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# England and Wales Court of Appeal (Civil Division) Decisions

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**Neutral Citation Number: [2006] EWCA Civ 1494**

Case No: C5/2006/1004

**IN THE SUPREME COURT OF JUDICATURE**
**COURT OF APPEAL (CIVIL DIVISION)**
**ON APPEAL FROM**
**THE IMMIGRATION APPEAL TRIBUNAL**
**HX/22284/2003 & HX/34961/2002**

Royal Courts of Justice
Strand, London, WC2A 2LL

09/11/2006

B e f o r e :

**Lord Justice Buxton**
**Lord Justice Sedley**
**and**
**Lord Justice Dyson**

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**Between:**

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|---|---|
| **W(China) and X(China)** | **Appellants** |
| **- and -** | |
| **The Secretary of State for the Home Department** | **Respondent** |

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**Mr Manjit Gill QC Mr Ramby de Mello and Miss Christa Fielden (instructed by The Central London Law Centre) for the Appellants**
**Miss Marie Demetriou (instructed by The Solicitor to Her Majesty's Treasury) for the Respondent**
**Hearing dates : 19 October 2006**

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**HTML VERSION OF JUDGMENT**

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**Lord Justice Buxton :**

*Facts and the nature of the case*

1. The first appellant [W] and his partner, the second appellant [X], are citizens of the Peoples' Republic of China. They object to that country's policies with regard to child-bearing and the age of marriage. They left China in May 2001 and travelled direct to Holland, where they did not regularise their immigration position. They then entered the United Kingdom illegally on 20 May 2001. In November 2001 X went to the Republic of Ireland, being followed thereafter by W. Again, as the AIT found, there is no reason to think that their entry to that country was legal under its domestic law. Their child [Q] was born on 20 December 2001. The parents, with Q, re-entered the United Kingdom in January 2002. Subject to the issues to be discussed in this appeal, that entry was also illegal. W and X thereafter made applications for asylum. Both of those applications were rejected, and are not appealed.

2. The matter before the IAT and before this court concerned the position of Q, and the effect of Q's status on the right of W and X to remain in this country. At the time at which Q was born the Republic of Ireland applied the *jus soli* in nationality issues, with the result that anyone born in the Republic (or even in that part of the United Kingdom that is Northern Ireland) is a citizen of the Republic, irrespective of their parents' nationality; status; or length of residence and lack of intention to remain in the Republic. Q is therefore a citizen of the Republic and thus also, by article 17 of the EC Treaty, a citizen of the European Union [EU]. Put shortly for the moment, W and X assert that since Q cannot assert her rights of free movement within the EU without their assistance, they are entitled to bring her to the United Kingdom for that purpose, and to stay here, even though absent those considerations their presence in this country would be illegal under English domestic law.

*The law*

3. The Community law that we have to apply is to be found in article 18 of the EC treaty as supplemented by Directive 90/364, and expanded by the ECJ in Case C-200/02 *Chen*. The legislative provisions are as follows:

   Article 18 EC provides that:
   Every citizen of the Union shall have 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.

   Article 1 of Directive 90/364 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.
   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 dependents;

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

4. The right of movement and residence of a citizen of the EU is therefore subject to two pre-conditions: (i) cover by sickness insurance in respect of all risks in the host state; (ii) possession of resources sufficient to avoid becoming a burden on the social assistance system of the host state. Those are logical requirements for the exercise of the right under article 18. The EU citizen does not need to rely on article 18 in order to install himself in another member state unless he is not an economic operator, assumed to contribute to the economy of the host state. If he is in that position, he will have a right of entry in any event either under article 39 as a worker; or under article 43 as a self-employed person; or under article 49 as a provider of services. Those who do not make that contribution, the article 18 cases, are thus reasonably required to establish that they will nonetheless not be a burden on the host state.

5. Directive 90/364 is drafted with an adult citizen in mind, and those covered by article 1.2, as dependents of the EU citizen, are the typical dependents of an adult. In *Chen* the ECJ had by jurisprudence to expand that regime to accommodate the case of an infant EU citizen who could not assert her rights without the presence and assistance of people who, far from being her dependents, were, as it was put in argument before us, her custodians. That case also concerned a child born to Chinese parents in territory to which the Republic of Ireland extended the *jus soli*, and therefore a citizen of the EU. Her mother sought to establish herself in the United Kingdom on the basis of being the custodian of the child. An important difference between *Chen* and our case was that it was not argued in *Chen* that the presence of the mother in the United Kingdom was otherwise unlawful.

6. The ECJ recognised that the mother could not take advantage of article 1.2 of Directive 90/364 because she was not a dependent of her child. The court however held, at its §45, that:

   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 art 18EC 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.

   That meant that the mother could enter in that capacity and for that purpose but, as the court also held, subject to the Directive's regime for the protection of the host state. In the specific case of *Chen*, therefore, the court regarded it as relevant that the child had both health insurance and sufficient resources, provided by her mother, not to become a burden on the host state.

7. The ECJ did not deal specifically with whether the accompanying carer or carers needed to have health insurance, or sufficient resources so that they themselves, as opposed to the child, did not become a burden on the host state. However, in both those cases I with respect find compelling the treatment of the IAT at §§ 14 and 16 of its Determination:

   As the Court pointed out in Chen, the accompanying parent in circumstances like this is not claiming under the provisions of Article 1 of Directive 90/364 because the parent is not dependent upon the child. It therefore follows that the Directive's requirements in respect of medical insurance do not apply precisely to the accompanying parents. But, as Chen establishes, the residence of the accompanying parents in the Member State is simply a consequence of the child's right. And the child's right is a right to reside only in such circumstances as will not place on the Member State a financial burden arising out of his residence. When the person exercising the right of residence is an adult, this result is secured by the requirement that accompanying dependent family members also have medical insurance. We think it inconceivable that a similar requirement does not apply to the family members who accompany under the Chen principle and are not dependent on the person exercising the right of residence. If it were otherwise, the exercise of the right of residence would in fact impose a financial burden on the Member State.
   The next requirement we consider is that of sufficient resources generally. Again, so far as Chen was concerned, there was no doubt that the parents had sufficient resources for

themselves and for the child. The Court expresses the requirement in terms again based on Directive 90.364 that the accompanying parents have *"sufficient resources for that minor not to become a burden on the public finances of the host Member State".* Again, it is not entirely clear whether the resources have to be sufficient to maintain the minor only or sufficient for the carer as well. We would apply the same reasoning as we have applied to medical insurance. Article 90/364 requires that the resources be sufficient for the person exercising the right of residence and all the accompanying dependent family members; it is inconceivable that accompanying family members who are not dependent should not need to be properly supported; and, if they were not, the residence of the child would in practice impose a burden on the public finances of the Member State because of the parent's needs.

8. I conclude therefore that the IAT was correct in holding that in order to fulfil the requirements of Directive 90/364 all of Q, W and X had to demonstrate (i) the possession of sickness insurance; and (ii) sufficient resources to avoid becoming a burden on the social assistance system of the United Kingdom. I consider in turn whether those requirements are indeed fulfilled in this case.

*Sickness insurance*

9. The IAT accepted that at the time of the hearing before it Q was covered by health insurance. W and X were not. We were told from the bar in the course of the appeal that W now had health insurance, but even if we were able to act on that statement further enquiry showed that all that was referred to was the payment of social security contributions as an employee. For reasons that I will shortly develope that does not count as "sickness insurance" in the terms of the Directive.

10. The appellants' original case on this issue, as put in the skeleton argument of Mr Gill QC who appeared before us but had not appeared before the IAT, was that the requirement of sickness insurance had been waived or otherwise conceded by the Secretary of State. I deal with that argument at the end of this part of the judgment, because in the course of oral submissions a more fundamental point was raised. That was that in the case of the United Kingdom the requirement of sickness insurance was otiose, or automatically fulfilled, because health care was in any event available free of charge under the National Health Service. That argument overlooks the fundamental reason for the insurance requirement that was identified as the basis of the scheme of the Directive in *Chen*: to prevent the presence of the EU citizen placing a burden on the host state. Use of free state medical services exactly creates such a burden. And in any event, even if the argument were otherwise valid its factual premise is false: Mr Gill did not demur from the assumption that, as citizens of a third country, W and X would not be entitled to free care under the NHS.

11. It is also because of the nature of the NHS that the social security payments currently being made by W do not count as "insurance" for these purposes. The NHS scheme is not financed solely out of the social security scheme, but is largely tax-financed. Contribution to the social security fund cannot therefore serve as any sort of proxy for insurance designed to remove from the *taxpayer* the burden of providing health care.

12. The claim that the Secretary of State had in some way waived or withdrawn the requirement of insurance was in the first instance based on two letters that the appellants' solicitors had received, many years ago, in the one case from the Immigration and Nationality Directorate and in the other from the Department of Health. The second letter confirmed the point about the NHS being largely financed by tax; but apart from that the letters were quite irrelevant to the matter before us, since they addressed enquiries about the position as to free healthcare of EEA nationals, which W and X are not. It was then submitted that it was consistent with the alleged concession that paragraph 257C of HC 395 dealing with "requirements for leave to enter or remain as the primary carer or relative of an EEA national self-sufficient child" required that the party "can and will be maintained and accommodated without taking employment or having recourse to public funds" with no specific reference to a requirement of health insurance. It is understandable that this point is put in terms of waiver or concession, rather than that the provisions of the Immigration Rules in some way displace the provisions of EU law already set out. It must be plain that domestic regulations cannot take the latter step. And as for waiver or concession, the sources relied on are far too non-specific in their terms to achieve that end, quite apart from there being no suggestion that W or X or anyone else has

arranged their affairs on the basis of this understanding: which, it may be noted, did not emerge in the case until it reached this court, despite the appellants having been represented throughout by specialist counsel.

13. Like the IAT, I consider the absence of health insurance to be fatal to the appellants' claim. I would dismiss the appeals on that ground alone.

*A burden on the social assistance system*

14. This part of the case was thought to involve issues of some difficulty. The IAT's finding was expressed in the following terms in its §17:

    Whether the sufficiency is that of the child alone or of the parents as well is not material on the facts of this case. By the time of the hearing, W had a job, and we understand that he has had previous employment in the United Kingdom. It is clearly asserted by the Secretary of State, and there is no evidence to the contrary on the Appellant's behalf, that the employment is illegal, because W is now (having returned from Eire) as he was when he first arrived in the United Kingdom (illegally from Holland) an illegal entrant with no leave to remain in the United Kingdom. It appears that W's employment exposes both himself and his employer to criminal sanctions. In any event as a matter of fact, in such circumstances, the employment and the funds deriving from it cannot be regarded as anything other than of an ephemeral nature. Employment which has no proper or lawful prospect of permanence cannot be regarded as providing sufficient resources for the maintenance either of Q alone or of her and the Appellants. It is not suggested that any other funds are available to the family. Accordingly, Q is not in a position to exercise the right of residence secured by Directive 90/364 because she does not have sufficient resources to prevent herself becoming a burden on the social assistance system of the host Member State during her period of residence. If, as we think, that requirement applies also to W and X, they also fail to fulfil it.

    The illegality to which the IAT refers arises under section 8 of the Asylum and Immigration Act 1996, by which an employer can be subject to an unlimited fine for employing a person subject to immigration control who does not have valid leave to enter or remain in the United Kingdom.

15. Mr Gill said bluntly that that conclusion had not been open to the IAT. W's employment in the United Kingdom was not illegal, accordingly not insecure, because as Q's custodian W did not require leave to enter or remain in the United Kingdom. W was entitled under article 18 to enter or remain in any EU country to which Q decided to go, even though that decision was necessarily taken on her behalf by W himself.

16. I regret that we do not have the opinion of the IAT on this question, which was never raised before it. I am, however, satisfied that it is wrong simply as a matter of logic and construction, and giving full weight to the primacy of EU law. As interpreted by the ECJ in *Chen*, the article 18 right of Q and the associated right of her custodians can only be lawfully asserted under the strictly limited conditions imposed by Directive 90/364. Those conditions are pre-conditions not merely to the exercise but also more fundamentally to the existence of the right in any particular case: article 18 stating in terms that "the right" to move and reside is subject to the limitations and conditions laid down in, e.g., Directive 90/364. The right accordingly does not exist if Q does not have access to the relevant resources. There is no suggestion that under article 18 the host state is obliged to take positive steps to make resources available to an entering EU citizen: Mr Gill understandably drew back from any suggestion that the state would be obliged to provide support for a custodian without resources in the shape, for instance, of disablement benefit. By the same token, the state is not obliged to adjust its domestic law in order to make available to the EU citizen resources that would not otherwise be available to him, so that he can fulfil the pre-condition to the existence in his case of the article 18 right: the right which has to exist before he can require the state to adjust its domestic law in deference to it.

17. I consider that the point is as short as that, but I will address some further arguments that were put before us.

18. First, Mr Gill drew attention to article 2.2 of Directive 90/364, which provides that

The spouse and the dependent children of a national of a Member State entitled to the right of residence within the territory of a Member State shall be entitled to take up any employed or self-employed activity anywhere within the territory of that Member State, even if they are not nationals of a Member State.

By the same token, he said, X, as not the dependent but the *Chen*-recognised custodian of Q, should be entitled to take up employment. But that requires it to be established that Q is indeed entitled to residence within the United Kingdom, and she is not so entitled, under *Chen*, unless her custodian can meet the resources requirement of the Directive.

19. Second, both parties were inclined to press us with analogies from other parts of the free movement jurisprudence, for instance relating to the rights of dependents of workers. Little is to be gained from such comparisons, because the solution developed by the ECJ in *Chen* is in truth a special rule to meet a special case that can only arise under article 18. Accordingly, the court in *Chen* gave very close attention to the detailed legislative provisions that control the article 18 right, and relied not at all on other chapters of EU law. Nevertheless, I should say something about the ECJ case that Mr Gill put at the forefront of this part of his argument, Case C-60/00 [2003] QB 416 (*Carpenter*).

20. Mr Carpenter, based in the United Kingdom, sold advertising space to customers in other member states, thus exercising a right to provide services protected by Article 49 EC. He married Mrs Carpenter, a Philippines national, when she had for two years been an illegal overstayer in the United Kingdom. When the United Kingdom authorities sought to deport Mrs Carpenter under the provisions of United Kingdom domestic law, she argued that that step, by disrupting Mr Carpenter's family life, would in practice unlawfully disrupt the exercise of his article 49 rights. The ECJ held, at its §40, that the state could only invoke reasons of public interest, *in casu* the demands of immigration control, to defend interference with article 49 rights if the measure taken in the public interest was compatible with fundamental rights protected by the court. On the facts as presented to it, the court held that the deportation of Mrs Carpenter, whose presence in the United Kingdom was not seen as a threat to public order or public safety, was disproportionate to Mr Carpenter's right to respect for his family life under article 8 of the ECHR. The interference with his rights under article 49 EC could accordingly not be justified.

21. It will be seen that *Carpenter* is entirely different from our case. Mr Carpenter had an established Community right, the existence of which, and Mr Carpenter's right to exercise it in the United Kingdom, had nothing to do with, and did not depend on, Mrs Carpenter. By contrast, Q has no Community right at all, or at least cannot exercise any potential article 18 right, without the contribution provided by W's resources. Mr Gill submitted that *Carpenter* was authority for a general proposition that where the presence of a third party national was required to make EU rights fully effective then domestic law cannot be enforced against that third party. The case is authority for no such thing. First, it depends on the establishment of the EU right before the third party enters the equation. Second, and in any event, it is clear that the ECJ even in those circumstances laid down no absolute rule, but required a proportionate balance between the assertion of EU rights and the domestic public policy that was in conflict with their unlimited exercise.

22. We are not required to be drawn into the latter balancing exercise because of the absence in this case of the EU right that is a necessary pre-condition to that exercise. I would however venture to comment that, looking at *Carpenter*, it was to put it at its lowest unfortunate that those representing the United Kingdom did not tell the ECJ that in English domestic law, a provision that has not been suggested to be inconsistent with article 8 of the ECHR, Mrs Carpenter would have been most unlikely to have an answer to a claim to deport her, because she and Mr Carpenter had married at a time when her immigration status was known to be irregular: see per Lord Phillips of Worth Matravers MR in *R(Mahmood) v SSHD* [2001] 1 WLR 840[55]. That necessarily distorted the ECJ's assessment of the balance in that case, but did not of course alter the ratio of the case, that such assessment was a necessary step in the court's determination. If we were to descend into an assessment in the present case, it is clear that the IAT, if it had been asked that question, would have been much troubled by the serial illegality of W and X's movements though various EU member states, and the attempt then to

use their decision to move Q from the Republic to the United Kingdom as a means of validating that illegality in Community terms.

23. I make these observations only out of deference to the weight that was placed by the appellants on *Carpenter*. On the issues that actually arise in this case it is clear that the IAT did not err in law in considering that W's employment in the United Kingdom is illegal. On that basis, they reached a factual conclusion as to the stability of his, and therefore Q's, resources that was plainly open to them and which cannot be interfered with by this court. The appeal fails on that ground also.

**Lord Justice Sedley:**

24. I agree.

25. Neither Directive 90/364 nor the Immigration Rules provide in terms for the situation which is before the court. They provide for derivative rights, on specified conditions, for spouses and dependent relatives of EU nationals; but since the applicants are in neither of these classes in relation to their daughter, neither source of law applies to them. Equally, however, neither parent has any personal right of entry or abode here. Their claim is made in right of their child: her rights, they contend, can only be exercised if they are able to exercise them with and for her. In point of fact, this is undoubtedly the case. But in point of law the child's own right, which is the right given by Art. 18 EC to reside here and not any of the separate Treaty rights to work here, is itself qualified by a dual requirement: self-sufficiency and health insurance.

26. As it happens, the child now has health insurance. But I would enter a caveat as to whether the Directive, when it speaks of "sickness insurance in respect of all risks" is necessarily speaking of private health insurance. The National Health Service, although now heavily funded out of general taxation, is in origin and in law based on national insurance. Nothing would have been easier, in the Directive and in the Rules, than to include the word 'private' if that alone was what was meant – especially since, so far as I know, private insurance rarely if ever covers all risks, such as the risk of requiring long-term medical care.

27. But there is no such problem of meaning in relation to economic self-sufficiency. Neither the child nor the parents can lawfully work here, unless – and Mr Gill QC contends that this is the case – the child's status makes it unlawful to deny the parents the right to work. There would be force in this argument if the child herself had a Treaty right to work here; but she has none, and her parents cannot therefore claim a derivative right to work. In this regard they are not in the same position as the claimant in *Chen*, who had resources originating in China which made her, and thereby the child, self-sufficient in the UK. Mr Gill's argument on self-sufficiency, if sound, would have to apply to any EU citizen seeking entry under Art. 18 EC and would defeat the prior conditions envisaged by the Article itself and explicitly enacted by the Directive.

**Lord Justice Dyson:**

28. I agree that this appeal should be dismissed for the reasons given by Buxton LJ.

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