THE HIGH COURT

JUDICIAL REVIEW

[2012 No. 631 J.R.]

BETWEEN

BELINDA WANG (A MINOR) SUING THROUGH HER MOTHER AND NEXT FRIEND LILI WANG AND HUI ZHENG

APPLICANTS

AND

MINISTER FOR JUSTICE AND LAW REFORM

RESPONDENT

RULING of Mr. Justice Cooke of the 23rd day of July, 2012.

1. This is the Court's ruling on an application made *ex parte* on behalf of the applicants for leave to apply for judicial review, including orders of *certiorari,* in respect of decisions of the respondent contained in letters dated the 18th April, 2012, refusing applications for permission to reside in the State pursuant to the provisions of the European Communities (Free Movement of Persons) (No.2) Regulations 2006 and 2008 (hereinafter referred to as the 2006 Regulations) and pursuant more generally to provisions of EU Treaty and principles of EU law.

2. The second named applicant ("the mother") is a Chinese national who arrived in the State in April 2004, on a student visa. She met a Hungarian national Mr. Jozsef Tuza in 2005, and they married in December 2006. She was subsequently granted permission to remain in the State for a period of five years as the wife of a Hungarian National under the 2006 Regulations.

3. The first named applicant ("the daughter") was born to that couple on the 5th July, 2009 and is now, accordingly, three years old. The child is a Hungarian national.

4. According to the mother the marriage broke down and her husband returned to Hungary at the beginning of 2010. She says that he has since had no relationship with his daughter and makes no contribution to her care or upbringing.

5. The third named applicant is also a Chinese national who arrived in the State in February, 2002, on a student visa. His permission has been renewed on a number of occasions and is currently valid until the 16th August, 2012.

6. The mother describes the third named applicant as "my long term partner" and claims that they are "in a long term, committed relationship". The third named applicant is also said to be the father of a second child to which the mother expects to give birth shortly.

7. On the 23rd September, 2011, a solicitor for the applicants applied to the EU Treaty Rights Section of the Minister's Department for permissions to reside on their behalf under the 2006 Regulations. In addition to presenting formal applications on Form EU1, the solicitor also requested the Department to consider generally the position on the three applicants under EU law with particular reference to the *Zhu* and *Chen* case (Case C- 200/02, *Zhu & Chen v Secretary of State for the Home Department* [2004] ECR I-9925) and Case 34/09 *Ruiz Zambrano* [2010] ECR I-000). In particular, it was asserted that the position of the mother is substantially identical to that of Mrs. Chen in the former case in that she is self-sufficient, can support her family and daughter, has medical insurance and wishes for her daughter to reside in a Member State of the European Union. It was therefore claimed that Ms. Wang is entitled to reside with her daughter in Ireland as her daughter's "primary carer". It was also asserted that the third named applicant was effectively the minor's "stepfather"; that together they constituted a family unit and that the third named applicant was accordingly entitled to reside with his stepdaughter and partner in the State.

8. By letter of the 3rd October, 2011, to the mother, the EU Treaty Rights Section replied to the above letter stating that in view of the information that the husband no longer resides in the State, it appeared that the grounds upon which permission to reside had been granted to the mother on the 21st August, 2007, no longer applied.

The letter informed her that it was proposed to revoke that permission and invited "written representations to this office within ten working days of the date of this letter setting out the reasons as to why your permission to remain in the State should not be revoked". The letter added:

> "...having considered the evidence submitted in detail I am to advise that the Minister is satisfied that you are neither a permitted or qualifying family member within the meaning of Regulation 2(1) [of the 2006 Regulations]. Accordingly you application cannot be accepted under these Regulations. On examination of the documentation it appears that you 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* judgment. Accordingly, the Minister now proposes to consider your application with regards to the provisions of that judgment."

9. On the same day the section wrote to the third named applicant in somewhat similar terms stating that his application could not be accepted under the Regulations for the same reasons, but that his entitlement under the *Chen* judgment would be looked at.

10. On the 13th October, the solicitor wrote noting that the Minister was considering the applications in the light of the *Chen* judgment and pointing out that the third named applicant's visa was about to expire and requesting temporary extension pending a decision on the applications.

11. On the 2nd November, the solicitor again wrote to the Treaty Rights Section making more extensively the case in support of the

entitlement of the mother and daughter to remain in the State on the basis of the *Zambrano* case. On the 7th November, 2011, the third named applicant was granted a three month extension of his visa.

12. The decisions which are sought to challenged in this judicial review proceeding are contained in two letters dated the 18th April, 2012, written to the solicitor dealing separately with the respective cases of the mother and daughter on the one hand and the third named applicant on the other.

13. In dealing with the application on behalf of the mother and daughter, the letter first addressed the position under the *Zambrano* judgment and drew particular attention to para. 45 of the judgment. It stated that the essential principle of the entitlement arising under that judgment based on Article 20 TFEU was that a Member State is precluded "rom refusing 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 residence and nationality of those children and from refusing to grant a work permit to that third country national insofar as such decisions deprive those children of the genuine enjoyment of the substance of the rights attaching to the status of European Union citizen."

14. The letter stated that "it is clear that Ms. Belinda Wang is a national of the Republic of Hungary but is resident in Ireland. As Belinda's situation does not meet the two criteria of the judgment it is not possible for your client (the mother) to rely on the provisions of the *Zambrano* judgment in order to claim a right to residency in the State". Reference was then made to the later judgment in Case C256/11 *Dereci and Others*.

15. The letter then dealt with the application under the 2006 Regulations and stated:

> "It is the position of the Minister that an adult cannot claim dependency based on a child. Furthermore, it is the Minister's position that, Ms. Belinda Wang, as a minor cannot constitute the basis of a household for the purpose of the Directive. It is more appropriate to state that Ms. Belinda Wang is in fact a member of the household of her mother ... as (the mother) is not a Union citizen herself, it is not possible for Belinda Wang to form part of her household within the meaning of Regulation 2(1) of the Regulations".

16. Regulation 2(1) (so far as relevant to these applications)defines "permitted family member" as meaning: "Any family member, irrespective of his or her nationality, who is a not a qualifying family member of the Union citizen and who in his or her country of origin habitual residence or previous residence- (a) is a dependant of the Union citizen, (b) is a member of the household of the Union citizen, [or] (c) on the basis of serious health grounds strictly requires the personal care of the Union citizen".

17. The letter then addressed the outstanding issue as to the possible application of the *Chen* judgment. It explained that the judgment only "relates to the right of a third country national parents of Union citizen children to reside in a Member State other than the state of nationality of the child". That right was said to be dependent upon the minor citizen being covered by appropriate sickness insurance and being in the care of a parent having sufficient resources for the minor not to become a burden on the finances of the host Member State. The letter then rejected the possible application of this judgment in the following terms:-

> "In respect of (the mother) as the parent of a minor EU citizen, it is possible for the Minister to consider her application for a right of residence in accordance with the provisions of the *Chen* judgment. As stated above, such a right is dependent on the minor Union citizen being covered by appropriate medical insurance and being in the care of a parent who is a third country national and has sufficient resources for that minor, thus not a burden on the public finances of the host Member State. Having considered the documentation submitted as part of the application, the Minister is of the view that (the mother) is unable to comply with the requirements in respect of being self sufficient and having private medical insurance. Indeed the attached evidence suggests that self sufficiency means are being funded by (the third named applicant) as (he) is neither the spouse of (the mother) nor the father of Belinda Wang, he is under no legal obligation to provide such supports neither at this time or in the future. Accordingly, the Minister is not satisfied that "the mother) could be considered to be self sufficient in her own right within the meaning of the provisions of the *Chen* judgment."

18. In the second letter of the 18th April, 2012, the Treaty Rights Section wrote in somewhat similar terms in relation to the application on behalf of the third named applicant. Again, quotations are given from para. 45 of the *Zambrano* judgment and from the *Dereci* judgment. It is pointed out that in accordance with that case law, the daughter could consider residing and exercising her rights as a Union citizen with her Hungarian father and thereby avoid being deprived of the enjoyment of her right as a Union citizen.

19. In dealing with the application under the 2006 Regulations the Section again points out that the third named applicant cannot claim to be a "permitted family member" because an adult cannot claim dependancy upon a Union citizen who is a child. Furthermore, the daughter "as a minor cannot constitute the basis of a household for the purposes" of the Regulations. The application was therefore rejected upon the basis that the third named applicant is neither a qualifying member nor a permitted family member under the Regulations.

20. The possible application of the principle in the Chen judgment is also rejected on the basis that the third named applicant is not a parent of Belinda Wang. The letter says: "It is noted that it is asserted that he is the stepfather of Belinda Wang. However, as [the mother] has not had her marriage to her Hungarian husband annulled nor obtained a decree of divorce, she cannot be married to the (the third named applicant) and accordingly this confirms that (the third named applicant) has no legal relationship to Belinda Wang and therefore he cannot be considered a parent of a minor citizen within the meaning of the provisions of the *Chen* judgment".

21. It is convenient to deal with the position of the third named applicant first. In the judgment of the Court, no arguable case is made out that the respondent has erred either in law or in fact in the decision given in the letter of the 18th April, 2012, in respect of the third named applicant. The third named applicant is neither the spouse of the second named applicant nor the father of the first named applicant. As indicated above, the term "permitted family member" in Regulation 2(1) means any family member who is not a qualifying family member of the Union citizen "and who, in his or her country origin, habitual residence or previous residence (a) is a dependant of the Union citizen and, (b) is member of the household of the Union citizen". Quite apart from the issue as to whether an adult third national could, in the ordinary meaning of the word used, be a "dependant" of a three year old child, the third named applicant was never the dependant or member of the household of the Union citizen "in his or her country of origin, habitual residence or previous residence". As the recitals to Directive 2004/38/EC of the European Parliament and of the Council of 29th April, 2004, ("the Directive",)- which is implemented by the 2006 Regulations- make clear, the legislative rationale of the provision is that citizens of the European Union should not be inhibited from exercising the fundamental right to move and reside within the territory of the Union by an inability to be accompanied by family members including family members who are not nationals of a Member State. Thus, the Regulations entitle the Union citizen who is exercising the right of free movement to be accompanied both by the direct relatives who are "qualifying family members" and also by other but more distant "family members" who come within the definition of "permitted family member". This can even include an individual who is not a relative by blood or marriage but who is shown to have been a part

of the family household. The situation of the elderly childrens' nurse "Nanny Hawkins" living out her retirement in her room in *Brideshead* may seem remotely quaint to the modem western reader but would no doubt appear quite normal in other cultures as the "family reunification" cases that come before the High Court under s. 18 of the Refugee Act 1996 often illustrate. Thus the notion may cover for example, an elderly housekeeper now retired who had lived with and been supported by the family over many years and thus was part of the household. But this is dependent upon such an individual having been a family member in that way "in his or her country of origin, habitual residence or previous residence". The third named applicant has never been in that position. His country of origin and previous residence has been China. Even if it could be argued that the daughter in this case falls to be treated as a Hungarian national who has been brought here by her father such that his exercise of his right of free movement is imputed to his daughter, the third named applicant was never a member of the daughter's notional household in Hungary.

22. The distinction made between "qualifying family member" and "permitted family member" in the 2006 Regulations derives, of course, from the provisions of Articles 2 and 3 of the Directive. Article 2.2 defines the scope of the term "family member" so as to confer an automatic right (see recital6) to accompany the Union citizen upon the spouse, a registered partner, direct dependant descendents under the age of 21 including those of the spouse or partner and direct dependant relatives in the ascending line including those of a spouse or partner.

23. Article 3 extends the scope of the benefit of the entitlement to accompany a Union citizen exercising the right of freedom of movement upon a wider category of "family members" but without conferring the same automatic right upon them. Under Article 3.2 the host Member States are required in accordance with their national legislation "to facilitate entry and residence" for such beneficiaries. This category extends to "any other family members" who fall outside the definition of "family member" in Article 2.2 but 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" and "the partner with whom the Union citizen has a durable relationship, duly attested".

24. Thus, even if these provisions can be construed so as to treat a three year old child as "the Union citizen having the primary right of residence" it is clear, in the judgment of the Court, that the third named applicant was never "in the country from which he has come" (ie China) a dependant of the child or a member of the child's household.

25. It has been pointed out in the Opinion of the Advocate General in Case C- 83/11 *Secretary of State for the Home Department v Rahman and others* (Unreported 27 March 2012) that there is some uncertainty as to the legal effect for the Member States of the requirement to "facilitate entry and residence" of this category of family member in accordance with their national legislations and as to whether it has binding force of law or is merely a recommendation. (See paragraphs 47 *et seq*.) It is clear however that the obligation, whatever its character in law, does not require the Member States to facilitate entry and residence of persons who fall outside the category defined in Article 3.2 (See paragraph 60.) Thus the obligation to examine the personal circumstances, finances or situation of dependance of a "family member" arises only in respect of persons who come within the scope of the defined category.

26. It follows that, contrary to the argument advanced in support of the application, it cannot be said that the respondent has failed to interpret the definition of "permitted family member" broadly and "in accordance with the spirit and objective of the Regulations and Directive". The scope of the wider category of potential beneficiaries is defined in Article 3.2 of the Directive and that provision has been in the view of the Court, correctly reflected in the definition of "permitted family member". Article 3.2 does not impose upon the Member States an obligation to facilitate entry and residence for persons whose relationship with the Union citizen falls outside the scope of Article 3.2.

27. Nor in the judgment of the Court can any arguable case be made that the principle of the *Chen* judgment could be applied to the third named applicant. He is not the first named applicant's parent. Insofar as the daughter may have an arguable entitlement to reside in a Member State other than Hungary, she is clearly in the care of her mother and her entitlement is dependent upon the application of the Chen principle to her mother and herself exclusively.

28. For these reasons the Court considers that leave cannot be granted in respect of any of the reliefs sought to be obtained on behalf of the third named applicant. This is not to say, however, that the third named applicant in these circumstances is wholly without the prospect of protection or that the three of them are without possible legal protection as a unit. In the judgment of the Court, the position of the third named applicant will, if necessary, fall to be considered in the context of the possible application to the unit comprising the three applicants in the context of the protection afforded to family life under Article 8 of the ECHR. This will be particularly the case following the birth to the second and third named applicants of the expected child.

29. It is necessary, accordingly, to consider separately the applications for leave made in respect of the mother and daughter.

30. The position of the mother and daughter, of course, is materially different because the mother is the parent of a Union citizen and, at least for the moment, the spouse of a Union citizen. Until the departure of her Hungarian husband from the State in January 2010, she was entitled to reside as a "qualifying family member" as the spouse of a Union citizen. Because she ceased to be a qualifying family member before she had resided for a continuous period of five years "in conformity with these Regulations" that is as the spouse of a Union citizen present in the State, she did not acquire an entitlement to permanent residence under Regulation 12.

31. Her application for a residence card under the Regulations has been refused in the letter of the 18th April, 2012, upon the ground that she does not qualify now as a "permitted family member" because, as the mother of a three year old child, she is not a dependant of the only Union citizen present in the State and is not "a member of the household" of that Union citizen.

32. In the judgment of the Court no arguable case can be made that the Minister has erred in law in deciding that the mother is not a dependant of the Union citizen. Dependence in this context is a question of fact. If the word "dependant" is given its ordinary meaning it is clear that an adult cannot be the dependant of a three year old child. Indeed, that the contrary is the case is demonstrated by the very arguments that have been advanced in support of the proposition that the mother and daughter should be entitled to reside on foot of the principles in the *Zambrano* and *Chen* cases. The case is explicitly made that the mother is the daughter's primary carer and that the daughter is so dependent upon her mother that if the mother is obliged to return to China, the daughter must go with her.

33. In the judgment of the Court, however, while the proposition may be novel it is not unarguable that the mother in these circumstances might be considered a member of "the household" of the Union citizen notwithstanding the fact that the Union citizen is only three years old. It is true, as the contested decision seems to suggest, that the notion of "household" normally connotes a group of individuals living together under a "head of household". The term is defined in the Oxford dictionary as "The people living in a house, *esp*. a family in a house; a domestic establishment." It is not beyond argument, therefore, that the expression "the household of the Union citizen" is not used in that proprietary sense but is open to the interpretation that if one individual is a Union citizen all members of the group could be regarded as equal members of the household.

34. The second contested aspect of this refusal decision relates to the question as to whether the circumstances of the mother and daughter come within the principle of the *Chen* case. As the Courts reads the letter of the 18th April, 2012, that possibility appears to be conceded in principle, but the application is rejected upon the ground of failure to comply with the requirement that the parent has sufficient resources to preclude their being a burden on the public finances of the host Member State and that the child is covered by appropriate medical insurance. In particular the decision, as quoted above, is based on the proposition that the means which make the mother and child self-sufficient for this purpose are being supplied by the third named applicant. It is not apparently disputed that the medical insurance cover condition is complied with. What is not clear however, is what test of self-sufficiency has been applied by the respondent in reaching the conclusion that the means test condition is not met if the support of the third named applicant is eliminated. It is, accordingly, sufficiently arguable for the purpose of the grant of leave that the Minister has erred in fact in rejecting the application upon the basis that the conditions of the *Chen* principle are not met in this case.

35. Leave will therefore be granted to the first and second named applicants to seek judicial review of the decision contained in the letter dated the 18th April, 2012, addressed to them. Leave will be granted to apply for the reliefs set out in section (d) of the statement of grounds at the following paragraphs (i), (ii), (viii), (ix) and (x). It is unnecessary to duplicate the application for *certiorari* in respect of the one decision by reference to separate grounds; and the reliefs by way of mandamus are unnecessary because the quashing of the existing decision, if granted, will require the Minister to take a new decision on the outstanding application.

36. The application for judicial review may be made in respect of the following grounds:

> (1) The respondent erred in law and in fact in deciding that the second named applicant was not a "permitted family member" within the meaning of the definition of that expression in Regulation 2(1) of the 2006 Regulations because she was not a member of the household of the first named applicant as a Union citizen;
>
> (2) The respondent erred in fact and reached an unreasonable and disproportionate conclusion in deciding that the second named applicant is unable to comply with the requirements in respect of being self sufficient and having private medical insurance in order to qualify to reside with her daughter as primary carer in application of the principle in the judgment of the Court of Justice in the European Union in Case C-200/02 *Zhu and Chen v. The Secretary of State for the Home Department*.

37. The Court will also grant leave to the first and second named applicants to seek judicial review on the basis of four of the more general grounds set out in the statement of grounds dated the 11th July, 2012. Subject to deleting the references to the third named applicant, leave will be granted in respect of grounds (xi), (xii), (xiii) and (xx).

38. In the judgment of the Court, the remaining grounds sought but not included in the order granting leave are unnecessary either as duplications of the above grounds or as constituting essentially arguments in support of the above alleged flaws in the decision rather than distinct substantive grounds in their own right