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OPINION OF ADVOCATE GENERAL
SZPUNAR
delivered on 19 June 2019 [1]

Case C-93/18

Ermira Bajratari
v
Secretary of State for the Home Department,
intervener
AIRE Centre

(Request for a preliminary ruling from the Court of Appeal in Northern Ireland (United Kingdom))

(Reference for a preliminary ruling — Citizenship of the Union — Directive 2004/38/EC — Right of residence of a third-country national who is a direct relative in the ascending line of Union citizens who are minor children — Article 7(1)(b) — Condition of having sufficient resources — Resources consisting of income from work carried out without a residence and work permit)

[1] Original language: French.

I. Introduction

1. By its request for a preliminary ruling, the Court of Appeal in Northern Ireland (United Kingdom) seeks from the Court an interpretation of Article 7(1)(b) of Directive 2004/38/EC. [2]

2. The questions raised by the referring court concern, in essence, the sufficiency of the resources which a Union citizen must have where those resources, made available to minor children who are citizens of the European Union, derive from income obtained from work carried out in a Member State by their father, a third-country national, who, having been granted residence and work permits in the past, no longer has those permits in that Member State because his residence card has expired.

3. Although the Court will, for the first time, address that specific question, it must nevertheless be pointed out that the provision at issue in the main proceedings has already been interpreted by the Court, inter alia, in the judgment in *Zhu and Chen*. [3]

4. Consequently, the present case will require the Court, in particular, to clarify the scope of that judgment within the specific context of the case in the main proceedings.

II. Legal context

A. EU law

5. Article 2 of Directive 2004/38, entitled 'Definitions', provides:

'For the purposes of this Directive:

1. "Union citizen" means any person having the nationality of a Member State;

2. "Family member" means:

…

[2] Directive of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC (OJ 2004 L 158, p. 77), as amended by Regulation (EU) No 492/2011 of the European Parliament and of the Council of 5 April 2011 (OJ 2011 L 141, p. 1, and corrigenda in OJ 2004 L 229, p. 35, and OJ 2005 L 197, p. 34) ('Directive 2004/38').

[3] Judgment of 19 October 2004 (C-200/02, EU:C:2004:639).

(b) the partner with whom the Union citizen has contracted a registered partnership, on the basis of the legislation of a Member State, if the legislation of the host Member State treats registered partnerships as equivalent to marriage and in accordance with the conditions laid down in the relevant legislation of the host Member State;

…

(d) the dependent direct relatives in the ascending line and those of the spouse or partner as defined in point (b);

3. "Host Member State" means the Member State to which a Union citizen moves in order to exercise his/her right of free movement and residence.'

6. Article 3 of that directive, entitled 'Beneficiaries', provides in paragraph 1 thereof:

'This Directive shall apply to all Union citizens who move to or reside in a Member State other than that of which they are a national, and to their family members as defined in point 2 of Article 2 who accompany or join them.'

7. Article 7 of that directive, entitled 'Right of residence for more than three months', provides in paragraph 1(b) thereof:

'1. All Union citizens shall have the right of residence on the territory of another Member State for a period of longer than three months if they:

…

(b) have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State during their period of residence and have comprehensive sickness insurance cover in the host Member State; or

…'

8. Article 14 of Directive 2004/38, entitled 'Retention of the right of residence', states, in paragraph 2 thereof:

'Union citizens and their family members shall have the right of residence provided for in Articles 7, 12 and 13 as long as they meet the conditions set out therein.

…'

B. United Kingdom legislation

9. The only provision cited by the Court of Appeal in Northern Ireland in its order for reference is section 1(2) of the Immigration Act 1971, under which a person who is not a British citizen must have permission to remain, work and settle in the United Kingdom. [4]

III. The facts giving rise to the dispute in the main proceedings, the questions referred and the procedure before the Court

10. Ms Ermira Bajratari, an Albanian national, has resided in Northern Ireland since 2012. During the period from 13 May 2009 to 13 May 2014, her husband, Mr Durim Bajratari, who is also an Albanian national residing in Northern Ireland, had a residence card authorising him to reside in the United Kingdom. That card had been issued to him on the basis of his previous relationship with Ms Toal, a United Kingdom national, [5] which ended in early 2011.

11. Although, following the end of his relationship with Ms Toal, the husband of Ms Bajratari had left the United Kingdom in 2011 to marry the appellant in the main proceedings in Albania, he returned to Northern Ireland in 2012. His residence card was at no time revoked.

12. The couple have three children, all of whom were born in Northern Ireland and two of whom have obtained a certificate of Irish nationality.

13. Since 2009, Ms Bajratari's husband has pursued various occupational activities, including as a restaurant worker in Northern Ireland, but has been working illegally since 12 May 2014, the date on which his residence card expired.

14. The family has never moved to or resided in an EU Member State other than the United Kingdom.

15. After the birth of her first child, an Irish national, the appellant in the main proceedings applied to the Home Office (United Kingdom) for recognition of a derived right of residence under Directive 2004/38, relying on her status as the person who is the primary carer of her child, a Union citizen, and arguing that

4 It is apparent from the observations of the United Kingdom that, at the material time in the present case, Article 7 of Directive 2004/38 was transposed into national law by regulation 4 of the Immigration (European Economic Area) Regulations 2006. That Member State states that, on 1 February 2017, those regulations were replaced by the Immigration (European Economic Area) Regulations 2016 but that none of the changes made in the latter regulations is relevant to the present case.

5 It is apparent from the observations of the appellant in the main proceedings and of the United Kingdom that Ms Toal is an Irish national. Since the referring court refers to Ms Toal's British nationality, it is highly likely that she has dual British and Irish nationality.

refusal of a residence permit would deprive her child of the enjoyment of his rights as a Union citizen.

16. That application was rejected on two separate grounds, that is, first, that the appellant in the main proceedings did not have the status of 'family member' within the meaning of Directive 2004/38 and, secondly, that her child did not satisfy the requirement of self-sufficiency provided for in Article 7(1)(b) of that directive.

17. On 8 June 2015, the First-tier Tribunal (Immigration and Asylum Chamber) (United Kingdom) dismissed the appeal brought by Ms Bajratari against the decision of the Home Office. On 6 October 2016, the Upper Tribunal (Immigration and Asylum Chamber) (United Kingdom) dismissed the appellant's second appeal. The appellant then applied to the referring court for leave to appeal against the judgment of the Upper Tribunal (Immigration and Asylum Chamber).

18. The referring court notes that the Court has previously held that the requirement imposed by Article 7(1)(b) of Directive 2004/38, according to which a Union citizen must have sufficient resources, is satisfied when those resources are at the disposal of that citizen and that there is no requirement as to the origin of those resources, since they could be provided by, among others, a national of a third country. [6] That court points out that the Court nonetheless did not specifically rule on whether income deriving from employment which is unlawful under national law should be taken into account.

19. Against that background, the Court of Appeal in Northern Ireland decided, by order of 15 December 2017 received by the Court Registry on 9 February 2018, to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'1. 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 [Directive 2004/38]?

2. If "yes", can Article 7(1)(b) [of that directive] be satisfied where the employment is deemed precarious solely by reason of its unlawful character?'

20. On 6 November 2018, the Court sent to the referring court a request for clarification pursuant to Article 101 of the Rules of Procedure of the Court, to which the referring court responded on 12 December 2018. [7]

6 See, to that effect, judgments of 19 October 2004, *Zhu and Chen* (C-200/02, EU:C:2004:639, paragraphs 28 and 30), and of 10 October 2013, *Alokpa and Moudoulou* (C-86/12, EU:C:2013:645, paragraph 27).

7 I shall return to this issue later, in points 28 to 30 of this Opinion.

21. Written observations were submitted by the appellant in the main proceedings and the AIRE Centre, [8] the United Kingdom, Czech, Danish, Netherlands and Austrian Governments and the European Commission.

22. At the hearing held on 24 January 2019, oral submissions were made on behalf of the appellant in the main proceedings, the AIRE Centre, the United Kingdom and Danish Governments and the Commission.

IV. Analysis

A. Continuance of the dispute in the main proceedings

23. It is clear from both the wording and the scheme of Article 267 TFEU that a national court or tribunal is not empowered to bring a matter before the Court of Justice by way of a reference for a preliminary ruling unless a case is pending before it in which it is called upon to give a decision which is capable of taking account of the preliminary ruling. [9] Therefore, the Court may verify of its own motion that a dispute such as that at issue in the main proceedings is continuing. [10]

24. The dispute in the main proceedings concerns the rejection of Ms Bajratari's application for a derived right of residence under Directive 2004/38, an application having been made to the Court of Appeal in Northern Ireland for leave to appeal against the judgment of the Upper Tribunal (Immigration and Asylum Chamber).

25. However, it is clear from the written observations of the United Kingdom Government that the Crown Solicitor's Office (Northern Ireland) informed the referring court, on 22 February and 6 March 2018, that is to say, after the present reference for a preliminary ruling had been made, that the certificates of Irish nationality of Ms Bajratari's children had been invalidated on the ground that her husband had ceased to have a derived right of residence in the United Kingdom following the end of his relationship with a United Kingdom national during 2011.

26. In that regard, the United Kingdom Government argues that Ms Bajratari's children no longer enjoy Union citizenship and the rights deriving therefrom, since their Irish nationality was withdrawn after the competent authorities

8 The intervener in the main proceedings, the AIRE Centre (Advice on Individual Rights in Europe), is a charity providing information and advice concerning EU law and international human rights law, in particular the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950. It was granted leave to intervene in the present case by the referring court on 22 September 2017.

9 Judgments of 11 September 2008, *UGT-Rioja and Others* (C-428/06 to C-434/06, EU:C:2008:488, paragraph 39), and of 13 September 2016, *Rendón Marín* (C-165/14, EU:C:2016:675, paragraph 24).

10 Judgment of 13 September 2016, *Rendón Marín* (C-165/14, EU:C:2016:675, paragraph 24).

established that it had been granted to them when their father was no longer in possession of a valid residence permit. Consequently, it is submitted, the reference for a preliminary ruling is devoid of purpose and the questions raised by the referring court are hypothetical. Accordingly, it is argued, the Court does not have jurisdiction and should therefore refuse to answer those questions.

27. However, it is also apparent from the observations of the United Kingdom Government that on 12 April 2018 the appellant in the main proceedings was granted leave to challenge, by an application for judicial review, the decisions invalidating the certificates of Irish nationality of her first two children.

28. In the light of those circumstances, the Court of Appeal in Northern Ireland was invited to inform the Court of the effect on the main proceedings of the possible withdrawal from Ms Bajratari's first two children of their certificates of Irish nationality and the consequences of such withdrawal on the questions referred.

29. By order of 12 December 2018, the referring court stated that, although it was possible that the dispute before it would become devoid of purpose on account of the loss of Irish nationality of those two children, that dispute was nonetheless still continuing and valid at that date. [11]

30. In the light of the foregoing, the dispute in the main proceedings is still pending before the referring court and a reply from the Court to the question raised remains useful for deciding that dispute.

B. Consideration of the questions referred

31. By its two questions, which must be considered together, the referring court asks, in essence, whether Article 7(1)(b) of Directive 2004/38 must be interpreted as meaning that a young child who is a Union citizen has sufficient resources not to become a burden on the social assistance system of the host Member State during his period of residence in the case where those resources are provided from income derived from the unlawful activity carried on in that Member State without a residence or work permit by his father, a national of a third country.

32. Before answering that question, I shall briefly address, in the first place, the question whether the situation of the appellant in the main proceedings and of her two infants, who have never moved to or resided in a Member State other than that in which they were born and are resident, comes within the scope of EU law and, in particular, of Article 21 TFEU and Directive 2004/38. I shall then examine, in the second place, the following question: do the children of Ms Bajratari satisfy the conditions laid down in Article 7(1)(b) of Directive

[11] In the light of the referring court's response in that order, and contrary to what the United Kingdom Government suggests, it must be concluded, in the context of my analysis, that Ms Bajratari's first two children are, at present, citizens of the Union.

2004/38 where, as in the present case — this being a matter for the referring court to ascertain — the resources consist of the income of their father, a national of a third country, deriving from work carried out without a residence or work permit?

1. The existence of a right of residence granted to a Union citizen and the members of his family in the host Member State based on Article 21 TFEU and Directive 2004/38

33. It should be recalled, first of all, that, in accordance with Article 3(1) of Directive 2004/38, the 'beneficiaries' of the rights conferred by that directive are 'all Union citizens who move to or reside in a Member State other than that of which they are a national, and … their family members as defined in point 2 of Article 2 who accompany or join them'.

34. In the present case, Ms Bajratari is an Albanian national who is the mother of two infants of Irish nationality for whom she is the carer and who have resided since birth in the same Member State, namely the United Kingdom. [12]

35. In that regard, the fact that those children have never exercised their right to free movement and have always resided in the Member State in which they were born and are resident might suggest that they are not covered by the concept of 'beneficiary' for the purposes of Article 3(1) of Directive 2004/38. [13] However, it must be borne in mind that, according to settled case-law, the situation of a national of a Member State who was born in the host Member State and has not made use of the right to freedom of movement cannot, for that reason alone, be assimilated to a purely internal situation, thereby depriving that national of the benefit in the host Member State of the provisions of EU law on freedom of movement and of residence. [14]

36. In so far as the first two children of the appellant in the main proceedings reside in a Member State other than that of their nationality, they are therefore entitled to rely on Article 21(1) TFEU.

12 It should be recalled, as the Commission rightly pointed out in its written observations, that Ms Bajratari's application for recognition of a right of residence is based solely on her status as the person who is the primary carer of her two children, who are Irish nationals.

13 See, to that effect, judgments of 15 November 2011, *Dereci and Others* (C-256/11, EU:C:2011:734, paragraph 57); of 6 December 2012, *O and Others* (C-356/11 and C-357/11, EU:C:2012:776, paragraph 42); and of 13 September 2016, *Rendón Marín* (C-165/14, EU:C:2016:675, paragraph 40).

14 Judgments of 2 October 2003, *Garcia Avello* (C-148/02, EU:C:2003:539, paragraphs 13 and 27); of 19 October 2004, *Zhu and Chen* (C-200/02, EU:C:2004:639, paragraph 19); and of 13 September 2016, *Rendón Marín* (C-165/14, EU:C:2016:675, paragraph 42). In the context of Article 20 TFEU, see the judgments of 8 March 2011, *Ruiz Zambrano* (C-34/09, EU:C:2011:124, paragraphs 43 and 44), and of 13 September 2016, *CS* (C-304/14, EU:C:2016:674, paragraph 29).

37. In those circumstances, Article 21(1) TFEU and Directive 2004/38 in principle confer a right to reside in the United Kingdom on Ms Bajratari's children.

38. In that regard, it should be pointed out that the right of citizens of the Union to reside in a Member State other than that of which they are a national is recognised subject to the limitations and conditions imposed by the FEU Treaty and by the measures adopted to give it effect. [15]

39. In that context, it is necessary to examine whether Ms Bajratari's children who are Union citizens satisfy the conditions laid down in Article 7(1)(b) of Directive 2004/38, in which case she would be granted a derived right of residence for more than 3 months.

2. Do Ms Bajratari's children, who are citizens of the Union, satisfy the conditions laid down in Article 7(1)(b) of Directive 2004/38?

40. A derived right of residence for more than 3 months may be granted to the appellant in the main proceedings only if her first two children, infants who are citizens of the Union, satisfy the conditions laid down in Article 7(1)(b) of Directive 2004/38, that is to say, in particular, if they have 'sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State during their period of residence and have comprehensive sickness insurance cover in [that Member State]'. [16]

41. With regard to the condition relating to comprehensive sickness insurance cover in the host Member State, it is apparent from the order for reference that the Home Office has not disputed that that condition was fulfilled.

42. However, as regards the condition that the Union citizen must have sufficient resources, that authority concluded that it was not fulfilled. [17]

43. In that regard, the analysis contained in the order for reference shows that the referring court is aware of the case-law of the Court of Justice concerning the

15 See judgments of 19 October 2004, *Zhu and Chen* (C-200/02, EU:C:2004:639, paragraph 26), and of 13 September 2016, *Rendón Marín* (C-165/14, EU:C:2016:675, paragraph 45).

16 It is apparent from the order for reference that the first child was born in Northern Ireland on 1 May 2013 and was granted a certificate of Irish nationality on 15 July 2013. The referring court indicates only that one of the other two children was granted a certificate of Irish nationality. In that regard, it is clear from Ms Bajratari's observations that this second child was born in Northern Ireland in November 2014. In view of the dates of birth of those children, I cannot in principle rule out that they acquired a right of permanent residence in that Member State in accordance with Article 16(1) of Directive 2004/38. In that case, their right of residence would not be subject to the conditions provided for in Chapter III of Directive 2004/38 and, in particular, to those set out in Article 7(1)(b) of that directive, this being a matter for the referring court to ascertain.

17 See point 16 of this Opinion.

interpretation of Article 7(1)(b) of Directive 2004/38. However, it has doubts as to whether that case-law applies in the present case.

44. I shall therefore begin by recalling that case law.

(a) The case-law of the Court relating to the condition that the Union citizen must have sufficient resources for the exercise of a right of residence in the host Member State

45. The Court has already given several rulings relating to the condition concerning the sufficiency of resources for the purpose of Article 7(1)(b) of Directive 2004/38 in cases similar to that here at issue in the main proceedings.

46. In the judgment in *Zhu and Chen*, [18] the Court, sitting as a full Court, held, in relation to the measures of EU law which preceded Directive 2004/38, that 'it is sufficient for the nationals of Member States to "have" the necessary resources, and that provision lays down no requirement whatsoever as to their origin', since they could be provided by, among others, a national of a third country who is the parent of the citizens who are the minor children at issue. [19] The Court also stated, on the one hand, that 'the correctness of that interpretation is reinforced by the fact that provisions laying down a fundamental principle such as that of the free movement of persons must be interpreted broadly' and, on the other hand, that a contrary interpretation 'would add to that condition, as formulated in that directive, a requirement as to the origin of the resources which, not being necessary for the attainment of the objective pursued, namely the protection of the public finances of the Member States, would constitute a disproportionate interference with the exercise of the fundamental right of freedom of movement and of residence upheld by [Article 21 TFEU]'. [20]

47. The Court has repeated that interpretation of the condition concerning the sufficiency of resources, inter alia in the judgments in *Alokpa and Moudoulou* [21] and *Rendón Marín*. [22]

18 Judgment of 19 October 2004 (C-200/02, EU:C:2004:639).

19 Judgment of 19 October 2004, *Zhu and Chen* (C-200/02, EU:C:2004:639, paragraphs 28 and 30). More recently, with regard to resources provided by a national of a third country who is the spouse of the Union citizen, see judgment of 16 July 2015, *Singh and Others* (C-218/14, EU:C:2015:476, paragraphs 74 and 77). With regard to resources provided by a national of a third country who is a partner residing in the host Member State, see judgment of 23 March 2006, *Commission* v *Belgium* (C-408/03, EU:C:2006:192, paragraphs 40, 46 and 51).

20 Judgments of 19 October 2004, *Zhu and Chen* (C-200/02, EU:C:2004:639, paragraphs 31 and 33); of 23 March 2006, *Commission* v *Belgium* (C-408/03, EU:C:2006:192, paragraphs 40 and 41), and of 16 July 2015, *Singh and Others* (C-218/14, EU:C:2015:476, paragraph 75).

21 Judgment of 10 October 2013 (C-86/12, EU:C:2013:645, paragraph 27).

22 Judgment of 13 September 2016 (C-165/14, EU:C:2016:675, paragraph 48).

48. In the Grand Chamber judgment in *Rendón Marín*, [23] the Court, referring to paragraphs 45 to 47 of the judgment in *Zhu and Chen*, [24] recalled, in the first place, that a refusal to allow the parent, whether a national of a Member State or of a third country, who is the carer of a minor child who is a Union citizen to reside with that child in the host Member State would deprive the child's right of residence of any useful effect, since *enjoyment by a young child of a right of residence* necessarily implies that that child is entitled to be accompanied by the person who is his primary carer and accordingly that the carer must be in a position to reside with the child in the host Member State for the duration of such residence. [25] The Court pointed out, in the second place, that while Article 21 TFEU and Directive 2004/38 grant a right to reside in the host Member State to a minor who is a national of another Member State and who satisfies the conditions laid down in Article 7(1)(b) of that directive, the same provisions allow a parent who is that minor's primary carer to reside with him in the host Member State. [26]

49. If that case-law is applied to the case in the main proceedings here, it would mean that, in so far as Ms Bajratari's children fulfil the conditions laid down in that provision for entitlement to a right of residence in the United Kingdom on the basis of Article 21 TFEU and Directive 2004/38 and in so far as the appellant in the main proceedings is the primary carer of her children, which it is for the referring court to ascertain, she could therefore rely on a derived right of residence in the United Kingdom under those same provisions.

50. Although the fact that it is through their father, who is a national of a third country, that the children concerned have sufficient resources within the meaning of Article 7(1)(b) of Directive 2004/38 does not constitute an obstacle to fulfilling the condition relating to sufficient resources laid down in that provision, as interpreted by the case-law set out in points 46 and 47 of this Opinion, it will nonetheless be necessary to examine the question which lies at the heart of the present case and to which I shall devote the rest of my analysis: can income derived from an activity carried out without a work and residence permit be classified as 'sufficient resources' within the meaning of that provision?

23 Judgment of 13 September 2016 (C-165/14, EU:C:2016:675).

24 Judgment of 19 October 2004 (C-200/02, EU:C:2004:639).

25 Judgment of 13 September 2016, *Rendón Marín* (C-165/14, EU:C:2016:675, paragraphs 51 and 52). See, also, judgment of 10 October 2013, *Alokpa and Moudoulou* (C-86/12, EU:C:2013:645, paragraph 28).

26 Judgment of 13 September 2016, *Rendón Marín* (C-165/14, EU:C:2016:675, paragraph 52). See, also, judgment of 10 October 2013, *Alokpa and Moudoulou* (C-86/12, EU:C:2013:645, paragraph 29).

(b) Can income derived from work carried out without a work and residence permit in the host Member State be classified as 'sufficient resources' within the meaning of Article 7(1)(b) of Directive 2004/38?

51. In order to answer that question, it is necessary to examine, first of all, the work carried out by Ms Bajratari's husband before and after the expiry of his residence card on 12 May 2014. [27]

52. It is apparent from the order for reference and from the written observations of the appellant in the main proceedings that, during the period between 2009 and February 2018, Ms Bajratari's husband worked as a kitchen chef in a restaurant in Belfast (Northern Ireland). In addition, Ms Bajratari states that, since then, her husband has worked as an attendant in a car wash.

53. In that regard, in response to a question put by the Court at the hearing, the representative of the appellant in the main proceedings confirmed that, following the expiry of his residence card in 2014, Ms Bajratari's husband lost his work and residence permit, but nevertheless continued to work in the restaurant where he had been employed since 2009. Accordingly, it was only because his residence card expired that the employment of Ms Bajratari's husband became unlawful. In spite of the expiry of that card, he remained liable to pay taxes and contributions to the social security system and, as confirmed at the hearing, amounts were periodically deducted at source by his employer. [28]

54. In those circumstances, it must be borne in mind that the right of citizens of the Union to reside in a Member State other than that of which they are nationals is recognised subject to the limitations and conditions imposed by the FEU Treaty and by the measures adopted to give it effect, [29] and those limitations and conditions must be applied in compliance with the limits imposed by EU law and

27 It is clear from the written observations of the appellant in the main proceedings and from those of the United Kingdom that Ms Bajratari's husband entered Northern Ireland in September 2002 and that from 2005 he was in a stable relationship with an *Irish national* which ended in 2011. In view of the fact that he lived in Northern Ireland with a Union citizen between 2005 and 2011, the Commission pointed out at the hearing that, in 2011, he could have applied for permanent residence in the host Member State under Article 16(1) of Directive 2004/38. The fact that he obtained his residence card in 2008 is irrelevant since the grant of a residence permit to a national of a Member State is to be regarded, not as a measure giving rise to rights, but as a measure by a Member State serving to prove the individual position of a national of another Member State (or the members of his family) with regard to provisions of EU law. See judgments of 21 July 2011, *Dias* (C-325/09, EU:C:2011:498, paragraph 48), and of 14 September 2017, *Petrea* (C-184/16, EU:C:2017:684, paragraph 32).

28 In response to a question put by the Court at the hearing, the representative of the appellant in the main proceedings stated, inter alia, that the annual salary of Ms Bajratari's husband was GBP 17 000 (EUR 19 315) in 2014 and GBP 20 000 (EUR 22 718) in the preceding years.

29 Judgments of 19 October 2004, *Zhu and Chen* (C-200/02, EU:C:2004:639, paragraph 26), and of 13 September 2016, *Rendón Marín* (C-165/14, EU:C:2016:675, paragraph 45).

in accordance with the general principles of that law, in particular the principle of proportionality. [30]

55. Accordingly, it is necessary to determine whether the refusal to grant Ms Bajratari a right of residence, based on the finding that the income earned by her husband without a work and residence permit does not constitute sufficient resources within the meaning of Article 7(1)(b) of Directive 2004/38, is a measure which complies with the principle of proportionality.

56. In the light of the circumstances of the case in the main proceedings, examination of the principle of proportionality involves determining whether the national measures making the right of residence of the appellant in the main proceedings and her children subject to the legitimate interests of the United Kingdom are appropriate and necessary to attain the objective pursued.

57. In that regard, I would point out that the main objective of Directive 2004/38 is, as is apparent from recitals 1 to 4 thereof, to facilitate the exercise of the primary and individual right to move and reside freely within the territory of the Member States that is conferred directly on Union citizens by Article 21(1) TFEU and that that directive aims, inter alia, to strengthen that right. [31] In the context of that *main objective*, the condition of having sufficient resources set out in Article 7(1)(b) of Directive 2004/38 — as is clear from recital 10 thereof — pursues the *specific objective* '[of] prevent[ing] such persons becoming an unreasonable burden on the social assistance system of the host Member State'. [32]

58. It follows from the case-law recalled in point 46 of this Opinion that it is sufficient for the nationals of Member States to 'have' the necessary resources, and Article 7(1)(b) of Directive 2004/38 lays down 'no requirement whatsoever as to their origin'. [33] According to the Court, a contrary interpretation would add to that condition, as formulated in that directive, a requirement as to the origin of the resources which, not being necessary for the attainment of the objective pursued, namely the protection of the public finances of the Member States, would

30 Judgments of 17 September 2002, *Baumbast and R* (C-413/99, EU:C:2002:493, paragraph 91); of 19 October 2004, *Zhu and Chen* (C-200/02, EU:C:2004:639, paragraph 32); and of 13 September 2016, *Rendón Marín* (C-165/14, EU:C:2016:675, paragraph 45).

31 Judgments of 25 July 2008, *Metock and Others* (C-127/08, EU:C:2008:449, paragraph 82); of 5 June 2018, *Coman and Others* (C-673/16, EU:C:2018:385, paragraph 18); and of 11 April 2019, *Tarola* (C-483/17, EU:C:2019:309, paragraph 23).

32 Judgments of 21 December 2011, *Ziolkowski and Szeja* (C-424/10 and C-425/10, EU:C:2011:866, paragraph 40); of 4 October 2012, *Commission* v *Austria* (C-75/11, EU:C:2012:605, paragraph 60); and of 19 September 2013, *Brey* (C-140/12, EU:C:2013:565, paragraph 54).

33 Judgments of 19 October 2004, *Zhu and Chen* (C-200/02, EU:C:2004:639, paragraphs 28 and 30); of 23 March 2006, *Commission* v *Belgium* (C-408/03, EU:C:2006:192, paragraphs 40, 46 and 51); and of 16 July 2015, *Singh and Others* (C-218/14, EU:C:2015:476, paragraphs 74 and 77).

constitute a *disproportionate interference* with the exercise of the fundamental right of freedom of movement and of residence upheld by Article 21 TFEU. [34]

59. Accordingly, it is clear that the fact that the father of Ms Bajratari's minor children, who are citizens of the Union, began working in 2009, when his residence card was still valid, and that he continued in the same employment in the territory of the host Member State after the expiry date of that residence card, without a work and residence permit, cannot constitute a ground for adding to Article 7(1)(b) of Directive 2004/38 a requirement as to the source of the 'sufficient resources' which is not imposed by that provision.

60. In addition, it must be pointed out that it is apparent from the Communication from the Commission to the European Parliament and the Council of 2 July 2009 on guidance for better transposition and application of Directive 2004/38 [35] that, in order to be regarded as 'sufficient', the resources do not have to be periodic and can be in the form of accumulated capital. [36] *Only receipt of social assistance benefits* can be considered relevant to determining whether the person concerned is a burden on the social assistance system. [37] In that regard, the Court has held that 'the mere fact that a national of a Member State receives social assistance is not sufficient to show that he constitutes an unreasonable burden on the social assistance system of the host Member State'. [38]

61. Accordingly, Article 14(3) of Directive 2004/38 provides that 'an expulsion measure shall not be the automatic consequence of a Union citizen's or his or her family member's recourse to the social assistance system of the host Member State'. Moreover, it is clear from recital 16 of that directive that, as long as the beneficiaries of the right of residence do not become an unreasonable burden on the social assistance system of the host Member State, they should not be expelled. [39]

62. The Court has already pointed out that it is clear from recital 16 of Directive 2004/38 that, in order to determine whether a person *receiving social assistance* has become an unreasonable burden on its social assistance system, the host Member State should, before adopting an expulsion measure, examine whether the person concerned is experiencing temporary difficulties and take into

34 Judgments of 19 October 2004, *Zhu and Chen* (C-200/02, EU:C:2004:639, paragraphs 31 and 33); of 23 March 2006, *Commission* v *Belgium* (C-408/03, EU:C:2006:192, paragraphs 40 and 41); and of 16 July 2015, *Singh and Others* (C-218/14, EU:C:2015:476, paragraph 75).

35 COM(2009) 313 final ('the Commission guidelines').

36 The Commission guidelines, p. 8.

37 The Commission guidelines, p. 9.

38 Judgment of 19 September 2013, *Brey* (C-140/12, EU:C:2013:565, paragraph 75).

39 See the Commission guidelines, p. 9.

account the duration of residence of the person concerned, his personal circumstances, and the amount of aid which has been granted to him. [40]

63. In the context of the assessment of those three criteria listed in recital 16 of Directive 2004/38, the national authorities must assess, inter alia, the duration for which the benefit was granted, the level of connection of the Union citizen and the members of his family with the society of the host Member State, particular considerations such as age, state of health, family and economic situation, and whether the Union citizen (or the members of his family) has a history of relying heavily on social assistance, as well as the duration of the contributions by that citizen (or by the members of his family) to the financing of social assistance in the host Member State. [41]

64. In the present case, not only is there nothing to indicate that Ms Bajratari's children had recourse to social assistance in the host Member State, [42] but it was stated at the hearing — this being a matter for the referring court to verify — that Ms Bajratari's husband, the father of her children, continued after the expiry of his residence card to contribute to the financing of the Member State's social assistance by means of taxes and contributions deducted periodically at source.

65. In that context, I note, first of all, as is apparent from point 53 of this Opinion, that the alleged unlawfulness of the employment of Ms Bajratari's husband is, in principle, solely the result of the fact that his residence card has expired. Moreover, the employment he carried out prior to the expiry of his residence card and which he continued to carry out after its expiry was not, in itself, unlawful, in particular, in my view, since the income derived from that employment was subject to the tax and social security contributions imposed by national law. Accordingly, I am of the view that a situation where a worker pays taxes and contributes to social security, which it is for the referring court to ascertain, cannot be regarded as contrary to the protection of the public finances of the Member States.

66. Moreover, sufficiency of resources and illegality of resources derived from criminal activity are, without doubt, two completely different matters. Therefore, the effect of that difference on the interpretation of Article 7(1)(b) of Directive 2004/38 can be only indirect: if, for example, the resources available to minors who are citizens of the Union, through another Union citizen or a national of a third country, derive from a criminal activity, such as drug trafficking, and that

40 Judgment of 19 September 2013, *Brey* (C-140/12, EU:C:2013:565, paragraph 69).

41 See the Commission guidelines, pp. 8 and 9. Moreover, I recall that recital 16 of Directive 2004/38 states that, 'in no case should an expulsion measure be adopted against workers, self-employed persons or job-seekers as defined by the Court of Justice save on grounds of public policy or public security'.

42 Furthermore, I note that it is clear from the order for reference that the condition relating to sickness insurance cover for the children laid down in Article 7(1)(b) of Directive 2004/38 was not challenged by the Home Office. See, in that regard, point 41 of this Opinion.

person is sentenced to a term of imprisonment, then those children will, in principle, no longer have the resources to provide for themselves in practice.

67. It should be noted, next, that, despite the loss of his work and residence permit following the expiry of his residence card on 12 May 2014, not only was the presence of the husband of Ms Bajratari tolerated by the host Member State for *5 years*, during which he, I reiterate, continued to pay tax and social security contributions, but, as was also confirmed at the hearing, his second child was during that period, on 26 July 2016, granted a certificate of Irish nationality.

68. Moreover, as the Commission rightly pointed out, the right of Union citizens, including minor Union citizens, who move to reside in another Member State would be considerably weakened if that right could be terminated at any time on the basis of poorly defined infringements committed by a person caring for them or on whom they depend, whether in the host Member State or elsewhere. Indeed, given the very wide range of acts which may be classified as unlawful, not only within a single Member State but also from one Member State to another and from one era to another, such an approach would give rise to a real risk of legal uncertainty and a proliferation of the number of situations in which the right of residence of a Union citizen could be called into question because of doubts as to the circumstances in which the resources made available to that citizen were obtained. [43]

69. Finally, in those circumstances, it seems to me that the refusal on the part of the authorities of a Member State to recognise the income derived from work carried out in the host Member State without a work and residence permit because of the expiry of the residence card must be regarded as a disproportionate measure unjustifiably undermining the freedom to move and reside enjoyed by infants who are citizens of the Union, in that it is not necessary for the attainment of the objective pursued, namely the protection of the public finances of the Member States.

70. Accordingly, in the light of the foregoing considerations, I am of the view that, in a situation such as that in the main proceedings, the fact that income derives from work carried out without a work and residence permit in the host Member State is sufficient to support the conclusion that the Union citizen has ‘sufficient resources’ within the meaning of Article 7(1)(b) of Directive 2004/38.

71. In those circumstances, I consider that Ms Bajratari’s children not only come within the scope of Article 21 TFEU and of Directive 2004/38 but also satisfy the conditions laid down in Article 7(1)(b) of Directive 2004/38. Consequently, Ms Bajratari can rely on a right of residence derived from that of her children.

[43] For example, the person concerned might have failed to comply with a deadline for paying his income tax or simply neglected to pay his latest electricity bill.

3. Analysis of the argument put forward by the United Kingdom relating to the public policy exception

72. The United Kingdom Government submits in its written observations that, since the husband of the appellant in the main proceedings is illegally staying in the territory, his work is unlawful in and of itself. In that regard, that government states that, in its domestic legal system, working without authorisation is regarded as contrary to public policy and entails the imposition of civil and criminal penalties not only on the employer but, as of 12 July 2016, also on the worker. [44]

73. Admittedly, as the Danish, Netherlands and Austrian Governments argue, it is clear from the Commission guidelines that the national authorities may verify the existence, lawfulness, amount and availability of resources. However, in response to a question put by the Court at the hearing, the Commission stated that the Member States' assessment as to whether resources are sufficient or lawful relates only to *whether there has been a crime or abuse of rights* [45] and, therefore, whether or not Chapter VI of Directive 2004/38 is applicable to the particular situation of a Union citizen or the members of his family. Thus, a Member State may take all necessary measures, in accordance with its criminal law, to prosecute offences where the unlawful nature of the income received results from the exercise of a criminal activity such as, for example, drug trafficking. In those circumstances, it is clear from Chapter VI of Directive 2004/38 that Member States have the possibility of relying on an exception linked, in particular, to upholding the requirements of public policy and safeguarding public security.

74. Moreover, it is important to recall that, as a justification for derogating from the right of residence of Union citizens or members of their families, the concepts of 'public policy' and 'public security' must be interpreted *strictly*, with the result that their scope cannot be determined unilaterally by the Member States without being subject to control by the EU institutions. [46]

44 The Austrian Government also refers to public security.

45 The United Kingdom and Czech Governments classify as abusive the situation in which a parent obtains, through his employment which is unlawful, a right to work because it establishes a right of residence. According to those governments, this amounts to a reliance on unlawful conduct in order to establish a right, which is tantamount to an abuse of rights prohibited by Article 35 of Directive 2004/38. However, it should be noted that there is nothing in the order for reference to indicate that there has been an abuse of rights in this case. In any event, I recall that the Court has already held that 'evidence of an abusive practice requires, first, a combination of objective circumstances in which, despite formal observance of the conditions laid down by the European Union rules, the purpose of those rules has not been achieved, and, second, a subjective element consisting in the intention to obtain an advantage from the European Union rules by creating artificially the conditions laid down for obtaining it': judgments of 16 October 2012, *Hungary* v *Slovakia* (C-364/10, EU:C:2012:630, paragraph 58 and the case-law cited); of 12 March 2014, *O. and B.* (C-456/12, EU:C:2014:135, paragraph 58); and of 18 December 2014, *McCarthy and Others* (C-202/13, EU:C:2014:2450, paragraph 54).

46 See, inter alia, judgments of 4 December 1974, *van Duyn* (41/74, EU:C:1974:133, paragraph 18); of 29 April 2004, *Orfanopoulos and Oliveri* (C-482/01 and C-493/01,

75. As regards the concept of 'public policy', the Court has held that this concept presupposes, in any event, the existence, in addition to the disturbance of the social order which any infringement of the law involves, of a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society. [47]

76. As regards the concept of 'public security', the Court has held that this concept covers both the internal security of a Member State and its external security and that, consequently, a threat to the functioning of institutions and essential public services and the survival of the population, as well as the risk of a serious disturbance to foreign relations or to peaceful coexistence of nations, or a risk to military interests, may affect public security. The Court has also held that the fight against crime in connection with drug trafficking as part of an organised group or against terrorism is included within the concept of 'public security'. [48]

77. I would recall that it is apparent from the first subparagraph of Article 27(2) of Directive 2004/38 that, in order to be justified, measures restricting the right of residence of a Union citizen or a member of his family, including measures taken on grounds of public policy, must comply with the principle of proportionality and must be based exclusively on the personal conduct of the individual concerned. [49]

78. In the present case, as follows from points 64 to 69 of this Opinion, it is clear that a refusal to grant a right of residence to Ms Bajratari on the basis of the

EU:C:2004:262, paragraphs 64 and 65); of 7 June 2007, *Commission* v *Netherlands* (C-50/06, EU:C:2007:325, paragraph 42); and of 13 September 2016, *CS* (C-304/14, EU:C:2016:674, paragraph 37). The United Kingdom, citing in part from paragraph 23 of the judgment of 22 May 2012, *I* (C-348/09, EU:C:2012:300), argues that the Member States are free to establish, in accordance with their national needs, which can vary from one Member State to another, the requirements of public policy and public security. However, paragraph 23 of that judgment reads as follows: 'While Member States essentially retain the freedom to determine the requirements of public policy and public security in accordance with their national needs, which can vary from one Member State to another and from one era to another, particularly *as justification for a derogation from the fundamental principle of free movement of persons, those requirements must nevertheless be interpreted strictly*, so that their scope cannot be determined unilaterally by each Member State without any control by the institutions of the European Union'. I recall that that judgment concerns the interpretation of the concept of 'imperative grounds of public security', laid down in Article 28(3)(a) of Directive 2004/38, in the context of the criminal conviction of a Union citizen to a term of imprisonment of 7 years and 6 months for the sexual assault, sexual coercion and rape of a minor. Emphasis added. See, recently, judgment of 5 June 2018, *Coman and Others* (C-673/16, EU:C:2018:385, paragraph 44 and the case-law cited).

47 Judgments of 28 October 1975, *Rutili* (36/75, EU:C:1975:137, paragraph 28); of 10 July 2008, *Jipa* (C-33/07, EU:C:2008:396, paragraph 23); and of 13 September 2016, *CS* (C-304/14, EU:C:2016:674, paragraph 38).

48 Judgment of 13 September 2016, *CS* (C-304/14, EU:C:2016:674, paragraph 39 and the case-law cited).

49 Judgment of 13 September 2016, *Rendón Marín* (C-165/14, EU:C:2016:675, paragraph 59).

argument put forward by the United Kingdom relating to the public policy exception fulfils neither of those two requirements.

79. That said, I am of the view that other arguments, which I shall briefly set out below, may support my conclusion that Ms Bajratari's children not only come within the scope of Article 21 TFEU and Directive 2004/38 but also satisfy the conditions laid down in Article 7(1)(b) of Directive 2004/38 and that, accordingly, Ms Bajratari may rely on a right of residence derived from that of her children.

4. The practical effect of Directive 2004/38 and Article 21 TFEU

80. It should be noted from the outset that an answer contrary to that which I have just proposed would deprive the right of residence conferred by Directive 2004/38 and Article 21 TFEU of any useful effect. In accordance with the case-law of the Court, in view of the context of Directive 2004/38 and the objectives that it pursues, its provisions cannot be interpreted restrictively and must not in any event be deprived of their practical effect. [50]

81. It is for that reason that, in the judgment in *Zhu and Chen*, [51] the Court took into account the fact that it is not possible for minor children who are citizens of the European Union to provide for themselves, in holding that a refusal to allow a parent, a national of a Member State or a third-country national, who is the carer of a minor child who is a Union citizen to reside with that child in the host Member State would deprive the child's right of residence of any useful effect, since *enjoyment by a child who is a minor of a right of residence* necessarily implies that the child is entitled to be accompanied by the person who is his primary carer and accordingly that the carer must be in a position to reside with the child in the host Member State for the duration of such residence. [52]

82. It should be pointed out that that principle, set out by the Court for the first time in the judgment in *Zhu and Chen* [53] in the context of the interpretation of Directive 2004/38 and Article 21 TFEU, was confirmed in the judgment in *Ruiz Zambrano* [54] in the context of the interpretation of Article 20 TFEU. Accordingly, in paragraph 44 of the latter judgment, the Court held that 'it must be assumed that

50 Judgments of 11 December 2007, *Eind* (C-291/05, EU:C:2007:771, paragraph 43); of 25 July 2008, *Metock and Others* (C-127/08, EU:C:2008:449, paragraph 84); of 5 June 2018, *Coman and Others* (C-673/16, EU:C:2018:385, paragraph 39); and of 11 April 2019, *Tarola* (C-483/17, EU:C:2019:309, paragraph 38).

51 Judgment of 19 October 2004 (C-200/02, EU:C:2004:639).

52 Judgment of 13 September 2016, *Rendón Marín* (C-165/14, EU:C:2016:675, paragraphs 51 and 52). See, also, judgment of 10 October 2013, *Alokpa and Moudoulou* (C-86/12, EU:C:2013:645, paragraph 28).

53 Judgment of 19 October 2004 (C-200/02, EU:C:2004:639).

54 Judgment of 8 March 2011 (C-34/09, EU:C:2011:124, paragraphs 43 and 44).

such a refusal [to grant a right of residence] would lead to a situation where those children, citizens of the Union, would have to leave the territory of the Union in order to accompany their parents. Similarly, if a work permit were not granted to such a person, he would risk not having sufficient resources to provide for himself and his family, which would also result in the children, citizens of the Union, having to leave the territory of the Union. In those circumstances, those citizens of the Union would, *in fact*, be unable to exercise the substance of the rights conferred on them by virtue of their status as citizens of the Union'. [55]

83. A reading of those two judgments makes it very clear that in them the Court based its reasoning on the same principle: a child cannot demonstrate that it has resources and, therefore, those resources must be obtained from the person who is the child's primary carer. If it is accepted that a child may demonstrate that it has sufficient resources from the person who is its primary carer, it would be absurd to refuse that person a right of residence and, therefore, an opportunity to work. In the event of such a refusal, the situation would be that of a snake biting its own tail, that is to say, the issue is a circular one which would render nugatory the practical effect of Article 21 TFEU and Directive 2004/38. Such a refusal would mean that no minor who is a Union citizen, in a situation such as that at issue in the main proceedings, could fulfil the conditions of Article 7(1)(b) of that directive. It should be noted that, if they were adults, such children would have not only Union citizenship, which is destined to be the fundamental status of nationals of the Member States, [56] but also the status of worker.

84. Moreover, it is important to bear in mind that the Court has already held that, since the right to freedom of movement is — as a fundamental principle of EU law — the general rule, the conditions laid down in Article 7(1)(b) of Directive 2004/38 must be construed narrowly and in compliance with the limits imposed by EU law and the principle of proportionality. [57]

85. In the present case, Ms Bajratari's children are Irish nationals, although they have always resided in the United Kingdom, whereas, in the case which gave rise to the judgment in *Ruiz Zambrano*, [58] the children were nationals of the Member State in which they had always resided. If Ms Bajratari's children were British nationals, there is no doubt that the case-law deriving from *Ruiz Zambrano* would apply.

55 Judgment of 8 March 2011, *Ruiz Zambrano* (C-34/09, EU:C:2011:124, paragraph 44). Emphasis added.

56 Judgment of 20 September 2001, *Grzelczyk* (C-184/99, EU:C:2001:458, paragraph 31). See, recently, judgments of 10 December 2018, *Wightman and Others* (C-621/18, EU:C:2018:999, paragraph 64 and the case-law cited), and of 12 March 2019, *Tjebbes and Others* (C-221/17, EU:C:2019:189, paragraph 31).

57 Judgment of 19 September 2013, *Brey* (C-140/12, EU:C:2013:565, paragraph 70).

58 Judgment of 8 March 2011 (C-34/09, EU:C:2011:124).

86. The following question therefore arises: would it not be totally illogical for a child who is a Union citizen to have more rights on the basis of Article 20 TFEU than it would have where, as in the present case, Article 21 TFEU and Directive 2004/38 apply to that child?

87. In my view, it would.

88. Therefore, although Ms Bajratari's children have a nationality other than that of the Member State of their residence, in which they were nevertheless born and have since resided, I consider that the principle laid down by the Court in the judgments in *Zhu and Chen* [59] and *Ruiz Zambrano* [60] must be applied in the present case.

89. In that context, it seems to me to be relevant, first, to take into account the right to respect for private and family life, as laid down in Article 7 of the Charter of Fundamental Rights of the European Union and, secondly, to take into account the child's best interests, recognised in Article 24(2) of that Charter.

V. Conclusion

90. In light of all the foregoing considerations, I propose that the Court answer the questions referred by the Court of Appeal in Northern Ireland (United Kingdom) for a preliminary ruling as follows:

Article 7(1)(b) of Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC, as amended by Regulation (EU) No 492/2011 of the European Parliament and of the Council of 5 April 2011, must be interpreted as meaning that a young child who is a Union citizen has sufficient resources not to become a burden on the social assistance system of the host Member State during his period of residence where, in circumstances such as those of the case in the main proceedings, those resources are provided from income derived from the activity unlawfully carried on in that Member State, without a residence or work permit, by the child's father, a national of a third country.

59 Judgment of 19 October 2004 (C-200/02, EU:C:2004:639).

60 Judgment of 8 March 2011 (C-34/09, EU:C:2011:124).