



INSIGHT

“LAWFUL EMPLOYMENT” AS A PRECONDITION FOR THE RECOGNITION OF RESIDENCE RIGHTS: *BAJRATARI*

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ABSTRACT: In the judgment of *Bajratari*, the Court of Justice was asked to determine whether the availability of sufficient resources established by Art. 7, para. 1, let. b), of Directive 2004/38/EU as a precondition for the recognition of Union citizens’ right of residence in another Member State for more than three months should be understood as including income earned by a third-country national parent of a Union citizen child when said parent does not hold a residence card and a work permit. In answering this question, the Court has provided much needed clarifications on the proportionality of restrictive measures adopted by Member States in relation to residence rights of Union citizen children and of their third-country national parents.

KEYWORDS: Union citizenship – derived residence rights – Art. 21 TFEU – directive 2004/38/EU – social assistance – third-country national workers.

I. INTRODUCTION

On 2 October 2019, the Court of Justice (the Court) issued the *Bajratari* judgment,¹ which provided important clarifications as to the correct interpretation of Art. 7, para. 1, let. b), of Directive 2004/38/EC (the Directive). This provision subordinates the right of residence of Union citizens on the territory of another Member State to the preconditions of either being employed or self-employed or of having sufficient resources for themselves and their family members so as not to become a burden to the social assistance system of their host Member State. In the present case, the Court was asked to determine whether the income of a third-country national parent who works in the host State without a residence and work permit might account for such “sufficient resources” within the meaning of Art. 7, para. 1, let. b), of the Directive.

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¹ Court of Justice, judgment of 2 October 2019, case C-93/18, *Bajratari*.

Against this background, this contribution will comment on the *Bajratari* judgment, focusing in particular on the proportionality test carried out by the Court and on the possible implications of such a judgment for the judicial construction of third-country national parents' derived residence rights.

II. BACKGROUND

The judgment under comment stemmed from a request for preliminary ruling by the Court of Appeal in Northern Ireland with reference to an appeal brought by Ms Bajratari, an Albanian citizen, against the denial of her right to reside in the United Kingdom. Ms. Bajratari resided in Northern Ireland with her husband (Mr. Bajratari, also an Albanian national) and their three children, two of which had obtained a certificate of Irish nationality. Mr. Bajratari had been employed continuously since 2009. Initially, he held a residence card and a work permit issued to him on the grounds of a previous relationship with a British national. After the expiration of his residence card in 2014, he had continued working despite not holding a work permit. On September 2013, Ms Bajratari applied to the United Kingdom Home Office (the Home Office) for the recognition of her derived rights of residence by virtue of being the primary carer of one of her Union citizen children. Her request was denied because, according to the Secretary of State for the Home Department, Ms. Bajratari lacked the status of "family member" for the purpose of Directive 2004/38 and - most importantly for the purpose of this brief comment - because her child was not self-sufficient within the meaning of Art. 7, para. 1, let. b), of the Directive. The latter establishes that Union citizens may enjoy the right to reside on the territory of another Member State only if, among other requisites, they have "sufficient resources for themselves and their family members" so as not to become a burden to the host State's social assistance system. After Ms. Bajratari's appeal against this decision was dismissed by both the First-tier tribunal and the Upper Tribunal, she applied before the Court of Appeal in Northern Ireland. The latter stayed the proceedings before it and asked the Court of Justice to establish whether income such as that of Mr. Bajratari's - i.e., income earned by a third-country national parent employed unlawfully because of his lack of a residence card and a work permit - can be included among the sufficient resources required to his Union citizen child as a precondition for his enjoyment of his right of residence on the territory of the Union.

III. THE OPINION OF THE AG

On 19 June 2019, AG Szpunar delivered his Opinion on the *Bajratari* case.² In his view, the question raised by the referring courts prompted two main reflections. First, the situation of Ms. Bajratari and her children came within the scope of European Union law despite

² Opinion of AG Szpunar delivered on 19 June 2019, case C-93/18, *Bajratari*.

the fact that the latter had never exercised freedom of movement or their right of residence in a Member State other than the United Kingdom. This conclusion was necessary in the light of settled jurisprudence of the Court.³ Second, Ms. Bajratari’s children enjoyed a right of residence in the United Kingdom for more than three months on the grounds of Art. 21, para. 1, TFEU and Directive 2004/38. This assessment was grounded on the consideration that – both before and after the adoption of Directive 2004/38 – the Court had established the principle whereby the right of free movement and the prerequisite for its exercise concerning the availability of sufficient resources should be interpreted extensively. As a consequence, such a requirement could not be understood as including any other additional conditions concerning the origin of such resources.⁴ Moreover, AG Szpunar noted that the unlawfulness of Mr. Bajratari’s employment merely stemmed from the fact that he was working without a residence and work permit, and that after their expiry he had continued to contribute to the British social security system by paying taxes and contributions. An assessment of the proportionality of the denial of Ms. Bajratari’s right of residence should take these facts into account.

In this light, the denial of a right of residence to Ms. Bajratari was disproportionate to the legitimate objectives of preventing Union citizens and their family members from becoming an unreasonable burden for the national social assistance system and of protecting public finances. As a result, the argument of the United Kingdom Government whereby income from “unlawful employment” (i.e., employment carried out without a residence and work permit) could not be considered as income relevant for the purpose of satisfying the requirement of sufficient resources under Art. 7, para. 1, let. b), of Directive 2004/38 for reasons of public policy had to be rejected. Indeed, the concept of infringement of public policy concerns serious and genuine threats to the fundamental interests of society, and in this case the measures adopted were neither proportional nor strictly based on the personal conduct of the involved individuals.

Lastly, AG Szpunar recalled the well-established principle in the Court’s jurisprudence whereby denying the right of residence (and consequently of employment opportunities) to the primary carer of a Union citizen child would *de facto* force the latter to leave the Union territory, thus depriving Art. 21 TFEU and Directive 2004/38 of any practical effect.

Therefore, the AG proposed to answer the question of the referring court in the sense that “sufficient resources” under Art. 7, para. 1, let. b), of Directive 2004/38 should include also income deriving from the employment of a third-country national parent lacking a residence card and a work permit.

³ Court of Justice: judgment of 2 October 2003, case C-148/02, *García Avello* [GC]; judgment of 19 October 2004, case C-200/02, *Zhu and Chen*; judgment of 13 September 2016, case C-165/14 *Rendón Marín* [GC].

⁴ *Zhu and Chen*, cit.

IV. THE JUDGMENT OF THE COURT OF JUSTICE

First and foremost, the Court observed that the main question posed by the referring court was whether the expression “sufficient resources” under Art. 7, para. 1, let. b), of Directive 2004/38 should be understood as including resources derived from income of the father of said EU citizen (in this case, a minor) obtained through employment that is unlawful because it is carried out without a residence card and a work permit.

The Court noted that Art. 21, para. 1, TFEU and Directive 2004/38 recognise in principle a right of residence in the United Kingdom to the children of Ms. Bajratari by virtue of their Union citizenship. However, this right of residence as established by Art. 21 TFEU is subject to the conditions and limitations laid out in Directive 2004/38. Among such limitations, Art. 7, para. 1, let. b), requires EU citizens to have sufficient resources so as not to become a burden to the social assistance system of the host Member State.

The Court had already clarified that the origin of such resources is irrelevant, in so far as it had admitted that such resources could be provided by third-country national parents of Union citizen children.⁵ However, it had never ruled on the question of whether these resources could also include income derived from the employment of a third-country national parent who does not hold a residence card and a work permit, and who for this reason is employed unlawfully. With this respect, the Court observed that the wording of Art. 7, para. 1, let. b), does not allow to rule out this interpretation. Moreover, the principle of proportionality requires that any limitation to the fundamental principle that is freedom of movement must be necessary to fulfil the aim pursued.

In the Court’s view, considering the precarious situation of a third-country national employed without a residence and work permit, a national measure that excludes income derived from unlawful employment from the definition of “sufficient resources” under relevant EU law would achieve the objective of avoiding that the Union citizen becomes a burden to the host State’s social assistance system. Nonetheless, this measure does not appear necessary or proportionate to the objective pursued, in the light of the fact that Art. 14 of Directive 2004/38 provides that citizens of the Union and their families might no longer enjoy their right of residence in case of actual loss of their financial resources.

Therefore, an interpretation of Art. 7, para. 1, let. b), of Directive 2004/38 as including the additional condition that financial resources must necessarily derive from employment carried out by a person holding a residence card and a work permit is a disproportionate interference with the freedom of movement and the right of residence of Union citizen children as recognised by Art. 21 TFEU. In fact, such an interpretation would be contrary to the objective pursued by Directive 2004/38 – namely, to facilitate the exercise of the right of Union citizens to reside and move freely within the Union. The Court also shares the AG’s view that in the circumstances of the present case public

⁵ *Rendón Marín*, cit.

policy reasons may not be invoked as a legitimate justification for the denial of the right of residence to EU citizens and their family members for want of a “genuine, present and sufficiently serious threat”⁶ against a fundamental interest of society.

V. COMMENT

The *Bajratari* judgment is the latest of a long series of decisions concerning the conditions of access to derived residence rights of third-country national parents on the grounds of the EU citizenship of their minor children.⁷ The peculiarity of the case under review, however, is that the Court’s scrutiny was not directly focused on the derived residence right of Ms Bajratari but rather on a precondition for her Union citizen child’s enjoyment of his right to reside in a Member State other than his own for more than three months. This feature was a direct result of the justification provided by the British authorities for denying Ms. Bajratari with a residence permit. Differently than in previous instances examined by the Court,⁸ the main argument grounding this denial was not that the presence of a third-country national parent was unessential for a Union citizen child’s residence on the Union territory. Rather, the Home Office had simply argued that Ms. Bajratari’s child himself did not enjoy a right of residence due to his failure to comply with the requirement of being financially self-sufficient.

This different framing was also highlighted by AG Szpunar in his Opinion. On the one hand, he noted that the Court’s jurisprudence on the sufficiency of resources under Art. 7, para. 1, let. b), of Directive 2004/38 had established that this provision also allows third-country national parents who are primary carers of Union citizen children to reside with them in the host Member State, so as not to deprive the latter’s right of residence of any useful effect. With this respect, the judgments of *Zhu and Chen*,⁹ *Alokpa*¹⁰ and *Rendón Marín*¹¹ were recalled. The AG rightly observed that if this jurisprudence would be applied to the case at hand, Ms. Bajratari would be granted with a derived

⁶ *Bajratari*, cit., para. 51.

⁷ Landmark and well-known judgments in this field include the above mentioned judgments of *Zhu and Chen* and of *Rendón Marín*, as well as Court of Justice: judgment of 17 September 2002, case C-413/99, *Baumbast and R.*; judgment of 8 March 2011, *Ruiz Zambrano*; judgment of 15 November 2011, case C-256/11, *Dereci* [GC]; judgment of 10 October 2013, case C-86/12, *Alokpa*; judgment of 10 May 2017, case C-133/15, *Chavez-Vilchez* [GC].

⁸ On the Court’s jurisprudence concerning the recognition of derived residence rights to third-country national parents of Union citizen children to preserve the substance of the latter’s right of residence and free movement within the Union territory, see M. VAN DEN BRINK, *The Origins and the Potential Federalising Effects of the Substance of Rights Test*, and N. CAMBIEN, *EU Citizenship and the Right to Care*, both in D. KOCHENOV (ed.), *EU Citizenship and Federalism*, Cambridge: Cambridge University Press, 2017, respectively at p. 85 *et seq.* and p. 489 *et seq.*

⁹ *Zhu and Chen*, cit.

¹⁰ *Alokpa*, cit.

¹¹ *Rendón Marín*, cit.

right of residence - provided that the referring court could establish that she was the primary carer of her children. On the other hand, the AG also noted that the question posed to the Court was a different one, namely, whether Mr. Bajratari's income could qualify as "sufficient resources" under Art. 7, para. 1, let. b), of Directive 2004/38.

This different focus entailed two main consequences with respect to the Court's analysis. First, the best interest of the child did not appear to play any part in the Court's assessment of the proportionality of the exclusion of Mr. Bajratari's income from the definition of "sufficient resources" under Art 7, para. 1, let. b), of Directive 2004/38. This marked a striking difference with its previous case law on derived residence rights,¹² including the most recent *Chavez Vilchez* judgment. In the latter, the Court observed that the assessment of the risk that a Union citizen child would be compelled to leave the Union territory in case of refusal of a right of residence to his or her third-country national parent must take into account "the right to respect for family life [...] in conjunction with the obligation to take into consideration the best interests of the child".¹³

In *Bajratari*, on the other hand, the assessment of the proportionality of the denial of residence rights to a Union citizen child focused on the alleged reasons of public policy recalled by the Home Office's. The Court enquired not merely on the existence of an infringement of the substance of the rights related to Union citizenship but also on whether the measure in question – as an interference into such rights – was proportionate to the aim pursued. This analysis provided the Court with an important occasion to clarify the contours of the concept of public policy in relation to the degree of seriousness of breaches of domestic legislation concerning work permits. As any violation of the law, the latter do entail a disruption of the social order. However, the Court shared the AG's view that – regardless of their qualification as criminal or civil offences – this type of violations do not fundamentally threaten society and their institutions. In this light, it became apparent that the measure at issue was not proportionate to the legitimate aim of preserving public policy. The proportionality test also allowed the Court to unveil the unreasonableness of recalling the protection of state finances as the justification for the denial of residence rights to Ms. Bajratari and her child, since Mr. Bajratari had not only never relied on but in fact had contributed to public finances by paying taxes and contributions throughout the ten years of his employment.

Despite the importance of the clarifications offered by the Court, it remains to be seen how the Court of Appeal of Northern Ireland will comply with the *Bajratari* judgment. Because the appeal before this referring court concerned Ms. Bajratari's request for the recognition of derived residence rights, other crucial aspects of the family's situ-

¹² On the implicit consideration of the best interests of the child in the Court of Justice's jurisprudence, see M. KLASSEN, P. RODRIGUES, *The Best Interests of the Child in EU Family Reunification Law: A Plea for More Guidance on the Role of Article 24(2) Charter*, in *European Journal of Migration and Law*, 2017, p. 203-206.

¹³ *Chavez Vilchez*, cit., para. 70.

ation were left out of the preliminary questions before the Court. Most notably, the question of whether Mr. Bajratari should also be issued with a residence card and a work permit (as a provider for his Union citizen children) will inevitably be left to the assessment of competent national authorities. This decision may also be influenced by the outcome of Ms. Bajratari’s application for derivative residence rights, on which the Court did not intervene. The question of whether the Union citizen children would be forced to leave the Union in case of expulsion of their third-country national parents, then, may be posed to domestic courts, and possibly to the Court itself. If that will be the case, matters such as the type, quality and intensity of parental care needed for establishing a relationship of dependency necessary to justify the granting of derived residence rights to Union citizen children will be the object of further judicial scrutiny. Certainly, this hypothetical assessment would need to take into account the principle of the best interests of the child as recognised by Art. 24, para. 2, of the Charter of Fundamental Rights of the European Union and by Art. 3 of the Convention on the Rights of the Child (to which Ireland is a party). Looming over these important questions, however, are the currently pending proceedings before the High Court of Ireland against the decision of the Irish authorities to revoke Ms. Bajratari’s children Irish citizenship.

