

Neutral Citation No: [2017] NICA 74

Ref: McC10465

*Judgment: approved by the Court for handing down
(subject to editorial corrections)**

Delivered: 15/12/2017

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

ON APPEAL FROM THE UPPER TRIBUNAL, IMMIGRATION AND ASYLUM
CHAMBER

ERMIRA BAJRATARI

Appellant;

-and-

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent.

-and-

THE AIRE CENTRE

Intervenor

Before: Morgan LCJ, Gillen LJ and McCloskey J

**Order For Reference to the Court of Justice of the European Union pursuant to
Article 267 of the Treaty on the Functioning of the European Union**

Introduction

[1] By this reference Her Majesty's Court of Appeal in Northern Ireland requests the Court of Justice of the European Union (the "CJEU") to provide a preliminary ruling on an issue of EU law relating to the status of a non-EU citizen claiming a derivative right of residence in the United Kingdom relying on the EU citizenship status of her child.

The Facts

[2]

- (i) The Appellant and her husband are nationals of a non-EU country, Albania. They were married in Albania in 2011.
- (ii) The Appellant's husband had a residence card authorising him to reside in the United Kingdom from 13 May 2009 to 13 May 2014, based on his relationship with a United Kingdom national which ended in early 2011. He resided and worked in Northern Ireland between 2009 and 2011, when he went to Albania to be married.
- (iii) The Appellant's husband returned to Northern Ireland on an unspecified date between January and July 2012. His residence card was at no time revoked.
- (iv) At the same time the Appellant entered Northern Ireland without any legal authorisation under domestic law. The family have lived in Northern Ireland ever since.
- (v) The couple's first son was born in Northern Ireland on 01 May 2013 and was subsequently granted a formal certificate of nationality of the Republic of Ireland, on 15 July 2013.
- (vi) Two further children of the family were born subsequently. One of them has been granted a formal certificate of nationality of the Republic of Ireland.
- (vii) The Appellant's husband has worked from time to time as a restaurant worker in Northern Ireland since 2009. He has been working illegally since at latest 12 May 2014, when his EEA residence card expired, because under domestic law, by section 1(2) of the Immigration Act 1971 he required, but did not have, permission to live, work and settle in the United Kingdom.

No member of the family has ever moved to or resided or worked in any other EU Member State.

Legal Proceedings to Date

[3]

- (a) The Appellant applied to the relevant United Kingdom authority (the Home Office) when her first child, an Irish national, was aged four months for recognition of a derivative right of residence under the

European Parliament and Council Directive 2004/38/EC (the “*Citizens Directive*”) relying on her status of primary carer of the child and contending that a refusal to permit the Appellant to reside in the United Kingdom would deprive her child of the enjoyment of his EU citizenship rights.

- (b) The Appellant’s application for a right of residence was refused on two grounds. First, she did not satisfy the definition of “family member” in the Citizens Directive. Second, the requirement of self-sufficiency specified in Article 7 (1) (b) of the Citizens Directive was not satisfied as the evidence failed to demonstrate that her child had “.... *sufficient funds, an income from another source that would be sustainable during their period of residence in the United Kingdom*” The further requirement of “comprehensive sickness insurance cover” was not disputed.
- (c) On 08 June 2015, the Appellant’s first ensuing appeal against this decision was dismissed by the First-tier Tribunal (Immigration and Asylum Chamber).
- (d) On 06 October 2016, the Appellant’s second ensuing appeal, on issues of law only, was dismissed by the Upper Tribunal (Immigration and Asylum Chamber), which also refused to grant permission to appeal to this Court.
- (e) This Court is seized of an application for permission to appeal against the decision of the Upper Tribunal.

Issue of EU Law Arising

[4] This Court is mindful that while the CJEU held in *Alopa* [Case C-86/12] that for the purposes of Article 7(1)(b) of the Citizens Directive it suffices that the requisite resources are available to the Union citizen and there is no requirement relating to their origin it did not specifically decide the question of income deriving from employment unlawful under the national laws of the Member State concerned. This Court is also mindful that there may be a conflict between a decision of the English Court of Appeal, *W (China) and X (China)* [2006] EWCA Civ 1494 and the CJEU decision in *Zhu and Chen* [Case C - 200/02] and, further, a decision of the High Court of Ireland in *OA v Minister for Justice, Equality and Defence* [2014] IEHC 384 on this issue. This Court notes further that in *Alopa* the CJEU did not endorse fully the views of the Advocate General at [19]-[20] and [28]-[29]. The issue is considered not to be *acte clair*.

The Questions Referred

- [i] *Can income from employment that is unlawful under national law establish, in whole or in part, the availability of sufficient resources under Article 7(1)(b) of the Citizens Directive?*

- [ii] *If 'yes', can Article 7(1) (b) be satisfied where the employment is deemed precarious solely by reason of its unlawful character?*