Upper Tribunal
(Immigration and Asylum Chamber)

Seye (Chen children; employment) [2013] UKUT 00178 (IAC)

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 3 January 2013	.....

Before

UPPER TRIBUNAL JUDGE STOREY
UPPER TRIBUNAL JUDGE PETER LANE

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR SELWYN JASON SEYE
MS CLARISSE TCHATCHOU
MISS RHODE KYRIA NDANGA TEUKURA
MR SERGE PATRICE NDJANGA TECHAKOUNTE

Respondents

Representation:

For the Appellant/SSHD: Mr D Hayes, Home Office Presenting Officer
For the Respondents/Claimants: Mr S Techakounte (fourth Claimant) in person

(1) It is clear that income from illegal employment in the host Member State on the part of a parent of a "Chen" child (Case c-200/02 Chen [2004] ECR I-

9925) cannot create self-sufficiency for that child (W (China) and X (China) [2006] EWCA Civ 1494).

(2) The proposition in MA & Others (EU national: self-sufficiency; lawful employment) [2006] UKAIT 00090 and ER and Others (EU national; self-sufficiency; illegal employment) [2006] UKAIT 00096 that even lawful employment cannot create such self-sufficiency, where the parent is on limited leave or temporary admission, must be regarded as doubtful, in the light of Metock and Others [2008] EUECJ C-127/08 and Liu and Ors v SSHD [2007] EWCA Civ 1275.

(3) It is, however, part of the binding ratio in Liu that lawful employment undertaken by a parent whose leave has been extended under section 3C of the Immigration Act 1971 cannot create self sufficiency for the "Chen" child.

DETERMINATION AND REASONS

1. The subject of this appeal is the determination by First-tier Tribunal Judge Omotosho dated 7 November 2011 allowing the appeals of the four respondents (hereafter claimants) against the decision of the appellant (hereafter the SSHD) made on 23 June 2011 refusing to grant them residence documents as confirmation of their right of residence under European Union law. This followed the application for such documents made on their behalf by their then solicitors on 21 December 2010 and 5 February 2011.

2. It is not in dispute that the first claimant was born in January 2006 and is a French national and that the other three claimants, his mother (born in August 1976), his half-sibling (born in November 2008) and his step father (born in February 1974), are nationals of Cameroon. The first claimant was the issue of a relationship between his mother and a French national, which broke down some time after his birth. The second claimant subsequently met the fourth claimant and they began a relationship. They have not married but it is not in dispute that they are in a stable family relationship. The third claimant, born in November 2008, is their issue. The second claimant first entered the UK in November 2006 as a missionary and at the date of application she still had limited leave to remain in the UK as a missionary. The fourth claimant's date of arrival in the UK is unclear but he has been unable to show he has ever had lawful status in the UK.

3. In a decision sent on 11 April 2012 Upper Tribunal Judge Peter Lane found that the First-tier Tribunal judge had materially erred in law and that her decision was to be set-aside: see Annex. By virtue of that set aside our task in this appeal is to re-make the decisions and in that context we have to decide whether the claimants meet the requirements of the relevant legal provisions as at the date of hearing.

4. We should mention one procedural matter. On 22 December 2012 the claimants wrote requesting an adjournment. They said they needed to instruct new representatives.

5. On 28 December 2012 an Upper Tribunal Judge refused that request in writing. On the day of the hearing before us only the fourth claimant was in attendance. He confirmed that although the claimants still desired an adjournment he was ready to proceed with the case and to do so on behalf of all four claimants. In the light of the fact that notice of hearing was sent to the parties on 5 December 2012 and the claimants had left it until a very few days before the listed date, we considered that it remained the case that no good reason had been given why this matter should be further adjourned.

6. We made clear to the fourth claimant that we would do our best to assist him in presenting his case, particularly bearing in mind the legal complexities of some of the issues it raised. We are grateful to Mr Hayes in assisting with this process, by being prepared to respond to a number of questions we put to him as to matters of legal interpretation. We do not propose to set out a summary of either his submissions or those of the fourth claimant, as we have found it possible to draw on them where relevant in the course of our subsequent analysis set out below.

Principal issues

7. These appeals are all about the ambit of the Chen case (C-200/02) [2004] ECR I-9925 in the light of subsequent UK case law. There are many strands to this case but after having heard from Mr Hayes it is clear the SSHD accepts that *if* the first claimant is a self-sufficient person within the meaning of the Immigration (European Economic Area) Regulations 2006 (the 2006 EEA Regulations), then both his appeal and that of his mother (the second claimant) and his half-sister (the third claimant) must succeed.

8. Whilst Mr Hayes' submission in respect of the fourth claimant was that he did not have a right of appeal, Mr Hayes accepted that in practical terms there was no question that, if the SSHD accepted the first claimant was a self-sufficient person, she would proceed to recognise that the fourth claimant also had a right of residence. In addition to the issue of whether the fourth claimant had a right of appeal, we would observe that there is also the apparent difficulty in him being able to bring himself within the relevant legal provisions: the fact that he is not the natural father of the first claimant would appear to preclude him from the benefit of regulation 15A (see 15A(7) of the 2006 EEA Regulations, although it is arguable that Court of Justice jurisprudence would not exclude a de facto parent from the benefit of the principles established in the Chen case just because he was not a natural parent or in a married relationship with the second claimant: see O, S and L C-357/11, 6 December 2012). For reasons that will become apparent, we do not need to resolve these issues but will proceed for convenience only to continue to describe Mr Techakounte as the fourth claimant.

9. Whilst all hinges, therefore, on whether the first claimant is a self-sufficient person, it is convenient to set out why, if he is, he and the second and third claimants must succeed in their appeals. And to do that it will assist understanding if we identify the relevant legal provisions. The provisions of the 2006 EEA Regulations are as amended with effect from 16 July 2012 by the Immigration (European Economic Area) Amendment Regulations 2012.

Legal Framework

10. Article 7 of Directive 2004/38/EEC provides that:

> "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; ..."

11. So far as is relevant to these appeals, the 2006 EEA Regulations contain the following provisions:

> "**4**.-
> (1) In these Regulations –
> ...
> (c) "self-sufficient person" means a person who has-
> (i) sufficient resources not to become a burden on the social assistance system of the United Kingdom during his period of residence; and
> (ii) comprehensive sickness insurance cover in the United Kingdom;
> ...
> (2) For the purposes of paragraph (1)(c), where family members of the person concerned reside in the United Kingdom and their right to reside is dependent upon their being family members of that person—
> (a) the requirement for that person to have sufficient resources not to become a burden on the social assistance system of the United Kingdom during his period of residence shall only be satisfied if his resources and those of the family members are sufficient to avoid him and the family members becoming such a burden;
> (b) the requirement for that person to have comprehensive sickness insurance cover in the United Kingdom shall only be satisfied if he and his family members have such cover.
> (3) For the purposes of paragraph (1)(d), where family members of the person concerned reside in the United Kingdom and their right to reside is dependent upon their being family members of that person, the requirement for that person to assure the Secretary of State that he has sufficient resources not to become a burden on the social assistance system of the United Kingdom during his period of residence shall only be satisfied if he assures the Secretary of State that his resources and those of the family members are sufficient to avoid
> him and the family members becoming such a burden.

(4) For the purposes of paragraphs (1)(c) and (d) and paragraphs (2) and (3), the resources of the person concerned and, where applicable, any family members, are to be regarded as sufficient if —
(a) they exceed the maximum level of resources which a United Kingdom national and his family members may possess if he is to become eligible for social assistance under the United Kingdom benefit system; or
(b) paragraph (a) does not apply but, taking into account the personal situation of the person concerned and, where applicable, any family members, it appears to the decision maker that the resources of the person or persons concerned should be regarded as sufficient.
…
6.-
(1) In these Regulations “qualified person” means a person who is an EEA national and in the United Kingdom as-
…(d) a self-sufficient person”

…
7.-
(1) Subject to paragraph (2), for the purposes of these Regulations the following persons shall be treated as the family members of another person-
…
(c) depending direct relatives in his ascending line or that of his spouse or his civil partner
…
15A.-
(1) A person (“P”) who is not entitled to reside in the United Kingdom as a result of any other provision of these Regulations and who satisfies the criteria in paragraph (2), (3), (4) or (5) of this regulation is entitled to a derivative right to reside in the United Kingdom for as long as P satisfies the relevant criteria.
(2) P satisfies the criteria in this paragraph if—
(a) P is the primary carer of an EEA national (“the relevant EEA national”); and
(b) the relevant EEA national—
(i) is under the age of 18;
(ii) is residing in the United Kingdom as a self-sufficient person; and
(iii) would be unable to remain in the United Kingdom if P were required to leave.
…
(5) P satisfies the criteria in this paragraph if—
(a) P is under the age of 18;
(b) P's primary carer is entitled to a derivative right to reside in the United Kingdom by virtue of paragraph (2) or (4);
(c) P does not have leave to enter, or remain in, the United Kingdom; and
(d) requiring P to leave the United Kingdom would prevent P's primary carer from residing in the United Kingdom
…
(7) P is to be regarded as a “primary carer” of another person if
(a) P is a direct relative or a legal guardian of that person; and
(b) P—
(i) is the person who has primary responsibility for that person's care; or
(ii) shares equally the responsibility for that person's care with one other person who is not entitled to reside in the United Kingdom as a result of any other provision of these Regulations and who does not have leave to enter or remain.

(8) P will not be regarded as having responsibility for a person's care for the purpose of paragraph (7) on the sole basis of a financial contribution towards that person's care….”

12. The new provision in regulation 15A(2) gives effect to the position as analysed by the Upper Tribunal in M (*Chen* parents: source of rights) Ivory Coast [2010] UKUT 277 (IAC). The Explanatory Memorandum to the 2012 Amendment Regulations states that:

> “Paragraphs (1) and (2) of new regulation 15A (which is inserted into the 2006 Regulations by paragraph 9 of Schedule 1 to the Regulations) specifies that a derivative right of residence arises for the primary carer of a self-sufficient EEA national child where the denial of such a right would prevent the child from exercising their own right of residence. This regulation gives effect to the ECJ judgment in *Chen*. The UK Border Agency has to date been operationally compliant with this judgment by virtue of paragraph 257 of the Immigration Rules which will now be deleted on commencement of this amending regulation.”

13. However, by apparent oversight, paragraph 257 remained in force until it was deleted by HC1039 with effect from 5 April 2013.[1].

14. As adumbrated earlier, the principal Court of Justice case is Case C-200/02 Chen. Chen concerned an EU national child living in the UK who had Irish citizenship as a result of being born in Northern Ireland. She lived with her parents who were Chinese nationals. Because of income derived from her parents’ business in China, the child's mother had sufficient resources to support herself and the child. They also had comprehensive health insurance. The Court of Justice held that the child had a right of residence as a self-sufficient person by virtue of Article 18 of the EC treaty (now Article 21 of Treaty on the Functioning of the European Union (TFEU)(and (the then applicable) Directive 90/364. It was not necessary that she should have the resources personally. It was sufficient that there were adequate resources available to her from her mother that made her self-sufficient. In respect of her mother (who was her primary carer), the Court recognised that she was also entitled to reside in the UK in order to permit the child to exercise or enjoy its own EU right. At [45] the Court said:

> "... a refusal to allow the parent, whether a national of a Member State or a national of anon-member country, who is the carer of a child to whom Article 18 EC 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 and accordingly

[1] The Explanatory Memorandum to HC1039 at 7.23 states that “following the European Court of Justice case in Chen...the UK created paragraphs 257C-E of the Immigration Rules to provide for entry as the carer or relative of an EEA national child in the UK. In the Upper Tribunal case of M (Chen parent: source of rights)…the domestic court confirmed that a primary carer of a self-sufficient EEA national child had a directly enforceable right to enter and reside in the host state to facilitate the child’s free movement rights. This EU right is not subject to any restrictions imposed by the Immigration Rules regime. As a consequence it is no longer appropriate to deal with this category of case within the Rules”.

that the carer must be in a position to reside with the child in the host Member State for the duration of such residence … ."

15. In W (China) and X (China) [2006] EWCA Civ 1494 the Court of Appeal had to decide, applying Chen, the case of two nationals of China whose child had acquired Irish citizenship and, therefore, EU or Union citizenship. They had come to the UK in 2002 and sought to rely on an EU right of residence based on their illegal employment here. They contended that their savings from this employment meant that their child, Q, was a self-sufficient person under Article 18 of the EC treaty and Directive 90/364. In the subsequent case of Liu (see below) at [12] Buxton LJ summarised the conclusions of the Court in W (China) as follows:

> "i) Applying paragraph 45 of Chen, the right of residence of a minor could only be effectively asserted with the presence and support of a carer or guardian, and that, if the requirements of the Directives are fulfilled, creates a right for the parent to reside with the child, (W (China) [6]);
>
> ii) All of the minor EU citizen and his non-EU citizen carers have to fulfil the Directive requirements of (a) sickness insurance; (b) sufficiency of means: (W (China) [8]);
>
> iii) Those conditions are pre-conditions to the existence of the article 18 right in any given case, and thus the right does not exist until those conditions are fulfilled: (W (China) [16]);
>
> iv) The pre-condition of sufficiency of means cannot be fulfilled by funds derived from employment that is precarious because it is unlawful: (W (China) [14]);
>
> v) The member state is under no obligation to adjust its domestic law in order to make available to the EU citizen resources that will enable him to fulfil the pre-condition to the existence of the Article 18 right: (W (China) [16])."

16. Concerning (ii)(a) above, the Court held that the requirement of sickness insurance is not automatically fulfilled because of the availability of free health care under the NHS [9-13]). Concerning (ii)(b), the Court stated that in assessing whether a Union citizen child is self-sufficient it is necessary for the accompanying parent or parents themselves to have health insurance and sufficient resources to ensure that neither they nor the child becomes a burden on the social assistance system of the host member State during their period of residence [6]-[8]. (Put another way, a holistic approach looking at the resources of the family unit overall has to be taken to assessment of self-sufficiency.)

17. In analysing whether earnings from employment undertaken by a parent or parents in the host Member State could make the EU/Union citizen child self-sufficient the Court held that resources derived from employment of the Union citizen child's parent or parents that is illegal cannot create self-sufficiency of the child. It is contrary to conditions which the host member State is permitted to impose on the entry and residence of third-country nationals; and, because in the UK such employment exposes the parent(s)

(and their employer(s) to criminal sanctions it is unstable, insecure/precarious and ephemeral in nature ([14-23]; [27] (per Sedley LJ)). It quoted with approval what the IAT had to say about the father's employment:

> "It appears that [it] 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 (the child) alone, or of her and the appellants."

18. The case of W (China**)** was first considered by the UKAIT in MA & Others (EU national: self-sufficiency; lawful employment) Bangladesh [2006] UKAIT 00090. The Tribunal concluded that self-sufficiency could not be established by reliance upon income derived from either lawful or illegal lawful employment in the UK by the parent of an EU child where the parent was in the UK on limited leave for a temporary or specific purpose or temporary admission in situations and where that parent or parents seek themselves to derive an EU right of residence as a consequence. At [42]-[46] and [48] the Tribunal stated:

> "42. First, the presence of the child's parents in the UK is not only necessary for her to exercise her right of residence but also to establish it. This is so whether one looks at the income derived from their current employment or, if permitted despite the Immigration Rules, in the future. The underlying purpose of recognising the derivative rights of family members to accompany or join an EU national exercising Treaty rights in another EU country is not engaged here anymore than it was in GM and AM. In our view, the EU national's right must be established independently of the presence of the family members in the UK before they may derive any rights from EU law themselves. This, it may be said, is because the right is the right of the EU national. It is an individual right, not a family right (although it has consequences for the family); and it must be established on an individual, not a family basis.
>
> 43. Second, we do not see any basis for deciding that income derived from the first and second appellants' current employment can establish their daughter's right to reside. The circularity in establishing the child's rights and then the parents' rights is no less apparent in these appeals. Here, the child's self-sufficiency is dependent upon her parents working. They only have a temporary basis for doing so for so long as they have limited leave and are permitted to work. Once that leave runs out, there would be no lawful basis for working. Indeed, it seems to us that it is only because of these applications and subsequent appeals that the leave did not terminate in December 2005 but was continued under s.3C of the Immigration Act 1971. The only basis for their right to work would then have to be derived from EU law. The moment that occurred and they derived a right to reside and - it would have to be said - to continue working, the position would be indistinguishable from that in GM and AM. The circularity would be complete – their right to work would now sustain the child's right and through her their own derived right would continue.

44. Third, our conclusion accords with a proper understanding of the notion of 'self-sufficiency' and the distinction between free movement in reliance upon economic and, alternatively, non-economic rights.

45. An EU national who claims to be self-sufficient is not asserting a right to enter and reside in another EU state on the basis of economic activity in that country. If he were, he would be seeking to enter, for example, as a worker or self-employed person. Rather, he relies upon his resources which exist independently of any economic activity in the host Member state. Once that is established, his family members have a derivative right to accompany or join him. If they did not, the EU national's right of free movement might be inhibited or effectively denied to him. In addition, the central EU legislative instruments give family members a right to work in that the host Member state. But, their right to work is not a recognition of the right to engage in economic activity *per se*. Rather, it is simply a reflection of the underlying principle of EU law because otherwise they (and hence the EU national) might be inhibited from moving within the EU if family members were not allowed to carry on, what for them, is an important aspect of their everyday lives. The economic activity of the family members does not establish – nor could it in the context of an EU national worker or self-employed person – the EU national's right. That arises *a priori* and independently of any economic activity by the EU national or his family in the host EU country.

46. By contrast, in the Chen-type case the EU national can only establish his right by reliance upon economic activity in the host Member state, not, of course, economic activity by himself but rather by his family members. We see no reason to distort the usual situation simply because the EU national is a child and is dependent upon others for support and, unusually, is already present in the host EU country with his family members rather than seeking to enter it with is family. Here too, the right of free movement based upon self-sufficiency cannot depend upon resources derived from employment engaged in by the EU national or his family members in the UK.

...

48. In the result, therefore, the reasoning of the Tribunal in GM and AM is applicable where an EU national child places reliance upon income derived from a parent lawfully working in the UK during a period of limited leave restricted for a specific purpose or, which is not this case, who is on temporary admission and not prohibited from working. In such circumstances, a Member State is entitled to restrict the rights of employment of non-EU nationals, in particular to limit the duration of their permission to work just as it is entitled effectively to prohibit their ability to work (see, W (China) and X (China)). When it does so, that individual cannot derive a right to reside as a "family member" of an EU national because that income cannot be taken into account in order to establish the EU national's right of residence on a self-sufficient basis. "

19. The next main consideration by the AIT came very shortly after, in ER and Others (EU national; self-sufficiency; illegal employment) Ireland [2006] UKAIT 00096. This concerned two nationals of the Philippines and their

two children, one of whom (the third appellant) was an Irish national and hence an EU/Union citizen. The first appellant, the mother, was issued with a work permit in Manila on 23 July 2002 to take up work as a senior care assistant with a private nursing home. For some reason she did not apply for an extension and her leave and work permit were not renewed. From July 2004 she and her husband had remained in the UK without leave, both working illegally. Having decided it was required to consider the situation of the appellants as at the date of hearing, the Tribunal chose to deal head-on with the issue of whether the appellants had met the requirements of the 2006 EEA Regulations during the period when the first appellant still had lawful permission to work. The decision drew on W (China), Ali v SSHD [2006] EWCA Civ 484 and several AIT cases, most notably MA and others. Citing in full [42]-[46] and [48] of the latter, the Tribunal commented:

> "42. We agree with and adopt as our own the Tribunal's reasoning and conclusion in MA and others. Nothing we have heard in argument before us leads us to take a different view. Self-sufficiency cannot be established by reliance upon the income of family members of an EU national child who are lawfully employed or in business in the UK during a period of limited leave restricted to a specific purpose where the effect of that will be to create rights of residence in EU law not just for the EU national but also derivatively for those family members themselves. In this way, the decision in MA is a complete answer to Mr Cox's reliance upon the parents' income up to the end of July 2004. The latter income could not establish that the third appellant (their son) was self-sufficient and thus neither he, nor the other appellants, can thereby derive any right to reside in the UK. "

20. The Tribunal thus held that an EU/Union citizen child could not establish that he or she was a self-sufficient person based on even the lawful employment of his or her parent(s). If he were able to establish this, an EU right would be founded on a circularity, whereby a non-self-sufficient EU/Union citizen child would be able to confer a derivative EU right of residence on the basis of their employment.

21. The Court of Appeal also dealt with the Chen child issues in 2007 in Liu and Ors v SSHD [2007] EWCA 1275 albeit it did not refer to any of the Tribunal case law.

22. Liu concerned three conjoined cases, all three featuring third-country national parents of an EU/Union citizen child. The third appeal, that by Mouloungui, concerned a mother who was in the UK illegally. In the first appeal (concerning the appellant and mother Wang) and in the second appeal (concerning two parents Mr and Mrs Ahmed) the parents applied for an extension of leave on a Chen basis within the period of their limited leave to remain, but Buxton LJ's analysis appears to proceed on the basis that they were (or were at least due to become) overstayers: see [21]. Buxton LJ addressed submissions that appeared in part to challenge the precedent status of W (China) by reference to superior Court of Justice authority and in part to distinguish it. His lordship rejected them both on

the basis that W (China) was binding and also on the basis of their faulty logic. At [15] he stated:

> "15. It was principally argued that this case differed from W (China). In that case all of the adults' presence in the United Kingdom had been unlawful, hence they were not permitted to work, so such income as they had was precarious. Here, all of Wang, Mr Ahmed and Mrs Ahmed had been and still were working lawfully. But that permission to work was originally granted in relation to limited permissions to remain that had now expired; and the present condition only existed because of, and is only valid until the end of, the present proceedings. The temporary income that has resulted cannot possibly be characterised as sufficient resources to support an application for residence after the present proceedings have been resolved, which is what the applicants seek in each case. And that objection has nothing to do with whether the Directives require the self-sufficiency to be fulfilled throughout the foreseen period of residence (which in view of the ages of the children may be very lengthy). The present ability to work, on which the appellants rely, does not even enable the children and their parents to commence the period of residency that they seek, because that ability expires at the start of that period of residency."

23. In the course of addressing three further aspects of the appellants' main submissions, his Lordship said this about the first:

> "16. ...First, in placing a limit on the parents' right to work, and in not continuing that right once the present Section 3C right expired, the Secretary of State was enforcing domestic immigration law. It was submitted that that was not a permissible limitation to place upon, or a permissible source from which to draw limitations upon, the exercise of a fundamental Community right such as the Community citizen's right of residence in another member state. As stated in the Directives, the national government is permitted by Community law to protect the national social security system, but it is not permitted by Community law to protect the national labour market: which was a significant objective of immigration law.
>
> 17. This argument was very forcibly put, but it is based on an incorrect reading of the Community legislation. The Article 18 right is not absolute, for it depends for its existence on fulfilment of the conditions stipulated by the Directives: see sub-paragraph 12(iii) above. The parents in question, who are not EU citizens, have no right in EU law to work in this country unless, as Miss Webber indeed argued that it was, that right is derived from their EU citizen children's right to reside here. But the children do not have that right at all without the contribution of resources from the parent. The parents' immigration position is not, therefore, being used as a basis for taking away from an EU citizen a right that would otherwise exist; but as a factual reason, one amongst what might be many others, for instance if a carer was disabled, why the resources requirement was not fulfilled. It will be recalled from paragraph 16 of W (China) that the appellants in that case disclaimed any argument that the national state in a case of incapacity would have to provide disablement benefit in order to create a right of residence for the EU national child, and it was not suggested before us that that position had been incorrect. I do not see why Community law

should nonetheless require the national state to alter its immigration law when it is not required to alter its social security law.

18. If the present argument were correct, it would lead to the conclusion that W (China) was wrongly decided. However, I do not reject the argument on grounds of precedent, but on the basis of logic as set out in paragraph 17 above. Another approach to the authority of W (China) was to say, as did Miss Webber, that the case had been correctly decided, in that it excluded employment that was unlawful at the time at which the application had been made; but that could not apply to a case such as the present, where the employment was lawful, under a temporary right to work, when the application was made. That concession, if it was such, shows the difficulty of the present argument. Quite apart from it turning on whether Ms Wang happened to apply to stay in this country before or after her eighteenth birthday, immigration law was applied in W (China) just as much as it was by the Asylum and Immigration Tribunal in the present cases. In the one case it rendered the actual or hypothetical employment unlawful now; in the other, unlawful at the point when the employment would matter, on the first day after the present permission expired."

24. Buxton LJ, who also gave the main judgment in W (China), then turned to the third submissions:

20. The third submission affects all of the appellants, but it is of particular relevance to the Mouloungui appeal: which because of the continual unlawfulness of the presence in the United Kingdom of Mr Mouloungui would fail in any event if W (China) were applied to it. This submission was that the court should indeed look to the future, during the period of long-term residence, and ask whether, if granted permission to remain on Article 18 grounds, the adult claiming to provide the resources would indeed be able to do so, by taking employment if so permitted. The past experience was relevant to that question. Wang and Mr and Mrs Ahmed continue in their present employment; and Mr Mouloungui, although currently forbidden to work, had a "job offer". Permission to remain must therefore be provided in order to enable a parent to fulfil the resources requirement of the Directive, and thus make a reality of the child's right of residence as an EU citizen.

21. This approach fails for the reasons that have already been set out. By a combination of Article 18 read with the requirements of the Directives, the right to reside only exists once the requirements of the directives are fulfilled: see paragraph 12(iii) above. The member state therefore is not obliged to adjust its domestic law to create for the EU citizen the resources that he needs in order to create his right to reside: see sub-paragraph 12(v) above. In the present cases, Mr Mouloungui as a failed asylum seeker; and Ms Wang and Mr and Mrs Ahmed as overstayers; are forbidden to work save for the quirk provided by their participation in these proceedings; and there is no reason at all to think that that position will change. But the present applications demand that the United Kingdom creates for them a right to work outside the normal rules in order to provide resources for the respective children.

22. To refuse to take that course, as the Court of Appeal refused to do in W (China), is not in any way inconsistent with Chen. In that case Mrs Chen's resources were proved, extant, and not in any way

dependent on her taking employment. The case said absolutely nothing about conferring any rights on the parent in order to enable her to *create* the required resources; and I venture to think that the ECJ would have been extremely surprised if told that it had opened the door to any such obligation. Nor is it right to argue that to prevent the adults from working renders the children's EU rights meaningless. The EU right is not unlimited, but is subject to the conditions contained in the Directives. Those conditions include the resources condition, which was fulfilled in Chen, but which is not fulfilled in the particular cases such as the present.

23. I therefore conclude that there is no obligation on the member state to adjust its laws, whether its immigration law or any other part of the national legal order, to enable accompanying adults to work in order to provide resources for an EU citizen wishing to reside in that member state. All of the appeals fail on that point."

Our Assessment

25. We turn to consider the position of the claimants in light of the relevant legal provisions and principles. It is useful to set out what would be their position if the first claimant is able to show that he is a self-sufficient person. It would follow that:

The first claimant

(a) the first claimant himself would be a qualified person within the meaning of regulation 4(1)(c) of the 2006 Regulations and would thus be entitled to a registration certificate under regulation 16.

The second claimant

(b) the second claimant would have a derivative right of residence under regulation 15A(1) and (2) and a consequent right to a derivative residence card under regulation 18A. Her derived right could only be under regulation 15A(1) and (2) as she is precluded from relying on status under regulation 7(1)(c) as the direct family member in the ascending line of an EEA national exercising Treaty rights, by virtue of the fact that she is not a dependant of the first claimant; rather it is the reverse; he is her and the fourth claimant's dependant.

(b) the second claimant would have such a derivative right of residence under regulation 15A(1) and (2) because it is not in dispute that she is the first claimant's primary carer; the first claimant is under the age of 18: the first claimant is assumed for the moment to be residing in the United Kingdom as a self-sufficient person and he would be unable to remain here if she were required to leave.

The third claimant

(c) the third claimant would have a right of residence under regulation 15A(5) of the 2006 Regulations (and consequently a right to a

derivate residence card) by virtue of her being under the age of 18, having a primary carer entitled to a derivative right of residence in the UK by virtue of 15A(2); her not having leave to enter or remain in the UK; and because it is conceded that requiring her to leave the United Kingdom would prevent the second claimant (her primary carer) from residing in the United Kingdom.

The fourth claimant

(d) even assuming he has a right of appeal, the fourth claimant could not qualify under the 2006 Regulations on the same basis as the second claimant because, whilst he may share some responsibility for the first claimant, he is not the latter's direct relative or a legal guardian (see regulation 15A(7)).

Zambrano

26. Before proceeding further we should address another possible basis in EU law on which the claimants might be entitled to succeed, namely on Zambrano principles. This point was not raised by the claimants but as they were not represented we thought it fair to raise it at the hearing and to receive Mr Hayes' and the fourth claimant's submissions in it. It will suffice to say that we are wholly satisfied that Zambrano Case C-34/09 principles cannot avail this family in the UK. Such principles might conceivably avail them if they moved to France where the first claimant is a national, but clearly his rights as a Union citizen in the UK would not be disrupted by moving to France and it has not been demonstrated that the family would not be able to gain admission to and reside in France: see Ahmed (Amos; Zambrano; reg 15A(3)(c) 2006 EEA Regs) [2013] UKUT 00089 (IAC).

Self-sufficient Person

27. We turn then to the critical issue on which the first three appeals hinge: is the first claimant a self-sufficient person under the 2006 EEA Regulations?

Sufficiency of Resources

28. It may assist if we break this question down by addressing first of all whether, assuming the first claimant can rely in this regard on the resources of his mother and stepfather, his resources are sufficient.

29. Drawing on our earlier summary of basic propositions of case law (and leaving aside for the moment the issue of whether income from employment can assist in such cases), we consider that this requires assessing the overall income of the first claimant's family unit after taking into account expenditure: see para 19 above.

30. In this regard the FtT Judge found that the second claimant was lawfully employed in the UK as a missionary and that she had savings in excess of £4,000. The FtT judge did not specify the level of her earnings but at para

6 noted that the pay slips confirmed her earnings. As a result of a direction sent by us post-hearing the second claimant submitted payslips confirming that at the date of hearing she was earning £1344.75 net per month. In addition, the fourth claimant's pay slips showed he was employed as a building service engineer (electrical) with take home pay of £1,881.26 per month. We also received further evidence from the fourth claimant which Mr Hayes did not seek to challenge, that both adult claimants continued to be employed in the same capacities without any significant change in their pattern of income and expenditure. We do not have a full picture of their family income and expenditure although we do know from the documents they produced that the family had to pay £76 a month for their health insurance and council tax of £115 a month.

31. There is the important issue as to immigration permission for their employment, but leaving that to one side for a moment we consider that, even though lacking precise particulars of the family resources overall, the combined resources of her and her partner (the fourth claimant), living in the same household, were more than sufficient to ensure, as required by regulation 4(1)(c) of the 2006 Regulations that they had "sufficient resources not to become a burden on the social assistance system of the United Kingdom during his period of residence."

Comprehensive Sickness Cover

32. The next requirement on which we can make a finding concerns comprehensive sickness cover in the United Kingdom. The fourth claimant was able to assist the Tribunal by producing documentation relating to private medical insurance cover with the Health-on-Line company. This confirmed that the position continued to be as it had been at the time of the First-tier Tribunal hearing, namely that all four had such insurance. Mr Hayes helpfully confirmed that the SSHD accepted that this requirement was met for all four claimants.

Lawfulness of Second Claimant's Employment

33. Another requirement on which we can make a finding concerns the lawfulness of the second claimant's employment. As Mr Hayes accepted, the evidence establishes (1) that the second claimant was granted entry clearance as a missionary, valid from 20 November 2006 to 20 November 2008, and was then granted further leave in the same capacity until 16 February 2011. She and the other claimants applied for EEA residence documentation on 5 February 2011, on a date, that is to say, within her permitted period of leave. Since then her leave has been extended by operation of s.3C of the Immigration Act 1971. Accordingly we are satisfied and Mr Hayes accepts in any event, that the second claimant meets the requirements of the Immigration Rules and that her employment has been lawful (and continues to be lawful albeit on a s.3C basis only).

Lawfulness of Fourth Claimant's Employment

34. By contrast, in the application made by the claimants in December 2010, the fourth claimant submitted a passport which had expired in 2006 and there was no evidence he had valid leave to remain in the UK or permission to take employment or engage in business. The respondent thus considered that as a result any employment he had undertaken was illegal and the funds from it illegally obtained. The fourth claimant has not sought to adduce any evidence to counter that assessment and we consider it accurate.

Self-sufficiency of the Child

35. Peeling off the above requirements, it can be seen we have now reached the one that is at the core of this case. It concerns whether the first claimant can qualify as a self-sufficient person on the basis of his mother's/family unit's resources.

36. In our view there are two insuperable difficulties in the way of accepting that he can.

37. First the first claimant can only show sufficient resources in order to be self-sufficient on the basis of the family's combined resources. Their main income derives from the fourth claimant: he earning around £445 a week net; whereas the second claimant earns around £336 a week net. The potential for the second claimant's income to be taken into consideration is itself problematic: see paragraph 38. But in connection with the fourth claimant, the position is quite straightforward. He has never had lawful permission to be in the UK nor any lawful permission to work. Thus any employment he had undertaken was correctly considered by the respondent to be illegal and the funds from it illegally obtained. The Court of Appeal judgment in W (China) prevents reliance on illegal employment.

38. Second, whilst the ratio of the Court of Appeal in W (China) can possibly be construed as rejecting only illegal employment as a source of Chen rights, in the subsequent case of Liu the Court clearly rejected lawful employment as such a source, at least in the context with which we are concerned in these appeals, namely persons with limited leave to remain under national immigration law (i) who within the currency of their leave, apply for a right of residence as a Chen parent; and (ii) whose leave to remain has expired by the date of decision but is extended by s.3C of the 1971 Act. Just like Mrs Wang and the Ahmed parents, the relevant claimant in this case, the second claimant, was in the UK with lawful permission to work as a missionary and made an application as a Chen parent prior to expiry of that permission; and is only in possession of s.3C leave upon appeal. We are bound by the ratio of Liu to find that in such circumstances even lawful employment on the part of second claimant cannot create self-sufficiency so as to enable the first claimant to qualify as a self-sufficient person. In consequence we do not need to examine whether her income was sufficient to create sufficiency of resources on the part of the family unit and for the first claimant in particular.

39. We have considered whether there would be any basis for us departing from the binding authority of W (China) and Liu. We are wholly satisfied there is none. In Liu Buxton LJ did not rule out that in the context of cases governed by EU law a binding domestic precedent could be overset:

> "9. The jurisprudence that has to be applied to these applications was set out by the Court of Appeal, in terms that bind this court, in W (China) v The Secretary of State for the Home Department [2007] 1 WLR 1514. That authority causes significant difficulties for the appellants. It may in principle be possible, under the domestic rules of precedent, to undermine a binding authority by showing that it is clearly incompatible with the authority of the ECJ (see paragraph 171 of the judgment of the Master of the Rolls in R (Countryside Alliance v The Attorney General) [2007] QB 305)."

40. He went on to observe that in the cases before him "[n]o such sustained argument was made to us, though one of the arguments, referred to below, could not be maintained unless W (China) was wrongly decided. Rather, the main thrust of the submissions was that W (China) was distinguishable."

41. However, it is clear from R (Countryside Alliance v The Attorney General) that even for such a step to be in contemplation it would be necessary to identify either a superior norm of EU legislation or a ruling of the Court of Justice. In this case there is no such authority. Further, as noted by Buxton LJ in Liu in respect of W (China):

> *"Envoi*
>
> 31. When refusing permission to appeal in W (China) the House of Lords said this:
>
> "The correct application of community law is so obvious as to leave no scope for any reasonable doubt."
>
> 32. It is to be hoped that the professions, and the Legal Services Commission, will take good note of that observation, and that these appeals will be the last occasion on which the AIT, and this court, is troubled with these issues."

42. Solely to assist in the context of future cases (and taking a cue from Buxton LJ in Liu in considering the issue purely in terms of "logic"), we would accept that there is a strong argument for saying that neither the case law of the Court of Justice nor that of the Court of Appeal excludes the possibility that employment undertaken by parents in the host Member State may create self-sufficiency in the child, at least in some circumstances. The following seem to us relevant considerations:

43. First, whilst there is nothing said in the Court of Justice ruling in Chen or in any subsequent cases to indicate that employment undertaken by parents in the host Member State can create self-sufficiency in the child, equally the Court does not appear to attach any conditions that attach to the

ability of a Chen child to prove his or her self-sufficiency on the strength of his or her parent's resources.

44. Second, the case law could be said to lack clarity and to reflect a degree of tension between two positions.

45. On the one hand there is the position that asserts that income from employment undertaken in the host Member State can never qualify a Union citizen child as self-sufficient. This position is based on the view that where the third-country national parents do not qualify as workers in their own right, it would be illogical and circular to say that they derive rights through a Union citizen child by working. As expressed in MA and others at [42], "[i]n our view, the EU national's right must be established independently of the presence of the family members in the UK before they may derive any rights from EU law themselves…the right of the EU national…is an individual right, not a family right…." The offending circularity was described in [43] as being a situation where the parent's right to work would sustain the child's right and "through her, their own derived right would continue". The EU national child's right must be based on "resources which exist independently of any economic activity in the host Member State".

46. On the other hand, there is the position that does not exclude the possibility that lawful employment on the part of the parent(s) could in certain circumstances create self-sufficiency in the child. This position draws on the idea that, in Buxton LJ's words in Liu at [17], the immigration position of the parents is a disqualifier simply because it is a "factual reason" why the resources requirement cannot be fulfilled. A Member State is not (in Buxton LJ's words at [21]) "obliged to adjust its domestic law to create for the EU citizen the resources that he needs in order to create his right to reside", but if as a matter of fact her domestic law *permits* lawful employment, then there would appear to be no further technical barrier to the child being regarded as self-sufficient.

47. This alternative position would not appear to be inconsistent with W(China) or Liu. The proposition that employment in the host Member States on the part of parents of a Union citizen child cannot make the latter self-sufficient is not an evident part of the ratio of W(China), not at least according to the summary given of its ratio by Buxton LJ in Liu (see above). That summary only proscribes illegal employment.

48. Against the first position, some of the justifications given for it, at least in the AIT case law give pause for thought. It is very difficult to see that the first position can be justified on the basis that the right of residence flowing from self-sufficiency is an individual right. We have in mind here that the individuality of the right was one justification given by the AIT in MA & Others at [42]: see above para 17. It is very difficult because, if the Chen right was as these cases assert purely an individual right, then the Court of Justice could never have concluded that Chen's parents had a derived right. If a child could only be self-sufficient in his or her own individual right, without regard to the resources of his carers, then the

derived right of residence established by Chen would only have application in extremely rare cases (e.g. if he had inherited wealth). The Court of Justice in Chen clearly considered that the Chen right could be created indirectly through the resources of an EU child's carers/ parents.

49. Another justification given by the AIT in ER and Others for adopting the first position was that it considered it was bound to do so by the terms in which the Court of Justice had decided the case of SSHD v Akrich, (Case C-109/01) [2004] INLR 36 as well as by several cases on based on the doctrine of abuse of rights in the form of entry by deception, most notably R v SSHD ex parte Kondova (Case C-239/99). However, Akrich was disapproved in Metock and Others (Area of Freedom, Security and Justice) [2008] EUECJ C-127/08 and in that and subsequent cases the Court of Justice has made clear that the doctrine of abuse of rights is to be narrowly construed. As such it is not a doctrine obviously to be applied purely because applicants seek to create self-sufficiency by artificial but not abusive means.

50. A further argument against the first position is that, at least in the ER & others case the Secretary of State appeared ready to adopt the second position. At [39] the Tribunal recorded that:

> "We understand Mr Payne' submissions [on behalf of the Secretary of State} –which he also made in another reconsideration listed before us on the same day – to entail an acceptance by the Secretary of State that reliance may be placed upon income derived from employment pursuant to an independent right under national law to remain and work in the UK."

51. It seems to us that the preponderance of argument does not exclude the second position being consistent with either Court of Justice or Court of Appeal authority. However, we do not need in this case to resolve definitively which of the two positions described above is correct. As already explained, even assuming that the second position is the correct one under EU law, the claimants in this case could still not establish their case. Under the second position there remains the question of what type of employment could be considered to demonstrate such self-sufficiency in the Union citizen child. Whilst in our opinion the case law of the Court of Justice and Court of Appeal does not exclude employment on the part of a parent or parents in the host Member State being able to create self-sufficiency for their Union citizen child in some circumstances, it clearly does exclude employment that is illegal employment as well as employment that is lawful purely in the sense that the relevant parent has section 3C leave. That is why the appellants Mrs Wang and Mr and Mrs Ahmed lost in Liu and why the claimants cannot succeed in the appeal before us.

52. For the above reasons:

The First-tier Tribunal materially erred in law and its decision has been set aside.

The decision we re-make is to dismiss the claimants' appeals.

Signed Date

Upper Tribunal Judge Storey

ANNEX

ERROR OF LAW DECISION BY UPPER TRIBUNAL JUDGE P LANE:

CASE NOS: IA/24623/24617/24620/24621/2011

DATE OF INITIAL HEARING IN UPPER TRIBUNAL: 11 APRIL 2012

BEFORE: UPPER TRIBUNAL JUDGE PETER LANE

Representation:

For the Appellant: Ms. C. Gough, Senior Home Office Presenting Officer
For the Respondent: Mr A Jaffar, instructed by Cardinal Solicitors (Luton)

REASONS FOR FINDING THAT FIRST-TIER TRIBUNAL MADE AN ERROR OF LAW, SUCH THAT ITS DECISION FALLS TO BE SET ASIDE

1. At the hearing on 11 April 2012, by consent, I found that there were errors of law in the determination of the First-tier Tribunal judge, such that I should set her determination aside. The judge was plainly not helped in this difficult and unusual case by the absence of a presenting officer. Nevertheless, she erred in not making clear findings regarding the insurance position of the respondents and in ignoring the fact that, even if the second, third and fourth respondents fell within regulation 8 of the Immigration (European Economic Area) Regulations 2006, the Secretary of State has a discretion under regulation 17(4), which had not been exercised.

2. Although the determination of the First-tier Tribunal judge fell to be set aside, the findings of fact made by the judge, including the finding regarding the relationship between the second and fourth respondents, shall stand, not having been the subject of challenge in the grounds.

3. The fact that Mr Jaffar had been instructed only on the afternoon of 11 April, together with the nature of the issues, meant that the Upper Tribunal could not proceed forthwith to hear evidence and submissions for the purpose of re-making the decisions in the appeals. I accordingly made the following directions.

DIRECTIONS

1. Not later than 14 days before the forthcoming hearing the parties shall serve on the Upper Tribunal and each other skeleton arguments dealing with:-

(a) the status of the first respondent as a qualified person;

(b) the applicability or otherwise of the Immigration (European Economic Area) Regulations 2006 in relation to each of the respondents; and

(c) the applicability or otherwise of the case of Chen [2004] ECR I – 9925, if the 2006 Regulations are not relevant to one or more of the respondents.

2. The skeleton arguments shall be accompanied by copies of all case law relied on, or which is otherwise considered to be relevant.

3. Any documentary evidence (including witness statements) upon which it is intended to rely shall be served on the Tribunal and the other party not later than 14 days before the forthcoming hearing.

4. All materials to be served on the Secretary of State must be addressed to Ms C. Gough, Specialist Appeals Team, Building 2, Angel Square, 1 Torrens Street, London EC1V 1NY.

Signed:

Upper Tribunal Judge Peter Lane

11 April 2012