OPINION OF ADVOCATE GENERAL TIZZANO
delivered on 18 May 2004 [1]

I — Introduction

1. The Immigration Appellate Authority, Hatton Cross (United Kingdom) ('the Immigration Authority'), wishes to ascertain whether Community law, in the particular and unusual circumstances of the present case, precludes refusal by a Member State to grant a long-term residence permit to a young child who is a national of another Member State and has lived since birth in the territory of the first State, and to the child's mother, who is a national of a non-member country.

II — Relevant Community law

2. Article 17 EC provides for citizenship of the Union, which supplements Member-State nationality and involves, in particular, under Article 18 EC, in addition to other rights and duties provided for by the Treaty, 'the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in this Treaty and by the measures adopted to give it effect'.

3. Among the provisions of secondary law relevant to movement of persons and residence, of primary importance here is 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. [2]

4. Pursuant to Article 1 thereof:

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

1 — Original language: Italian.

2 — OJ 1973 L 172, p. 14.

...

(b) nationals of Member States wishing to go to another Member State as recipients of services;

...

(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.'

5. The first subparagraph of Article 4(2) provides that '[t]he right of residence for persons providing and receiving services shall be of equal duration with the period during which the services are provided'.

6. Council Directive 90/364/EEC of 28 June 1990 on the right of residence ('Directive 90/364') [3] governs the rights of movement and residence of people who are not economically active. Thus, Article 1 thereof provides:

'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.

...

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.'

3 — OJ 1990 L 180, p. 26.

III — Facts and procedure

7. The questions submitted to the Court were raised in proceedings before the Immigration Appellate Authority by Kunqian Catherine Zhu, an Irish national born on 16 September 2000 in Belfast (United Kingdom) (hereinafter 'Catherine' or 'the first appellant') and by her mother, Man Chen, a Chinese national (hereinafter 'the mother', 'her mother' or 'Mrs Chen') against the refusal by the Secretary of State for the Home Department (hereinafter 'the Secretary of State') to grant them a permanent residence permit in the United Kingdom.

8. Mrs Chen works with her husband, who is also a Chinese national, for a company whose registered office is in the People's Republic of China. It is a very large company, which produces and exports chemicals to various parts of the world, in particular to the United Kingdom and other Member States of the European Union.

9. Mr Chen is one of the directors of that company, in which he has a controlling shareholding. In his capacity as director, he undertakes frequent business trips to the United Kingdom and other Member States of the European Union.

10. Before Catherine's birth, the couple had only one child, Huixiang Zhu, who was born in the People's Republic of China in 1998. Mr and Mrs Chen had decided to have a second child, but came up against obstacles inherent in the birth control policy — the 'one child policy' — adopted by the People's Republic of China to dissuade couples living in China from having a second child.

11. In 2000, in order to ensure that the birth of her second child would not give rise to any of the negative repercussions associated with the abovementioned demographic policy, Mrs Chen decided to give birth abroad and for that purpose travelled to the United Kingdom.

12. Catherine came into the world on 16 September 2000, in Belfast, Northern Ireland.

13. The choice of the place of birth was no accident. It is noteworthy that, when certain conditions are fulfilled, anyone born within the territory of the island of Ireland, even outside the political boundaries of Ireland (Éire), acquires Irish nationality. As is apparent from the file, it was specifically because of that particular feature of Irish law, brought to their attention by the lawyers they consulted, that Mr and Mrs Chen decided to arrange for their child to be born in Belfast. They intended to take advantage of the

child's Community nationality in order to ensure that she and her mother would be able to establish themselves in the United Kingdom.

14. Catherine in fact met the abovementioned conditions laid down by Irish law and therefore acquired Irish nationality and, as a result, citizenship of the Union. However, she did not acquire United Kingdom nationality because she did *not* meet the requirements laid down for that purpose by the relevant United Kingdom legislation.

15. After moving to Cardiff with her child, Mrs Chen applied to the United Kingdom authorities for a permit to enable her and her child Catherine to reside in the United Kingdom.

16. Those applications were rejected by decision of the Secretary of State of 15 June 2000. Catherine and her mother appealed to the Immigration Appellate Authority.

17. That Authority found that the contested decision was, in principle, in conformity with the relevant national law. However, certain circumstances prompted it to query whether it was also compatible with Community law.

18. It noted, in essence, that Catherine, as a citizen of the Union, could be vested with a right of residence conferred on her directly by provisions of Community law; her mother, for her part, might enjoy a right deriving from her child's right, in so far as she is primarily responsible for her care and upbringing.

19. More specifically, with regard to the child, the question arises whether the right to remain in the United Kingdom derives primarily from her status as a recipient of services within the meaning of Directive 73/148: Catherine is a recipient in the United Kingdom of child-care services and medical services provided privately in return for payment.

20. In addition, the mother and child, who have always lived under the same roof, constitute an economically self-sufficient family unit, thanks to the resources made available by the mother. There is no charge on public United Kingdom funds, nor does it seem reasonable to conclude that there will be in the future. Both are covered by sickness insurance. The possibility cannot therefore be ruled out, according to the Immigration Authority, that they enjoy a right of residence under Directive 90/364.

21. Finally, the Immigration Authority observes that Catherine is entitled to enter the territory of the People's Republic of

China for not more than 30 days at a time and then only with permission from the government of that country, of which she is not a national. To deny the child or her mother a right to reside in the United Kingdom could therefore constitute unlawful interference with their family life, because the possibility of their continuing to live together would thereby be significantly undermined.

22. For those reasons, the Immigration Appellate Authority referred the following questions to the Court of Justice for a preliminary ruling:

'(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 national 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 national 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?

(4) In the circumstances of the present case, is the First Appellant precluded from residing in the host State pursuant to Article 1 of Council Directive 90/364/EEC because her resources are provided exclusively by her third country national parent who accompanies her?

(5) On the special facts of this case does Article 18(1) EC give the First Appellant the right to enter and reside in the host Member State even when she does not qualify for residence in the host State under any other provision of EU law?

(6) If so, does the Second Appellant consequently enjoy the right to remain with the First Appellant, during that time [4] in the host State?

(7) In this context, what is the effect of the principle of respect for fundamental human rights under Community law claimed by the Appellants, in particular where the Appellants rely on Article 8 ECHR that everyone has the right to respect for his private and family life and his home in conjunction with Article 14 ECHR given that the First Appellant cannot live in China with the Second Appellant and her father and brother?'

23. In the proceedings before the Court of Justice, observations were submitted by the appellants in the main proceedings, and by Ireland, the United Kingdom and the Commission.

IV — Assessment

A — *Preliminary observations*

24. As I have already stated and as is confirmed by the account of the facts, this is certainly an unusual case whose features are so singular that the discussions between the parties have to some extent been influenced by that fact. On occasion, the parties have seemed more concerned with seeking similarly individualistic solutions than with verifying whether the more

4 — sic.

unusual aspects of the case might not be brought within the usual rules and principles of Community law, as defined by the case-law of the Court. As we shall see below, that is precisely the course which, in my opinion, should be followed in replying to the questions raised by Catherine's circumstances.

25. To that end, it is necessary in the first place to consolidate the various questions submitted by the Immigration Appellate Authority so as to highlight the essential issues brought before this Court and also to ensure that they are dealt with in an orderly manner.

It seems to me that this can be done by extracting from those questions two main issues which can be summarised in the following terms:

(a) whether Catherine is entitled to reside permanently in the United Kingdom as a recipient of services, within the meaning of Directive 73/148, or as a Community national who is not active but has at her disposal sufficient resources and sickness insurance, within the meaning of Directive 90/364, or, finally, directly on the basis of Article 18 EC;

(b) and whether her mother has a right of residence as being 'a dependent member of the family' of the child for the purposes of the abovementioned directive or as Catherine's primary carer, or, finally, on the basis of the right to respect for family life upheld by Article 8 ECHR.

26. I shall therefore now deal with the questions raised by the Immigration Authority on the basis of the approach outlined above, taking into account, when and where necessary or appropriate, the arguments put forward by those who have submitted observations in these proceedings.

B — *The internal nature of the dispute*

27. However, before examining those questions, I must spend some time on an objection of inadmissibility raised by the United Kingdom Government.

28. The United Kingdom Government has raised the preliminary objection that the Court has no jurisdiction to give a ruling on the questions submitted by the Immigration Appellate Authority because the dispute relates to a purely internal situation. The only foreign element, namely the nationality of the child, is in its opinion the result of a subterfuge resorted to by Mr and Mrs Chen, which should be seen as an abuse of law.

29. I shall for the moment leave aside the latter point, that being a matter which may well become clearer after I have examined the merits of the questions submitted (see below, point 108 et seq.).

30. Turning instead to the objection concerning the purely internal nature of the facts, I would observe that, according to the United Kingdom Government, the appellants have never exercised the freedom of movement granted to them by the Treaty because they have never left the United Kingdom to go to another Member State. Therefore there are no foreign elements of such a kind as to render Community law applicable to the applications for residence permits at issue.

31. My view, however, is that that objection cannot be upheld.

32. It should be borne in mind, first, that, according to settled Community case-law, the fact of possessing the nationality of a Member State other than the one in which a person resides is sufficient to render Community law applicable, even where the person relying on those provisions has never crossed the frontiers of the Member State in which he lives. [5]

33. In particular, in its recent judgment in *Garcia Avello*, after stating that '[c]itizenship of the Union, established by Article 17 EC, is not ... intended to extend the scope of the Treaty also to internal situations which have no link with Community law', [6] the Court made it clear that '[s]uch a link with Community law does, however, exist in regard to ... nationals of one Member State lawfully resident in the territory of another Member State', [7] and that is the case regardless of whether they have exercised the freedom of movement provided for by the Treaty or, as in that case, had lived since birth in the territory of the host Member State.

34. Catherine's Irish nationality is therefore sufficient to establish that the proceedings between her, with her mother, and the Secretary of State are not purely internal to United Kingdom law.

35. A different conclusion might possibly be reached only if it were considered that Catherine *does not in fact possess Irish nationality* or that in some way the fact of such nationality could not be relied on against the United Kingdom Government.

5 — See for example Case 235/87 *Matteucci* [1988] ECR 5589, which was concerned with the right of an Italian citizen, born and living in Belgium, where he worked, not to be discriminated against regarding a vocational training grant. See also the earlier well-known judgment in Case 36/75 *Rutili* [1975] ECR 1219, in which the Court held that Article 48 of the Treaty (now Article 39 EC) was applicable outright to measures restricting the freedom of movement in French territory of an Italian worker who was born and lived in France, where he worked and engaged in trade-union activity.

6 — Case C-148/02 *Garcia Avello* [2003], not yet published in the ECR, paragraph 26.

7 — Ibid., paragraph 27.

36. However, at no stage of the proceedings, either before the Immigration Authority or before this Court, has there ever been any doubt that Catherine does possess Irish nationality, and likewise the United Kingdom Government has not challenged the legality, from the point of view of international or Community law, of the grant of that nationality by the Irish State.

37. In those circumstances, it is not necessary to express any view as to the existence or otherwise of any provision of general international law to the effect that no State is required to recognise nationality granted to an individual by another State in the absence of a real and effective link between the individual and that State. [8]

38. I shall merely point out that, as regards Community law, the Court has held in its judgments in *Micheletti* [9] and *Kaur* [10] that '[u]nder 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', [11] and that therefore 'it is not permissible for the legislation of 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'. [12]

39. I think that therefore it can be concluded that, in view of Catherine's Irish nationality, the dispute pending before the Immigration Authority falls, as a matter of principle, within the scope of the Treaty, and that the objection of inadmissibility raised by the United Kingdom Government must therefore be rejected.

C — *Catherine's right of residence*

40. That said, and moving on to the merits of the questions set out above (point 25(a)), the first point to be dealt with is what rights of movement and residence are available under Community law to a child, like Catherine, who is a national of one Member State of the Union and has lived since birth in another Member State.

8 — In support of such a rule, in relation to matters of diplomatic protection, see the well-known judgment of the International Court of Justice in the *Nottebohm* case (judgment of 6 April 1955, *Lichtenstein* v *Guatemala, Second Phase*, ICJ Reports 1955, p. 4, in particular at p. 20 et seq.).

9 — Case C-369/90 *Micheletti* [1992] ECR I-4239.

10 — Case C-192/99 *Kaur* [2001] ECR I-1237.

11 — *Micheletti*, paragraph 10; *Kaur*, paragraph 19. That finding, it should be noted, is entirely consistent with the case-law of the International Court of Justice, according to which '[i]t is . . . for every sovereign State to settle by its own legislation the rules relating to the acquisition of its nationality' (*Nottebohm* judgment, cited above, p. 20).

12 — *Micheletti*, paragraph 10; and, more recently, *Garcia Avello*, paragraph 28.

— Can a minor be vested with rights of movement and residence?

41. In that connection, the Irish Government appears to object that, as a matter of principle, Catherine could not invoke the rights of movement and residence provided for by the Treaty.

42. If I have correctly understood that government's reasoning, it considers that, given her tender age, Catherine is not in fact capable of independently exercising the right to choose a place of residence and establish herself there. [13] Consequently, she cannot be regarded as a person entitled to the rights accorded to nationals of a Member State by Directive 90/364. [14]

43. I do not agree with that reasoning. I think it derives from a confusion between the capacity of a person to be the subject of rights and obligations (legal personality) [15] and the capacity of that person to take action which produces legal effects (legal capacity). [16]

44. The fact that a minor cannot exercise a right independently does not mean that he has no capacity to be an addressee of the legal provision on which that right is founded.

45. The line of reasoning should instead follow the opposite course. Because, according to a general principle which is common to the legal systems of the Member States (and not only to them), legal capacity is acquired at birth, even a minor is a subject of law and, as such, is therefore a holder of the rights conferred by law.

46. The fact that he is not in a position to exercise those rights independently does not detract from his status as the holder of those rights. On the contrary, it is precisely because he has that status that other persons, appointed by operation of law (parents, guardian, etc.), will be able to give effect to

13 — The child is 'unable to assert a choice of residence in her own right'.

14 — 'While a minor, and unable to exercise a choice of residence, Catherine cannot be a "national" for the purposes of Art. 1 (1)'.

15 — 'Capacité de jouissance'; 'Rechtsfähigkeit'; and in English legal terminology, '"general" legal personality' (see A. Heldrich, A.F. Steiner, 'Legal Personality', in *International Encyclopaedia of Comparative Law*, Vol. IV, Persons and Family, Dordrecht etc. 1995, Chapter 2, Persons, p. 4).

16 — 'Handlungsfähigkeit'; 'capacité d'exercice'; and in English legal terminology, 'capacity' or 'active legal capacity' (see A. Heldrich, A.F. Steiner, 'Capacity', in *International Encyclopaedia of Comparative Law*, Vol. IV, cited above, p. 9).

his rights and will be able to do so not because they are the holders of those rights but because they are acting on behalf of the minor, that is, they are acting on behalf of the sole and actual holder of those rights.

47. In the present case, however, the argument put forward by the Irish Government is not only not supported by any textual provision but is likewise not justified by the nature of the rights and freedoms in question. That argument appears to be incompatible with the aims pursued by the relevant provisions of the Treaty, namely Article 49 EC et seq. as regards the free movement of services and Article 18 EC as regards the right of residence of nationals of the Union.

48. As regards Article 49 EC et seq., it is clear that one of the objectives of the freedom for which they provide is precisely that of facilitating the movement of persons who must travel in order to receive supplies of services. [17]

49. It must be pointed out that a minor, even one who is very young, can indeed be the recipient of a wide range of services, including services of very great importance (for example, medical treatment).

50. For that very reason, the minor will be the holder of the rights conferred by Article 49 EC et seq., as a recipient of services.

51. As regards, next, the provisions on the right of residence, I would observe that Article 18 EC, supplemented by Article 1 of Directive 90/364, seeks to guarantee *for every Community national* — who satisfies certain conditions — the right to establish himself in any Member State, even if he does not want or is not able to carry on any economic activity.

52. Having regard to the points I clarified earlier (paragraph 43 et seq.), there is no reason to deprive a minor of a right conferred in general terms on all Community citizens by a fundamental provision of Community law, such as Article 18 EC. Thus, if the conditions laid down by the directive are satisfied, even a minor can claim the right to reside freely, as an

17 — The Community case-law is consistent to the effect that a recipient of services too can invoke the freedom to provide services provided for by the Treaty: see, amongst many, Joined Cases 286/82 and 26/83 *Luisi and Carbone* [1984] ECR 377, paragraph 16, and Case 186/87 Cowan [1989] ECR 195, paragraph 15.

economically non-active person, in a Member State other than the one whose nationality he possesses.

53. Moreover, that is confirmed by the case-law of the Court of Justice, by virtue of which there is no doubt that minors can be vested with residence rights. In the case of *Echternach and Moritz*, [18] for example, it was explicitly stated that a minor who was the son of a worker who had in the meantime left the host country 'retains the right to rely on the provisions of Community law', which allow him to remain in that country to complete studies already commenced. [19]

54. And that outcome cannot vary according to the age of the minor because, as far as the relevant principles are concerned, the situation does not change.

55. I conclude therefore that even a very young minor like Catherine can be vested with rights of movement and residence within the Community.

— The existence of a right of residence in Catherine's specific case

56. Following those considerations of a general nature, it is now necessary to establish whether, in the present case, Catherine may invoke a right of residence (i) as a recipient of services within the meaning of Directive 73/148 or (ii) on the basis of Article 18 EC and Directive 90/364.

57. (i) Let me start by saying that Catherine's right to reside permanently in the United Kingdom could not be based on her status as a recipient of child-care services and medical services (see point 19 above).

58. So far as concerns the first category of services, even if we disregard the problem of identifying the recipient of the services, who would appear in fact to be her mother, it is clear from the file that the services in question are not provided on a temporary basis, but on a long-term and continuous basis.

59. However, as the Commission rightly pointed out, the Community case-law has long since made it clear that the freedom to provide services cannot be invoked in rela-

18 — Joined Cases 389/87 and 390/87 [1989] ECR 723.

19 — *Echternach and Moritz*, paragraph 21. That case concerned Council Regulation (EEC) No 1612/68 of 15 October 1968 on the free movement of workers within the Community (OJ, English Special Edition, First Series 1968 (II), p. 475), Article 12 of which provides: 'The children of a national of a Member State who is or has been employed in the territory of another Member State shall be admitted to that State's general educational, apprenticeship and vocational training courses under the same conditions as the nationals of that State, if such children are residing in its territory.'

tion to 'an activity carried out on a permanent basis or, in any event, without a foreseeable limit to its duration',[20] because in such circumstances it would be the provisions of the Treaty on freedom of establishment that would come into play. That is true, primarily, for the provider, but it is also clearly valid, with greater reason, for the recipient of services, who can invoke that freedom only if he does not intend to establish himself definitively in the host country.[21]

60. But a right of permanent residence likewise could not be established for Catherine in relation to medical services. Such services, by their very nature, are provided for a limited period. If, therefore, she was in fact the recipient of those services (and there is no clear indication in the file that she is), Catherine could claim, on the basis of the explicit provisions of the first subparagraph of Article 4(2) of Directive 73/148, only the right to remain in the United Kingdom for the periods necessary to receive that treatment.

61. In other words, she could claim a *temporary* right of residence of '*equal duration with the period during which the services are provided*' but could not, under that directive, obtain a long-term residence permit.

20 — Case 196/87 *Steymann* [1988] ECR 6159, paragraph 16.

21 — *Steymann*, paragraph 17, and Case C-70/95 *Sodemare and Others* [1997] ECR I-3395, paragraph 38.

62. (ii) The question remains to be considered whether Catherine may claim a right of residence in the United Kingdom under Article 18 EC and Directive 90/364.

63. Article 18 EC, it will be remembered, confers on every citizen of the Union the right to move and reside freely in the territory of the Member States, subject to the limitations and conditions laid down by the Treaty and by the rules of secondary law.

64. For the purposes of this case, those limits and conditions are defined by Directive 90/364.

65. Article 1, in particular, by granting 'the right of residence to nationals of Member States who do not enjoy this right under other provisions of Community law', imposes the condition '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'.

66. As is apparent from the order for reference, Catherine is covered by adequate sickness insurance and also has, through the

members of her family, sufficient resources to obviate any danger that she might become 'a burden on the social assistance system of the host Member State during [her] period of residence'.

67. It would therefore appear that both the requirements laid down by the directive are fulfilled.

68. That is not, however, the opinion of the governments which have submitted observations: they consider that Catherine is not economically self-sufficient because the financial resources available to her are in fact provided to her by her mother.

69. According to those governments, the right of residence created by Directive 90/364 is essentially limited to those persons who '*in [their] own right*' have income or earnings which guarantee the availability of sufficient resources.

70. I must, however, observe, as the Commission rightly points out, that no such limitation on the right of residence is to be found in the wording of the directive, which in fact confines itself to requiring that those who claim that right '*have* sufficient resources'. [22]

71. Nor, moreover, does it seem to me that such a limitation is consistent with the purposes of the directive.

72. The directive was adopted to extend the scope of the right of movement and residence to all Community nationals, subject to certain limitations designed to ensure that they do not 'become an unreasonable burden on the public finances of the host Member State' (see the fourth recital).

73. Following the introduction by the Maastricht Treaty of Article 8A of the EC treaty, now Article 18 EC, freedom of movement and residence came to be declared as fundamental rights of Community nationals, albeit subject to the limits and conditions laid down by (inter alia) Directive 90/364.

22 — '*Disposent* ... de ressources suffisantes' in the French text, '*dispongano* ... di risorse sufficienti' in Italian, 'über ausreichende Existenzmittel *verfügen*' in German, '*dispongan* ... de recursos suficientes' in Spanish (emphasis added).

74. In that new context, that directive has thus become a measure which *limits* the exercise of a fundamental right. The conditions imposed by it must therefore be interpreted restrictively, in the same way as all exceptions and limitations imposed on the freedoms upheld by the Treaty. There is therefore no question of stretching its text so far as to incorporate in it a condition not expressly laid down, like the one contended for by the governments involved in this case.

75. That is not all. As the Court recognised in its judgment in *Baumbast and R*, 'the exercise of the right of residence of citizens of the Union can be subordinated to the legitimate interests of the Member States', [23] '[h]owever, those limitations and conditions must be applied in compliance with the limits imposed by Community law and in accordance with the general principles of that law, in particular the principle of proportionality. That means that national measures adopted on that subject must be necessary and appropriate to attain the objective pursued'. [24]

76. It seems to me that an interpretation of the directive like that proposed by the United Kingdom and by Ireland would unnecessarily hamper the pursuit of the objectives of the directive.

77. What is important is to ensure that the citizens of the Union who exercise freedom of movement do not become a burden on the finances of the host State. Whilst therefore it is necessary to that end that they should 'have' sufficient financial resources, it is not, on the other hand, necessary to seek to impose the further condition — which, moreover, is difficult to define clearly — that those resources must belong to them directly.

78. In conclusion, I am of the opinion that the Court's answer to the Immigration Authority should be to the effect that a very young minor who is a Community national and is covered by sickness insurance covering all risks in the host Member State and who, although not directly possessing income or earnings in his own right, nevertheless has at his disposal, through his parents, sufficient resources to ensure that he will not become a burden on the finances of the host Member State, meets the requirements laid down by Article 1 of Directive 90/364 and therefore enjoys a right to reside for an indeterminate period in the territory of a Member State other than the one of which he is a national.

D — *The mother's right of residence*

79. We now come to the question of Catherine's mother's right of residence.

23 — Case C-413/99 [2002] ECR I-7091, paragraph 90.

24 — Paragraph 91. To the same effect, see the earlier judgment in Joined Cases C-259/91, C-331/91 and C-332/91 *Allué and Others* [1993] ECR I-4309, paragraph 15.

80. It seems to me to be beyond question, as a starting point, that Mrs Chen, as a national of a non-member country, is unable to invoke the right of residence granted to *Community nationals* by Article 1(1)(b) of Directive 73/148 (see paragraph 4 above) and by Article 1(1) of Directive 90/364 (see paragraph 6 above).

— The existence of a right as a 'dependent' family member

81. That said, there is likewise no possibility that Mrs Chen could invoke the right of residence provided for by Article 1(1)(d) of Directive 73/148 and by Article 1(2)(b) of Directive 90/364 in favour of 'dependent' relatives in the ascending line of Community citizens with a right of residence, regardless of their nationality.

82. The Community case-law has made it clear that a 'dependent' family member is one who is *dependent on material resources supplied by another member of the family.* [25]

25 — Case 316/85 *CPAS di Courcelles* v *Lebon* [1987] ECR 2811, paragraph 22.

83. That clearly is not the case here, since Mrs Chen is financially self-sufficient and indeed it is she herself who ensures that her daughter's material needs are satisfied.

84. Nor can it be concluded, contrary to what may be inferred from the order for reference, that the concept of a dependent family member includes people who are 'emotionally dependent' on the Community national who has a right of residence or those persons whose right to remain in a Member State 'depends' on the right of the Community national.

85. Even if we were to ignore the case-law of the Court of Justice just referred to, I would observe that only the English language version uses a neutral term like 'dependent' whereas, as the Commission correctly points out, in all the other language versions the term used relates unambiguously to *material dependency.*

86. In the present case, therefore, Mrs Chen cannot be described as a 'dependent member' of Catherine's family within the meaning of the directive, notwithstanding the undoubted emotional bond that exists between her and her daughter and notwithstanding the fact that any right she may have to remain is linked to that of her daughter.

87. It seems to me, therefore, that neither Directive 73/148 nor Directive 90/364 confers directly upon Mrs Chen a permanent right of residence in the United Kingdom.

— The existence of a derivative right of residence

88. It remains to be considered whether Catherine's mother could invoke a right of residence deriving from that of her daughter.

89. Let me say straight away that in my opinion that question should be answered in the affirmative.

90. I consider that the opposite conclusion would be manifestly contrary to the interests of the minor and to the requirement of respecting the unity of family life. But above all, it would deprive of any useful effect the right of residence conferred by the Treaty upon Catherine because clearly, since she cannot remain alone in the United Kingdom, she would otherwise ultimately be unable to enjoy that right.

91. Those same considerations also appear to inspire the Community case-law. In *Baumbast and R*, the Court recognised that 'where children have the right to reside in a host Member State' Community law 'entitl[es] the parent who is the primary carer of those children, irrespective of his nationality, to reside with them in order to facilitate the exercise of that right'.[26] It is clear that if a similar conclusion was valid in a case like the one cited concerning children of school age, *a fortiori* it must be valid in the case of a very young child like Catherine.

92. The rationale of the abovementioned case-law lies, of course, above all in the requirement of protecting the *interests of the minor*, having regard to the fact that it is precisely that purpose which must be pursued when the power granted to the parents (or guardian) to choose the place of establishment of the minor on behalf of the latter is exercised.

93. If she were denied a right of residence in Great Britain, the mother would only be able to exercise the right of establishment in the territory of that State on Catherine's behalf in a manner manifestly contrary to the interests of her daughter, because in such a case the child would automatically have to be abandoned by her mother.

26 — *Baumbast and R*, paragraph 75 (emphasis added). That case concerned a parent of United States nationality.

94. For the same reason, therefore, that denial would likewise contravene the principle of respect for the unity of family life, as laid down by Article 8 of the Rome Convention for the Protection of Human Rights and Fundamental Freedoms [27] to which the Court of Justice itself attributes fundamental importance. [28]

95. In order to preclude such a result, therefore, Mrs Chen would simply have to decline to exercise the right of her daughter to establish her residence in Great Britain. That means, however, that, contrary to the case-law just referred to, the right of movement and residence attaching to the Irish national Catherine under Article 18 EC and Directive 90/364 would not only not be 'facilitated' but would even be deprived of any useful effect.

96. For that reason alone, therefore, I consider that Catherine's mother may invoke a right of residence derived from her daughter's right.

— The prohibition of discrimination on grounds of nationality

97. Furthermore, it seems to me that the grant to Mrs Chen of a right of residence is decisively supported by Article 12 EC, which prohibits, within the scope of the Treaty, any discrimination on grounds of nationality.

98. I consider that in this case all the conditions for the application of that provision are satisfied.

99. In the first place, the present dispute indubitably falls within the scope of the Treaty since it concerns the right of a Community national to reside in the territory of a Member State pursuant to Article 18 EC and Directive 90/364; and that is also true as regards the mother's right of residence which, as we have seen, is inextricably linked with that of her daughter.

100. It should then be noted that, according to settled case-law, the prohibition of discrimination 'requires that comparable situations must not be treated differently and that different situations must not be treated in the same way'. [29]

27 — In the case-law of the European Court of Human Rights, see the judgments of 18 February 1991, *Moustquim* v *Belgium*; 19 February 1996, *Gül* v *Switzerland*; 28 November 1996, *Ahmut* v *Netherlands*; 11 July 2000, *Ciliz* v *Netherlands*; 21 December 2000, *Sen* v *Netherlands*, all published at: *http://hudoc.echr.coe.int* in the ECHR database of case-law.

28 — See in particular Case C-60/00 *Carpenter* [2002] ECR I-6279, paragraphs 41 to 45.

29 — See, most recently, *Garcia Avello*, paragraph 31.

101. As has become clear in the course of these proceedings and particularly at the hearing, if Catherine were a British national,[30] her mother, although a national of a non-member country, would be entitled to remain with her daughter in the United Kingdom.

102. That means that, if other things were equal from a factual point of view and thus there were an 'analogous situation', the nationality of the child would give rise to favourable treatment of her mother's application for a residence permit.

103. There is no objective justification for different treatment in the present case.

104. If a national of a non-member country, being the mother of an English child, is entitled purely because of that circumstance to remain in the United Kingdom, that position clearly derives from the fundamental role of a mother in caring for and bringing up her child, and, in more general terms, is based on reasons of protection of the family and family unity.

105. Such considerations apply equally, however, to a case like the present one, in which the child, although not able to derive its right of residence directly from British nationality, nevertheless enjoys a right of permanent residence in the United Kingdom by reason of her Community citizenship. It is entirely clear that the irreplaceable role of a mother in caring for and bringing up a very young minor does not in any way depend upon the nationality of the child.

106. Therefore, in the absence of objective reasons which might justify differing treatment of the mother's application for a residence permit on the basis of the nationality of her child, it must be concluded that the United Kingdom measures in question constitute discrimination on grounds of nationality contrary to Article 12 EC.

— Final considerations

107. I therefore propose, in conclusion, that the answer to be given to the Immigration Authority is that a measure whereby the authorities of a Member State reject an application for a long-term residence permit

30 — Such a hypotheses is entirely realistic: for that purpose, it would have been sufficient if the other parent had had British nationality or, although a foreigner, had a right of permanent residence in the United Kingdom (section 1 of the British Nationality Act 1981: see Note 8 to the United Kingdom's observations submitted to the Court).

submitted by the mother of a Community national who is a minor and has a right of residence in that Member State not only renders ineffective the right granted to the minor by Article 18 EC and by Article 1 of Directive 90/364 but also constitutes discrimination on grounds of nationality prohibited by Article 12 EC.

E — *Abuse of law*

108. As I have already stated (see paragraph 28 et seq.), the United Kingdom Government also objected that Mr and Mrs Chen had arranged for their daughter to be born in Northern Ireland with the manifest intention of ensuring that she would acquire Irish nationality and thereby the right of residence in another Member State of the Community. Catherine's Irish nationality is therefore 'contrived', being the result of a specific plan put into effect by her parents in order to acquire a right of residence in the Community.

109. It is clear from the case-law of the Court that a Member State is entitled to adopt measures designed to ensure that people do not use the opportunities offered by the Treaty to take advantage, improperly or fraudulently, of Community law in order to escape the effects of national laws. [31]

110. In the present case, it is alleged that there has been an abuse of law which is liable to affect the outcome of these proceedings.

111. For my part, however, I am unable to endorse that view, and that would be the case even if I were to disregard the reservations of a general nature prompted by the transposition to Community level of a concept whose existence is a matter of dispute in national systems of law and of which the definition is even less certain.

112. However, even if the United Kingdom's reasoning were to be taken into consideration, it seems to me that the scheme of the relationship between Community law and the laws of the Member States, as now clearly defined over several decades of case-law of the Court, necessarily implies that it is only in exceptional circumstances that the exercise of a right conferred by the Treaty can constitute an abuse, because the non-application of a national provision as a result of reliance on a right conferred by Community law constitutes the normal consequence of the principle of the supremacy of Community law.

31 — See Case C-212/97 *Centros* [1999] ECR I-1459, paragraph 24, and the copious case-law referred to therein.

113. Nor does the fact that a person knowingly places himself in a situation which causes a right deriving from Community law to arise in his favour, in order to avoid the application of certain national legislation unfavourable to him, constitute, *in itself*, a sufficient basis for the relevant Community provisions to be rendered inapplicable. [32]

114. For it to be possible to speak of an abuse of law, there must, in contrast, also be an underlying 'combination of objective circumstances' in which 'despite formal observance of the conditions laid down by the Community rules, the *purpose* of those rules *has not been achieved*'. [33] In other words, it must be ascertained whether the person concerned, by invoking the Community provision which grants the right in question, is betraying its spirit and scope.

115. The test is therefore, essentially, whether or not there has been a distortion of the purposes and objectives of the *Community provision* which grants the right in question.

116. In my opinion, those conditions are not fulfilled. I do not consider that the conduct of Mr and Mrs Chen can be regarded as being such as to imply 'circumvention of national law by Community nationals *improperly or fraudulently* invoking Community law'. [34]

117. It is true that Mrs Chen, in availing herself of the Treaty provisions which grant a right of residence to Catherine and, by ricochet, to herself as the child's mother, is ultimately circumventing the United Kingdom provisions which restrict the right of residence of nationals of non-member countries.

118. However, that does not, in my opinion, involve any distortion of the purposes of the Community provisions relied on.

119. The aim pursued by the provisions on the right of residence, in particular Article 18 EC, as implemented by Directive 90/364 and taken up in Article 45 of the Charter of Fundamental Rights, is entirely clear. Its purpose is to eliminate any restriction on the movement and residence of Community

32 — *Centros*, paragraph 27, and, in more detail, the Opinion of Advocate General La Pergola in that case ([1999] I-1461, et seq.).

33 — Case C-110/99 *Emsland-Stärke* [2000] ECR I-11569, paragraph 52. To the same effect, see *Centros*, paragraph 25, and Case C-436/00 *X and Y* [2002] ECR I-10829, paragraph 42.

34 — Abuse of Community law was thus defined in Case C-63/99 *Gloszczuk* [2001] ECR I-6369, paragraph 75. Emphasis added.

nationals, subject to the sole condition that they must not constitute a financial burden for the host State.

120. When a future parent decides, as in the present case, that the welfare of his or her child requires the acquisition of Community nationality in order to allow him to enjoy the rights associated with that status, and in particular the right of establishment under Article 18 EC, there is nothing 'abusive' about taking action, in compliance with the law, to ensure that the child, when born, satisfies the conditions for acquiring the nationality of a Member State.

121. Likewise, the fact that such a parent takes action to ensure that his or her daughter can exercise her legitimately acquired right of residence and consequently applies to be allowed to reside with her in the same host State cannot be classified as 'abusive'.

122. This is not a case of people '*improperly or fraudulently* invoking Community law', [35] failing to observe the scope and purposes of the provisions of that legal system, but rather one of people who, apprised of the nature of the freedoms provided for by Community law, take advantage of them by legitimate means, specifically in order to attain the objective which the Community provision seeks to uphold: the child's right of residence.

123. Nor can the non-application to the mother of the United Kingdom provisions on residence of nationals of non-member countries be regarded as following on from of an abuse of law. As has been seen, that result is entirely consistent with the purpose of the Community provision in question and is even a necessary precondition for the attainment of that objective, in so far as it allows Community nationals to be assured of the right to reside freely in the territory of a Member State.

124. The fact is that the problem, if problem there be, lies in the criterion used by the Irish legislation for granting nationality, the *ius soli*, [36] which lends itself to the emergence of situations like the one at issue in this case.

125. In order to avoid such situations, the criterion could have been moderated by the addition of a condition of settled residence of

35 — See *Gloszczuk*, paragraph 75

36 — On the other hand, no importance, for the purposes of this case, attaches to the fact that the 'land' to which the ius soli relates, namely Belfast, as a result of the well-known history of Ireland, is under the sovereignty not of Ireland (Éire) but of the United Kingdom. The issues would have been the same if the child had been born in the territory of Ireland (Éire) and had then moved to Belfast or Cardiff with her mother.

the parent within the territory of the island of Ireland. [37] But there is no such additional condition in Irish legislation, or in any event no such condition was applicable to Catherine.

126. In those circumstances, I repeat, there is certainly no basis for criticising Catherine or her mother for legitimately taking advantage of the opportunities and rights available to them under Community law.

127. Furthermore, if the United Kingdom's argument were accepted, suspicions of abuse could be raised in almost all cases of *intentional* acquisition of nationality of a Member State. And, paradoxically, that could lead to a situation in which the enjoyment of rights deriving from citizenship of the Union was subject to the condition ... that such citizenship had to have been acquired involuntarily.

128. But that would be equivalent 'to restrict [ing] 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'. And as the Court has made clear, that is not allowed in the Community legal order. [38]

129. To my way of thinking, therefore, the answer to be given to the Immigration Authority must not be influenced by the fact that Mr and Mrs Chen arranged for their daughter to be born in Northern Ireland specifically in order to ensure that she acquired Irish nationality and as a result the right to reside in the United Kingdom and the other Member States of the Community.

F — *The right to respect for family life*

130. Having concluded that Community law grants to Catherine the right to establish herself in the United Kingdom and to her mother the right to remain with her

37 — As, it may be noted incidentally, is provided in Article 1 and Annex 2 to the 'Agreement between the government of the United Kingdom of Great Britain and Northern Ireland and the government of Ireland signed at Belfast on 10 April 1998. Article 1(vi) provides that the two governments 'recognise the birthright of all *the people of Northern Ireland* to identify themselves and be accepted as Irish or British, or both, as they may so choose, and accordingly confirm that their right to hold both British and Irish citizenship is accepted by both Governments and would not be affected by any future change in the status of Northern Ireland. Annex 2 states that the term 'the people of Northern Ireland' in Article 1 of the agreement means 'all persons *born in Northern Ireland and having*, at the time of their birth, *at least oneparent who* is a British citizen, an Irish citizen or is otherwise *entitled to reside in Northern Ireland without any restriction on their period of residence*.' Emphasis added.

38 — *Micheletti*, paragraph 10; *Kaur*, paragraph 19.

daughter, I consider that it is unnecessary to go into the question of the compatibility of the national measures with the Convention for the Protection of Human Rights and Fundamental Freedoms. The interpretation of the Treaty proposed here is, as has been seen, entirely in conformity with the values embodied in Article 8 ECHR and in particular the requirement of respecting the unity of family life (see paragraph 94 above).

V — Conclusion

131. I therefore suggest that the Court give the following answers to the questions referred to it by the Immigration Appellate Authority, Hatton Cross:

(1) A very young minor who is a Community national and is covered by sickness insurance covering all risks in the host Member State and who although not directly entitled to income or earnings in her own right, nevertheless has at her disposal, through her parents, sufficient resources to ensure that she will not become a burden on the finances of the host Member State, meets the requirements laid down by Article 1 of Council Directive 90/364/EEC of 28 June 1990 on a right of residence and therefore enjoys a right to reside for an indeterminate period in the territory of a Member State other than that of which she is a national.

(2) A measure whereby the authorities of a Member State reject an application for a long-term residence permit submitted by the mother of a Community national who is a minor and has a right of residence in that Member State not only renders ineffective the right granted to the minor by Article 18 EC and by Article 1 of Directive 90/364 but also constitutes discrimination on grounds of nationality prohibited by Article 12 EC.