- 19 of his judgment:-

> *"15. Accordingly, it is only where the removal of the third country national or the refusal to grant a third country national parent a work permit will necessarily lead to the departure of the Union citizen child from the territory of the Union because he or she cannot continue to reside within the Union without the presence, care and support of that parent, that Article 20 TFEU can be invoked by the EU citizen to require the relevant Member State to permit the parent to remain and to be employed.*
>
> *16. That this is the extent of the effect of Article 20 in these situations is made clear by the later judgment of the Court of Justice of the 15th November, 2011, in case C256/11 Dereci and Others. There the Court was asked to consider the position of a number of third country nationals who wished to live with family members who were resident in Austria as nationals of that Member State and therefore citizens of the Union. Those Union citizens had lived in Austria; had never exercised their right to free movement and were not maintained by the non national applicants. The Court noted that some of the applicants such as the first named, Mr Dereci, had entered Austria illegally and had married Austrian nationals with whom there were three children who were also Austrian nationals and still minors.*
>
> *17. Referring to the case which led to the Ruiz Zambrano judgment, the Court reiterated the essential position that a refusal to grant a right of residence and a work permit to a third country national with dependent minor children in a Member State of which the children are nationals and resident 'would lead to a situation where those children, who are citizens of the Union, would have to leave the territory of the Union in order to accompany their parents. In those circumstances, those citizens of the Union would, in fact, be unable to exercise the substance of the rights conferred on them by virtue of their status as citizens of the Union '.*
>
> *18. The Court added however:-*
>
> > *'66. It follows that the criteria relating to the denial of the genuine enjoyment of the substance of the rights conferred by virtue of European Union citizen status refers to situations in which the Union citizen has, in fact, to leave not only the territory of the Member State of which he is a national but also the territory of the Union as a whole.*
> >
> > *67. That criterion is specific in character in as much as it relates to situations in which, although subordinate legislation on the right of residence of third country nationals is not applicable, a right of residence may not, exceptionally, be refused with a third country national who is a family member of a Member State national as the effectiveness of the Union citizenship enjoyed by that national would otherwise be undermined.*
> >
> > *68. Consequently, the mere fact that it might appear desirable to a national of a Member State for economic reasons or in order to keep his family together in the territory of the Union, for the members of his family who do not have the nationality of a Member State to be able to reside with him in the territory of the Union, is not sufficient in itself to support the view that the Union citizen would be forced to leave Union territory if such a right is not granted.*
> >
> > *69. That finding is, admittedly without prejudice to the question whether, on the basis of other criteria, inter alia, by virtue of the right to the protection of family life, a right of residence cannot be refused. However, that question must be tackled in the framework of the provisions on the protection of fundamental rights which are applicable in each case. '*
>
> *19. Thus the circumstance in which a Union citizen can require his or her Member State of nationality to permit a third country family member to reside and work in the Member State is explicitly exceptional and conditional on the fact that the citizen is dependent on the presence of the family member for care and support such that if it is removed, the citizen must leave the territory of the Union with the family member. It is clear, accordingly, that the entitlement of a minor Union citizen child to assert an entitlement to compel the grant of a right of residence and a work permit to a non national parent is fundamentally dependent upon it being shown that it is necessary to do so in order to avoid the Union citizen child having to depart the territory of the Union upon the removal of the parent. "*

62. In his reply to the applicant's submissions on *Chen* and *Zambrano*, counsel for the respondent pointed out that Mrs. Chen did not apply for a work permit, or a right to work in the United Kingdom: she applied for residency simpliciter. In *Zambran*o on the other hand, the applicant was arguing that without the right to work he and his EU national dependants would have to leave the territory of the Union. The right to work was, therefore, a central issue in the *Zambrano* case. In *Chen,* the right to work was not a matter before the court. Counsel distinguished *Zambrano* on the basis that the EU citizen children in *Zambrano* were at risk of being forced to leave the EU because they were residing in the EU State of which they were nationals and they had no other right of residence within the EU. In contrast, the EU citizen child in the present case, the second named applicant, is a German national resident in Ireland. If refused residence in Ireland, the respondent submitted that she has a right to reside in Germany, and there is no question of her being forced to leave the territory of the Union. For these reasons, counsel for the respondent submitted that the *Zambrano* decision did not assist the applicants.

63. The applicants also referred in the course of their argument to *Adzo Domenyo Alokpa v. Ministre du Travail, de l'Emploi et de l'Immigration* [2013] EUECJ C- 86/12 (10th October, 2013) (hereinafter referred to as "*Alokpa*"). In this case, the applicant, Mrs. *Alokpa*, a citizen of Togo, applied for a right to remain in Luxembourg on behalf of herself and her two French national children, who had been born in Luxembourg. The Luxembourg authorities refused her application. The applicant appealed this decision to the administrative court which stayed the proceedings and submitted a preliminary reference to the Court of Justice. The question referred by the national court was reformulated by the CJEU, at para. 20 of its judgment, as follows:-

> *"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. "

64. The applicants accepted that the question addressed by the CJEU in Alokpa concerned a right of residence only. That being the case, the CJEU answered the question referred at paras. 30 and 31 of its judgment as follows:-

"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(J)(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. "

65. The applicants placed great emphasis on the opinion of the Advocate General in *Alokpa*. (Case C-86/12, Opinion of Advocate General Mengozzi, delivered on 21st March, 2013). The Advocate General discussed at some length what constitutes "*sufficient resources"* for the purposes of Article 7(1)(b) of Directive 2004/38/EC. In particular, the applicants relied on the following portions of the Advocate General's opinion:-

"21. It is clear from the order for reference that, unlike the situation underlying Zhu and Chen, Ms Alokpa 's children do not have any means of subsistence, a matter which led to the Grand Duchy of Luxembourg, on the territory of which the three applicants in the main proceedings are residing in a hostel, taking full responsibility for them and for their mother.

22. As has been stated by several of the parties participating in the procedure before the Court, Ms Alokpa 's children do not therefore appear to satisfY the conditions of having sufficient resources and comprehensive sickness insurance cover in the host Member State within the meaning of Article 7(1)(b) of Directive 2004/38.

23. However, it is also clear from the order for reference that Ms Alokpa never intended to become a burden on the Luxembourg State and that she has been offered a job for an indefinite period in Luxembourg, subject to the sole condition that she obtain a residence permit and a work permit in Luxembourg. It should be noted in this connection that Ms Alokpa produced a copy of that job offer in the course of proceedings before the referring court.

24. At this stage, consideration must be given to the relevance of that job offer, and therefore to the possibility of taking into account resources which are not current but rather future or potential, for the purposes of satisfying the condition of 'sufficient resources ' laid down in Article 7(1)(b) of Directive 2004/38.

25. That question was debated at quite considerable length by the participants at the hearing before the Court.

26. At the hearing, the Luxembourg and Netherlands Governments adopted a strict interpretation of the condition laid down in Article 7(1)(b) of Directive 2004/38, taking the view that a mere job offer represented nothing more than a hypothetical possibility of obtaining the resources required, which is not covered by the wording of that provision. According to those governments, the means of subsistence must have already been acquired when the application for residence is made and any interpretation to the contrary would have the result of rendering the requirement laid down in Article 7(1)(b) of that directive meaningless and redundant.

27. As a matter of principle, I am not convinced by that view.

28. Like the German Government and the Commission, I consider 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 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.

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. "

66. The applicants assert in their written submissions that on the basis of the above extract the Advocate General *"explicitly holds that the third country national's employment status is relevant to the sufficiency or otherwise of the Union citizen's resources"*. The applicants thus conclude that it follows axiomatically that the residency of the third country national must include the right to work. The applicants submitted that this proposition was implicitly confirmed by the CJEU, who held that there was no requirement whatsoever as to the origin of a minor Union citizen's resources, since they could be provided by the EU minor's parents. The applicant submitted that, on the facts of the case, the only means by which Mr. Alokpa could provide resources to her children was through gainful employment.

67. On this basis, the applicants argued that the decision of the respondent to exclude *a priori* any entitlement on the part of the first named applicant to work in the State and, by extension, any capacity she may have to provide resources to her minor Union citizen child, was incompatible with Article 21 TFEU in conjunction with Council Directive 2004/38/EC.

68. Counsel for the applicant submitted that the resources do not have to be in existence at the time of the application. If the applicant is in a position to provide those resources through future employment, then she is entitled to a right of residence and a right to work to provide those resources. Counsel further submitted, with regard to *Alokpa*, that the only way resources could come from

Mrs. Alokpa was if she was allowed to work in Luxembourg. Counsel concluded that there is no other possible interpretation of the Court of Justice's decision. Counsel submitted that in *Alokpa* the CJEU confirmed the Advocate General's opinion that resources could be provided by prospective work.

69. In reply, counsel for the respondent submitted that the *Alokpa* judgment offers no assistance to the court. He submitted that when *Alokpa* is reduced to its essentials, all the Court of Justice was saying is that it was a matter for the domestic court as to whether the applicants had sufficient resources such that they would not become a burden on the social welfare system of the host Member State; no further guidance is offered.

70. In relation to the opinion of the Advocate General, counsel for the respondent pointed out that that opinion did not bind the court. With regard to the Advocate General's view that *"the condition of 'sufficient resources' is capable of being satisfied by the definitive prospect of future resources which would stem from a job offer"*, counsel for the respondent submitted that the Court of Justice did not follow the Advocate General's advice. The Court of Justice made no reference whatever to job offers or potential future resources in its decision. Counsel pointed out that work permits and the right to work were not even part of the question under consideration by the Court of Justice in *Alokpa*.

71. Certainly, it is the case that the Court of Justice made no reference to job offers or future or prospective resources in the course of its judgment in *Alokpa*. Instead it stated at para. 27, as follows:-

> *"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)."*

72. The Court of Justice concluded at para. 30 that it was for the referring court to *"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 "*.

73. The respondents pointed out that all references by the Court of Justice to sufficient resources are in the present tense: the applicants must *"have*" sufficient resources; and it is sufficient that such resources *"are available"* to the applicants. Counsel for the respondent argued that there is no mention of future resources and that it is difficult to see how one could imply that that was what the Court of Justice meant. The respondents submitted that if the Court of Justice had intended future resources to be taken into account, as per the opinion of the Advocate General, then surely it would have said as much. Counsel for the respondent suggested that it was reasonable to conclude that the absence of any references to future or potential resources in the court's judgment, such as those stemming from a job offer, shows that the court did not share the Advocate General's views.

74. I now turn to consider the relevant English jurisprudence which counsel for the respondent opened in support of his case.

United Kingdom Case Law

75. *W (China) v. Secretary of State for the Home Department* [2006] EWCA Civ. 1494, concerned Chinese parents (W. and X.) of an Irish citizen child (Q.) who asserted rights of residence in the United Kingdom pursuant to the decision of the CJEU in *Chen*. One of the arguments advanced on behalf of the applicants was that the income derived by W., father of the Irish citizen child, from his employment in the United Kingdom was adequate to meet the *"sufficient resources"* requirement under Directive 90/364 (now Directive 2004/38/EC). The Court of Appeal rejected this contention. Buxton L.J. held at para. 16 that this argument was *"wrong simply as a matter of logic and construction and giving full weight to the supremacy of EU law"*. He stated as follows in the course of his judgment:-

> *"As interpreted by the ECJ in Chen, the article 18 right of Q and the associated right of her custodians can only be lawfully asserted under the strictly limited conditions imposed by Directive 90/364. Those conditions are pre-conditions not merely to the exercise but also more fundamentally to the existence of the right in any particular case: article 18 stating in terms that 'the right' to move and reside is subject to the limitations and conditions laid down in, e.g., Directive 90/364. The right accordingly does not exist if Q does not have access to the relevant resources. There is no suggestion that under article 18 the host state is obliged to take positive steps to make resources available to an entering EU citizen: Mr Gill understandably drew back from any suggestion that the state would be obliged to provide support for a custodian without resources in the shape, for instance, of disablement benefit. By the same token, the state is not obliged to adjust its domestic law in order to make available to the EU citizen resources that would not otherwise be available to him, so that he can fulfil the pre-condition to the existence in his case of the article 18 right: the right which has to exist before he can require the state to adjust its domestic law in deference to it. "*

76. Counsel for the respondent also referred to the decision of the Upper Tribunal (Immigration and Asylum Chamber) in *Seye (Chen Children; Employment)* [2013] UKUT 00178 (IAC). In this case the first named claimant was a French national minor born in 2006. The other three claimants, his mother, his half-sibling (born in 2008), and his stepfather, were nationals of Cameroon. The first claimant was the issue of a relationship between his mother and a French national, which ended some time after his birth. The four claimants claimed a right of residence pursuant to the Chen decision. It was accepted by the British authorities that if the first claimant could establish that he was self sufficient within the meaning of the Immigration (European Economic Area) Regulations 2006 (being the United Kingdom Regulations implementing Directive 2004/38/EC), then both his appeal and that of his mother (the second claimant) and his half-sister (the third claimant) would succeed. The question that arose in that case, which is of relevance for present purposes, is whether employment in the host Member State could be relied upon to establish self sufficiency. The court held that it was bound by the ruling of the Court of Appeal in *Liu & Ors v. Secretary of State for the Home Department* [2007] EWCA 1275 and, accordingly, answered this question in the negative.

77. *Liu* concerned conjoined appeals dealing with questions arising from the jurisprudence of the CJEU and of the Court of Appeal in relation to the rights of movement and residence of citizens of the EU that are conferred by then Article 18 EC (now Article 21 TFEU) and the associated rights of certain members of their families that are conferred by Directive 90/364 (now replaced by Directive 2004/38/EC). None of the adult appellants were citizens of the Union. All of them claimed a right of residence in the United Kingdom by virtue of a family connection with a child who was a citizen of the Union. At para. 12 of his judgment in *Liu*, Buxton L.J. summarised the ratio of the Court of Appeal in *W (China*) as follows:-

> *"(i) Applying para. 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, (see W (China) at para. 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) at para. 8)

(iii) Those conditions are pre-conditions to the existence of the Art.18 right in any given case, and thus the right does not exist until those conditions are fulfilled: (W (China) at para. 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) at para. 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 (China) at para. 16). "

78. In the course of his judgment, Buxton L.J. gave the following analysis of the approach of the court to the question of sufficient resources.

21 ...By a combination of Art.18 read with the requirements of the Directives, the right to reside only exists once the requirements of the directives are fulfilled: see para. 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-para.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. "

Conclusion

79. In *Chen*, the CJEU held that in order for the minor EU citizen's right to free movement to be of useful effect, that right had to encompass a right of residence in the host Member State for the minor's primary carer. This is because minors are not in a position exercise their right of free movement on their own. On that basis, the primary carer, who was a non-EU national, acquired a derivative right of residence in the United Kingdom through her child, who was an EU citizen exercising her right to free movement within the Union. With regard to the "sufficient resources" requirement, the CJEU held at paras. 30 to 33 of its judgment:

30. According to the very terms of Article 1 (1) of Directive 90/364 [now Article 7(1)(b) of Directive 2004/38], 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.

31. 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.

32. Moreover, the limitations and conditions referred to in Article 18 EC and laid down by Directive 90/364 are based on the idea that the exercise of the right of residence of citizens of the Union can be subordinated to the legitimate interests of the Member States. Thus, although, according to the fourth recital in the preamble to Directive 90/364, beneficiaries of the right of residence must not become an 'unreasonable' burden on the public finances of the host Member State, the Court nevertheless observed that those limitations and conditions must be applied in compliance with the limits imposed by Community law and in accordance with the principle of proportionality (see, in particular, Baumbast and R, paragraphs 90 and 91).

33. An interpretation of the condition concerning the sufficiency of resources within the meaning of Directive 90/364, in the terms suggested by the Irish and United Kingdom Governments 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.

80. The respondents have argued forcefully that *Chen* residence is limited to a right to reside and does not include a right to work. They have also submitted that self-sufficiency under Article 7(1)(b) of Directive 2004/38/EC is to be assessed on the basis of resources extant at the time the application for *Chen* residence is made. The jurisprudence of the English Court of Appeal, which pre-dates *Alokpa*, supports this interpretation.

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.

85. Therefore, in the context of these proceedings, I make an order quashing the decision of the respondent notified by letter dated 6th February, 2012, to refuse the applicant's application for Stamp 4 residency pursuant to EU law. I will also make a declaration that: (i) the applicant is entitled to apply for Stamp 4 residency pursuant to EU law; and (ii) when assessing whether the applicant has "sufficient resources", the Minister is to take into account the definite prospect of future resources, such as those arising from a job offer which the applicant has accepted.