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Press and Information

Advocate General's Opinion in Case C-40/11
Yoshikazu Iida v Stadt Ulm

Advocate General Trstenjak takes the view that EU law can confer on a parent who is a third-country national and has custody rights a right of residence in his child's State of origin if that child has moved with the other parent to another Member State

In order for such a right of residence to exist, however, the denial thereof must restrict the child in his or her freedom of movement as a Union citizen and interfere disproportionately with his or her fundamental right to maintain, on a regular basis, a personal relationship and direct contact with both parents

Mr Iida, a Japanese national, has been married to a German since 1998. Their daughter was born in the USA in 2004 and holds German nationality in addition to Japanese and US nationality. At the end of 2005, the family moved from the United States to Ulm (Germany), where Mr Iida received a national residence permit as the spouse of a German national. Mr Iida has had a full-time job in Ulm since the beginning of 2006. At the beginning of 2008, his wife moved with their daughter to Vienna (Austria), where she had accepted a post. Mr Iida, who remained in Ulm, has been separated from his wife since January 2008. The parents have joint custody of their daughter, however. Mr Iida is still lawfully resident in Germany, although his national residence permit is now linked to his employment in Germany. However, he takes the view that he also has a right of residence in Germany under Union law by virtue of the right of custody which he exercises in respect of his daughter living in Austria. However, the City of Ulm dismissed his application for a 'residence card of a family member of an EU citizen' pursuant to the Directive on Free Movement[1].

The Verwaltungsgerichtshof Baden-Württemberg (Higher Administrative Court, Baden-Württemberg), which has to deliver a ruling in this case, has asked the Court of Justice whether, under EU law, a parent who has a right of custody and who is a third-country national has a right to remain in the Member State of origin of his child, who is an EU citizen, in order to maintain a personal relationship and direct parental contact on a regular basis, if the child, in exercise of his or her right of free movement, moves from there to another Member State.

Advocate General Verica Trstenjak takes the view in her Opinion delivered today that no right of residence for a third-country national who has custody rights, such as Mr Iida, in the Member State of origin of an EU citizen who is a minor and has moved to another Member State can be derived from the Directive on Free Movement. That directive governs only the right of residence of EU citizens and the members of their family in Member States other than that of which the EU citizen in question is a national.

Furthermore, according to the Advocate General, no right of residence for Mr Iida in Germany can be derived from the previous case-law of the Court of Justice, according to which the EU-citizen status of a minor child may, in individual cases, confer a right of residence under EU law on a parent who has custody rights and is a third-country national. According to that case-law, the core of the rights which EU-citizen status confers on the child must be impaired. That would be the case, for example, where a refusal of residence in the Member State in which the child resides

[1] Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States (OJ 2004 L 158, p. 77, and corrigendum OJ 2004 L 229, p. 35).

would have the result of forcing the child to leave the EU[2] or where the child's right of residence would be deprived of all practical effect[3]. Mr Iida's daughter, however, exercised her freedom of movement in full by moving with her mother to Austria, although her father had still not been granted a right to reside in Germany under EU law. The very essence of her rights as an EU citizen is therefore – in any case at present – clearly not under threat.

However, Advocate General Trstenjak is of the view that a right of residence under EU law for the parent who is a third-country national in the State of origin of his child may be possible in order to safeguard effectively the child's fundamental rights, which are enshrined in the Charter of Fundamental Rights, to maintain, on a regular basis, a personal relationship and direct contact with both parents and to respect for family life.

However, the Charter of Fundamental Rights is applicable only if there is a sufficient connection with the implementation of EU law. Such a connection may be assumed where refusal of a residence permit under EU law, while not constituting interference with the substance of the rights conferred by virtue of the status of EU citizen, does constitute a less serious restriction of the right to free movement on the part of the EU citizen who is a minor. As such, the father's insecure future residence in Germany may potentially deter his daughter from further exercising her right to free movement as an EU citizen. Whether this is so, however, is a matter to be determined by the Verwaltungsgerichtshof Baden-Württemberg.

Should the Verwaltungsgerichtshof find that there was a restriction of the daughter's right to free movement, the Charter of Fundamental Rights would apply and that court would have further to examine whether the refusal of a right of residence for the father under EU law actually interferes with the fundamental rights of the daughter. Such interference could be found to exist if a denial of a right of residence would make it impossible to maintain a personal relationship on a regular basis.

Advocate General Trstenjak therefore concludes that, under EU law, a parent who has custody rights and is a third-country national may, in order to maintain a personal relationship and direct parental contact on a regular basis, have a right of residence in the Member State of origin of his child who is an EU citizen, if the child, in exercise of his or her right of free movement, has moved from there to another Member State. In order for such a right of residence to exist, the denial thereof must have a restrictive effect on the child's right to freedom of movement and be regarded as a disproportionate interference with fundamental rights in the light of the fundamental rights of the child, enshrined in the Charter of Fundamental Rights, to maintain on a regular basis a personal relationship and direct contact with both parents and to respect for family life.

NOTE: The Advocate General's Opinion is not binding on the Court of Justice. It is the role of the Advocates General to propose to the Court, in complete independence, a legal solution to the cases for which they are responsible. The Judges of the Court are now beginning their deliberations in this case. Judgment will be given at a later date.

NOTE: A reference for a preliminary ruling allows the courts and tribunals of the Member States, in disputes which have been brought before them, to refer questions to the Court of Justice about the interpretation of European Union law or the validity of a European Union act. The Court of Justice does not decide the dispute itself. It is for the national court or tribunal to dispose of the case in accordance with the Court's decision, which is similarly binding on other national courts or tribunals before which a similar issue is raised.

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[2] Case C-34/09 *Ruiz Zambrano* see also Press Release No 16/11
[3] Case C-200/02 *Zhu und Chen* see also Press Release No 84/04