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Opinion of the Advocate General in Case C-200/02

Man Lavette Chen and Kunqian Catherine Zhu v Secretary of State for the Home Department

ACCORDING TO FIRST ADVOCATE GENERAL TIZZANO, A YOUNG CHILD WHO IS A NATIONAL OF A MEMBER STATE IS ENTITLED TO RESIDE IN ANOTHER MEMBER STATE PROVIDED THAT HE OR SHE IS COVERED BY SICKNESS INSURANCE AND HAS SUFFICIENT RESOURCES

The rejection of an application for a residence permit submitted by a mother – a third-country national – would render ineffective the right of residence of the child and would amount to discrimination on grounds of nationality since such a right would be granted to the non-Community mother of a British child.

Kunqian Catherine Zhu was born on 16 September 2000 in Belfast, Northern Ireland (United Kingdom), of Chinese parents who work for a company whose registered office is in the People's Republic of China.

Mrs Chen, already the mother of a son born in China in 1998, wished to have a second child, contrary to the 'one child policy' adopted in China and, on the advice of lawyers whom she consulted, went to Belfast to give birth, in order to ensure that her child would acquire Irish nationality and that she would be assured of the possibility of being able to establish herself with her daughter in the United Kingdom.

Catherine is thus an Irish national¹ and, consequently, a citizen of the Union; however, she did not acquire British nationality and cannot acquire Chinese nationality either.

At present, both mother and child live in Cardiff (Wales, United Kingdom) where the child is the recipient of medical and child-care services provided privately in return for payment. The United Kingdom authorities (Secretary of State for the Home Department), however, rejected their applications for permits to reside permanently in the United Kingdom.

The Immigration Appellate Authority, to which they appealed against that decision, sought a preliminary ruling from the Court of Justice of the European Communities to determine whether Catherine, a citizen of the Union, was vested with a right of residence conferred on her directly by the Community legal order and whether her mother enjoyed such a right deriving from her daughter's right (as the person primarily responsible for her daughter's care and upbringing).

First Advocate General Tizzano delivered his Opinion in this case today.

The Advocate General pointed out first of all that, although the appellants had never left the United Kingdom to go to another Member State and therefore had never specifically availed themselves of the right of freedom of movement, possession of the nationality of a Member State other than the State of residence provides a link with Community law and is sufficient to render applicable the provisions of Community law concerning the right of residence, even if the person concerned has never crossed the frontiers of the Member State in which he resides.

Catherine's right of residence

A minor (including a very young minor), being a subject of law who has acquired legal capacity at the time of birth, can be vested with the right of movement and the right of residence within the Community.

Specifically, the Advocate General made it clear, however, that the child's right of residence cannot be based on its status as a recipient of child-care and medical services: the freedom to receive services cannot be invoked in respect of activities of a continuous nature (such as child-care services), and medical services could give rise only to the right to remain in the United Kingdom for the periods necessary for those services to be provided.

The Advocate General stated, on the other hand, that Catherine is covered by adequate sickness insurance and, through the members of her family, has at her disposal sufficient resources to ensure that, during her stay, she does not become a burden on the public finances of the host Member State. Consequently, she can claim a right of residence either by virtue of the directive concerning rights of

¹ Subject to certain conditions, anyone born *within the territory of the island* of Ireland, *even outside the political boundaries* of the Republic of Ireland (Éire), acquires Irish nationality.

movement and residence for persons who are not economically active² or by virtue of the provision of the Treaty which provides for freedom of movement and of residence as a fundamental right of citizens of the Union.

The mother's right of residence

Under the case-law of the Court, a 'dependent' family member is a person who depends – for the satisfaction of his or her material needs – on support provided by another family member. In the opinion of the Advocate General, Mrs Chen cannot therefore invoke the right of residence which is available, irrespective of citizenship, to 'dependent' relatives in the ascending line of a Community national who has a right of residence.

Can Catherine's mother claim a right of residence deriving from her daughter's right of residence?

For the purposes of protecting the rights of minors, the case-law of the Court indicates that where the children enjoy a right to reside in the host Member State, Community law allows the parent with responsibility for them, regardless of the parent's nationality, to reside with them in order to facilitate their exercise of that right.

That reasoning applies *a fortiori* in the case of a very young child. If Mrs Chen were to exercise a right of establishment in the United Kingdom in the name and on behalf of her daughter, but were then herself denied the right to reside in that State, that outcome would be manifestly contrary to the interests of her daughter and would contravene the principle of respect for family unity:³ in such a case, the young child would automatically be abandoned. Therefore, her mother must be able to invoke a right of residence deriving from that of her young child, because otherwise the latter's right would be entirely deprived of any effectiveness. Being unable to remain alone in the United Kingdom, Catherine would ultimately be unable to enjoy the right of residence conferred on her by the Treaty.

The Advocate General also observes that a mother who was a citizen of a third country would be entitled to remain with her daughter in United Kingdom if her daughter were a British citizen. If, in Catherine Chen's case, a different course of action were followed, there would be a difference of treatment not justified by any objective reason.

The Advocate General therefore suggests that the Court should rule that the United Kingdom measures constitute discrimination on grounds of nationality, contrary to the EC Treaty.

² Council Directive 90/364/EEC.

³ Article 8 of the Rome Convention for the Protection of Human Rights and Fundamental Freedoms and judgment of the Court of Justice in Case C-60/00 *Carpenter* (see press release of 11 July 2002).

Important: The Opinion of the Advocate General is not binding on the Court. His role is to suggest to the Court, in complete independence, a legal solution to the case pending before it. The Court of Justice will now deliberate upon this case. Judgment will be delivered at a later date.

Unofficial document, for media use only, which does not bind the Court of Justice.

Available languages: English, French, German, Greek, Italian, Spanish.

*The full text of the opinion can be found on the internet (www.curia.eu.int).
In principle it will be available from midday GMT on the day of delivery.*

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