

ZHU AND CHEN

JUDGMENT OF THE COURT (sitting as a full Court)
19 October 2004^{*}

In Case C-200/02,

REFERENCE to the Court under Article 234 EC

from the Immigration Appellate Authority (United Kingdom), made by decision of 27 May 2002, received at the Court on 30 May 2002, in the proceedings

Kunqian Catherine Zhu,

Man Lavette Chen,

v

Secretary of State for the Home Department,

* Language of the case: English.

THE COURT (sitting as a full Court),

composed of: V. Skouris, President, P. Jann, C.W.A. Timmermans, A. Rosas, R. Silva de Lapuerta and K. Lenaerts, Presidents of Chambers, C. Gulmann, R. Schintgen, N. Colneric, S. von Bahr and J.N. Cunha Rodrigues (Rapporteur), Judges,

Advocate General: A. Tizzano,
Registrar: L. Hewlett, Principal Administrator,

having regard to the written procedure and further to the hearing on 11 November 2003,

after considering the observations submitted on behalf of:

- Man Lavette Chen, by R. de Mello and A. Berry, barristers, assisted by M. Barry, solicitor,

- the Irish Government, by D.J. O'Hagan, acting as Agent, assisted by P. Callagher SC, and P. McGarry, BL,

- the United Kingdom Government, by J.E. Collins, R. Plender QC, and R. Caudwell, acting as Agents,

— the Commission of the European Communities, by C. O'Reilly, acting as Agent,

after hearing the Opinion of the Advocate General at the sitting on 18 May 2004,

gives the following

Judgment

- 1 This reference for a preliminary ruling concerns the interpretation of Council Directive 73/148/EEC of 21 May 1973 on the abolition of restrictions on movement and residence within the Community for nationals of Member States with regard to establishment and the provision of services (OJ 1973 L 172, p. 14), of Council Directive 90/364/EEC of 28 June 1990 on the right of residence (OJ 1990 L 180, p. 26) and of Article 18 EC.

- 2 The reference was made in the course of proceedings brought by Kunqian Catherine Zhu (hereinafter 'Catherine'), of Irish nationality, and her mother, Man Lavette Chen (hereinafter 'Mrs Chen'), a Chinese national, against the Secretary of State for the Home Department concerning the latter's rejection of applications by Catherine and Mrs Chen for a long-term permit to reside in the United Kingdom.

Legal background

Community legislation

3 Article 1 of Directive 73/148 provides:

‘1. The Member States shall, acting as provided in this Directive, abolish restrictions on the movement and residence of:

- (a) nationals of a Member State who are established or who wish to establish themselves in another Member State in order to pursue activities as self-employed persons, or who wish to provide services in that State;
- (b) nationals of Member States wishing to go to another Member State as recipients of services;
- (c) the spouse and the children under 21 years of age of such nationals, irrespective of their nationality;
- (d) the relatives in the ascending and descending lines of such nationals and of the spouse of such nationals, which relatives are dependent on them, irrespective of their nationality.

2. Member States shall favour the admission of any other member of the family of a national referred to in paragraph 1(a) or (b) or of the spouse of that national, which member is dependent on that national or spouse of that national or who in the country of origin was living under the same roof.'

4 Article 4(2) of the same directive states:

'The right of residence for persons providing and receiving services shall be of equal duration with the period during which the services are provided.

Where such period exceeds three months, the Member State in the territory of which the services are performed shall issue a right of abode as proof of the right of residence.

Where the period does not exceed three months, the identity card or passport with which the person concerned entered the territory shall be sufficient to cover his stay. The Member State may, however, require the person concerned to report his presence in the territory.'

5 Under Article 1 of Directive 90/364:

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

burden on the social assistance system of the host Member State during their period of residence.

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

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

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

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

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

The United Kingdom legislation

- 6 Under Regulation 5 of the Immigration (European Economic Area) Regulations 2000 (the 'EEA Regulations'):

'1. In these Regulations, "qualified person" means a person who is an EEA national and in the United Kingdom as (a) a worker; (b) a self employed person; (c) a provider of services; (d) a recipient of services; (e) a self sufficient person; (f) a retired person; (g) a student; or (h) a self employed person who has ceased activity; or who is a person to whom paragraph (4) applies.

...'

The main proceedings and the questions referred to the Court of Justice

- 7 The order for reference states that Mrs Chen and her husband, both of Chinese nationality, work for a Chinese undertaking established in China. Mrs Chen's husband is a director and the majority shareholder of that company. For the purposes of his work, he travels frequently to various Member States, in particular the United Kingdom.

- 8 The couple's first child was born in the People's Republic of China in 1998. Mrs Chen, who wished to give birth to a second child, entered the United Kingdom in May 2000 when she was about six months pregnant. She went to Belfast in July of the same year and Catherine was born there on 16 September 2000. The mother and her child live at present in Cardiff, Wales (United Kingdom).
- 9 Under section 6(1) of the Irish Nationality and Citizenship Act of 1956, which was amended in 2001 and applies retroactively as from 2 December 1999, Ireland allows any person born on the island of Ireland to acquire Irish nationality. Under section 6(3), a person born in the island of Ireland is an Irish citizen from birth if he or she is not entitled to citizenship of any other country.
- 10 Under those rules, Catherine was issued with an Irish passport in September 2000. According to the order for reference, Catherine is not entitled, on the other hand, to acquire United Kingdom nationality since, in enacting the British Nationality Act 1981, the United Kingdom departed from the *jus soli*, so that birth in the territory of that Member State no longer automatically confers United Kingdom nationality.
- 11 It is common ground that Mrs Chen took up residence in the island of Ireland in order to enable the child she was expecting to acquire Irish nationality and, consequently, to enable her to acquire the right to reside, should the occasion arise, with her child in the United Kingdom.
- 12 The referring court also observes that Ireland forms part of the Common Travel Area within the meaning of the Immigration Acts, so that, because Irish nationals do not as a general rule have to obtain a permit to enter and reside in the United

Kingdom, Catherine, in contrast to Mrs Chen, may move freely within the United Kingdom and within Ireland. Aside from Catherine's right of free movement limited to those two Member States, neither of the appellants in the main proceedings is entitled to reside in the United Kingdom under its domestic legislation.

- 13 The order for reference also makes it clear that Catherine is dependent both emotionally and financially on her mother; that her mother is her primary carer; that Catherine receives private medical services and child-care services in return for payment in the United Kingdom, that she lost the right to acquire Chinese nationality by virtue of having been born in Northern Ireland and her subsequent acquisition of Irish nationality and, as a result, that she only has the right to enter Chinese territory under a visa allowing residence for a maximum of 30 days per visit; that the two appellants in the main proceedings provide for their needs by reason of Mrs Chen's employment, that the appellants do not rely upon public funds in the United Kingdom and there is no realistic possibility of their becoming so reliant, and, finally, that the appellants are insured against ill health.

- 14 The Secretary of State for the Home Department's refusal to grant a long-term residence permit to the two appellants in the main proceedings was based on the fact that Catherine, a child of eight months of age, was not exercising any rights arising from the EC Treaty such as those laid down by Regulation 5(1) of the EEA Regulations and the fact that Mrs Chen was not entitled to reside in the United Kingdom under those regulations.

- 15 The decision not to grant a permit was the subject of an appeal to the Immigration Appellate Authority, which stayed the proceedings pending a preliminary ruling from the Court of Justice on the following questions:

1. On the facts of the present case, does Article 1 of Council Directive 73/148/EEC or in the alternative Article 1 of Council Directive 90/364/EEC:
 - (a) confer the right on the First Appellant, who is a minor and a citizen of the Union, to enter and reside in the host Member State?

 - (b) and if so, does it consequently confer the right on the Second Appellant, a third country national who is the First Appellant's mother and primary carer, to reside with the First Appellant (i) as her dependent relative, or (ii) because she lived with the First Appellant in her country of origin, or (iii) on any other special basis?

2. If and to the extent that the First Appellant is not a 'national of a Member State' for purposes of exercising Community rights pursuant to Council Directive 73/148/EEC or Article 1 of Council Directive 90/364/EEC, what then are the relevant criteria for identifying whether a child, who is a citizen of the Union, is a national of a Member State for purposes of exercising Community rights?

3. In the circumstances of the present case, does the receipt of child care by the First Appellant constitute services for purposes of Council Directive 73/148/EEC?

The questions referred to the Court of Justice

- 16 By those questions, the national court seeks in essence to ascertain 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.
- 17 It is therefore necessary to examine the provisions of Community law concerning the right of residence in the light of the situation of a national not of legal age such as Catherine, and then that of a parent who is a national of a non-member country and looks after the child.

The right of residence of a person in Catherine's situation

Preliminary considerations

- 18 The Irish and United Kingdom Governments' contention that a person in Catherine's situation cannot claim the benefit of the provisions of Community law on free movement of persons and residence simply because that person has never moved from one Member State to another Member State must be rejected at the outset.

- 19 The situation of a national of a Member State who was born in the host Member State and has not made use of the right to freedom of movement cannot, for that reason alone, be assimilated to a purely internal situation, thereby depriving that national of the benefit in the host Member State of the provisions of Community law on freedom of movement and of residence (to that effect, see, in particular, Case C-148/02 *Garcia Avello* [2003] ECR I-11613, paragraphs 13 and 27).
- 20 Moreover, contrary to the Irish Government's contention, a young child can take advantage of the rights of free movement and residence guaranteed by Community law. The capacity of a national of a Member State to be the holder of rights guaranteed by the Treaty and by secondary law on the free movement of persons cannot be made conditional upon the attainment by the person concerned of the age prescribed for the acquisition of legal capacity to exercise those rights personally (to that effect, see, in particular, in the context of Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community (OJ, English Special Edition, Series I, 1968 (II), p. 475), Joined Cases 389/87 and 390/87 *Echternach and Moritz* [1989] ECR 723, paragraph 21, and Case C-413/99 *Baumbastand and R* [2002] ECR I-7091, paragraphs 52 to 63, and, in relation to Article 17 EC, *Garcia Avello*, paragraph 21). Moreover, as the Advocate General made clear in points 47 to 52 of his Opinion, it does not follow either from the terms of, or from the aims pursued by, Articles 18 EC and 49 EC and Directives 73/148 and 90/364 that the enjoyment of the rights with which those provisions are concerned should be made conditional upon the attainment of a minimum age.

Directive 73/148

- 21 The national court wishes to ascertain whether a person in Catherine's situation may rely on the provisions of Directive 73/148 with a view to residing on a long-term basis in the United Kingdom as a recipient of child-care services provided in return for payment.

- 22 According to the case-law of the Court, the provisions on freedom to provide services do not cover the situation of a national of a Member State who establishes his principal residence in the territory of another Member State with a view to receiving services there for an indefinite period (to that effect, see, in particular, Case 196/87 *Steymann* [1988] ECR 6159). The child-care services to which the national court refers fall precisely within that case.
- 23 As regards the medical services that Catherine is receiving on a temporary basis, it must be observed that, under the first subparagraph of Article 4(2) of Directive 73/148, the right of residence of persons receiving services by virtue of the freedom to provide services is co-terminous with the duration of the period for which they are provided. Consequently, that directive cannot in any event serve as a basis for a right of residence of indefinite duration of the kind with which the main proceedings are concerned.

Article 18 EC and Directive 90/364

- 24 Since Catherine cannot rely on Directive 73/148 for a right of long-term residence in the United Kingdom, the national court would like to know whether Catherine might have a right to long-term residence under Article 18 EC and under Directive 90/364, which, subject to certain conditions, guarantees such a right for nationals of Member States to whom it is not available under other provisions of Community law, and for members of their families.
- 25 By virtue of Article 17(1) EC, every person holding the nationality of a Member State is a citizen of the Union. Union citizenship is destined to be the fundamental status of nationals of the Member States (see, in particular, *Baumbast and R*, paragraph 82).

- 26 As regards the right to reside in the territory of the Member States provided for in Article 18(1) EC, it must be observed that that right is granted directly to every citizen of the Union by a clear and precise provision of the Treaty. Purely as a national of a Member State, and therefore as a citizen of the Union, Catherine is entitled to rely on Article 18(1) EC. That right of citizens of the Union to reside in another Member State is recognised subject to the limitations and conditions imposed by the Treaty and by the measures adopted to give it effect (see, in particular, *Baumbast and R*, paragraphs 84 and 85).
- 27 With regard to those limitations and conditions, Article 1(1) of Directive 90/364 provides that the Member States may require that the nationals of a Member State who wish to benefit from the right to reside in their territory and the members of their families be covered by sickness insurance in respect of all risks in the host Member State and have sufficient resources to avoid becoming a burden on the social assistance system of the host Member State during their period of residence.
- 28 It is clear from the order for reference that Catherine has both sickness insurance and sufficient resources, provided by her mother, for her not to become a burden on the social assistance system of the host Member State.
- 29 The objection raised by the Irish and United Kingdom Governments that the condition concerning the availability of sufficient resources means that the person concerned must, in contrast to Catherine's case, possess those resources personally and may not use for that purpose those of an accompanying family member, such as Mrs Chen, is unfounded.
- 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.

- 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.
- 34 The United Kingdom Government contends, finally, that the appellants in the main proceedings are not entitled to rely on the Community provisions in question because Mrs Chen's move to Northern Ireland with the aim of having her child acquire the nationality of another Member State constitutes an attempt improperly to exploit the provisions of Community law. The aims pursued by those Community provisions are not, in its view, served where a national of a non-member country wishing to reside in a Member State, without however moving or wishing to move from one Member State to another, arranges matters in such a way as to give birth to

a child in a part of the host Member State to which another Member State applies its rules governing acquisition of nationality *jure soli*. It is, in their view, settled case-law that Member States are entitled to take measures to prevent individuals from improperly taking advantage of provisions of Community law or from attempting, under cover of the rights created by the Treaty, illegally to circumvent national legislation. That rule, which is in conformity with the principle that rights must not be abused, was in their view reaffirmed by the Court in its judgment in Case C-212/97 *Centros* [1999] ECR I-1459.

35 That argument must also be rejected.

36 It is true that Mrs Chen admits that the purpose of her stay in the United Kingdom was to create a situation in which the child she was expecting would be able to acquire the nationality of another Member State in order thereafter to secure for her child and for herself a long-term right to reside in the United Kingdom.

37 Nevertheless, under international law, it is for each Member State, having due regard to Community law, to lay down the conditions for the acquisition and loss of nationality (see, in particular, Case C-369/90 *Micheletti and Others* [1992] ECR I-4339, paragraph 10, and Case C-192/99 *Kaur* [2001] ECR I-1237, paragraph 19).

38 None of the parties that submitted observations to the Court has questioned either the legality, or the fact, of Catherine's acquisition of Irish nationality.

- 39 Moreover, it is not permissible for a Member State to restrict the effects of the grant of the nationality of another Member State by imposing an additional condition for recognition of that nationality with a view to the exercise of the fundamental freedoms provided for in the Treaty (see, in particular, *Micheletti*, paragraph 10, and *Garcia Avello*, paragraph 28).
- 40 However, that would be precisely what would happen if the United Kingdom were entitled to refuse nationals of other Member States, such as Catherine, the benefit of a fundamental freedom upheld by Community law merely because their nationality of a Member State was in fact acquired solely in order to secure a right of residence under Community law for a national of a non-member country.
- 41 Accordingly, in circumstances like those of the main proceedings, Article 18 EC and Directive 90/364 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.

The right of residence of a person in Mrs Chen's situation

- 42 Article 1(2)(b) of Directive 90/364, which guarantees 'dependent' relatives in the ascending line of the holder of the right of residence the right to install themselves with the holder of the right of residence, regardless of their nationality, cannot confer a right of residence on a national of a non-member country in Mrs Chen's situation either by reason of the emotional bonds between mother and child or on the ground that the mother's right to enter and reside in the United Kingdom is dependent on her child's right of residence.

- 43 According to the case-law of the Court, the status of 'dependent' member of the family of a holder of a right of residence is the result of a factual situation characterised by the fact that material support for the family member is provided by the holder of the right of residence (see, to that effect, in relation to Article 10 of Regulation No 1612/68, Case 316/85 *Lebon* [1987] ECR 2811, paragraphs 20 to 22).
- 44 In circumstances such as those of the main proceedings, the position is exactly the opposite in that the holder of the right of residence is dependent on the national of a non-member country who is her carer and wishes to accompany her. In those circumstances, Mrs Chen cannot claim to be a 'dependent' relative of Catherine in the ascending line within the meaning of Directive 90/364 with a view to having the benefit of a right of residence in the United Kingdom.
- 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 and Directive 90/364 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.

Costs

- 48 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (sitting as a full Court) hereby rules:

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

Signatures.