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8. Breaking Chinese Law – Making European One: The Story of *Chen*, Or: Two Winners, Two Losers, Two Truths

with Dimitry Kochenov

This chapter has been previously published in *EU Law Stories: Contextual and Critical Histories of European Jurisprudence* (Fernanda Nicola and Bill Davies (eds.), Cambridge University Press 2017).

I. Introduction: Taking a Flight to Europe to Break the Law

In the *Chen* case the European Court of Justice (ECJ) extended the protections of European law to a non-citizen parent of an EU citizen child, who, although never having crossed borders between EU Member States, possessed the nationality of a Member State different from the one where the family resided.[1] The case fuelled important developments in Ireland and boosted the importance of the status of EU citizenship to a great degree.

On 15 May 2000 Mrs Man Lavette Chen, a very pretty petite twenty-five year old Chinese woman working for a successful chemical company,[2] arrived in the United Kingdom.[3] Impeccably dressed and with a vivid sense of humour, she knew Europe very well – she was a regular on London-bound flights. The majority interest in the pigments- and dyestuffs-producing company that she represented belonged to her husband,[4] alongside numerous other investments in the Chinese coastal cities.[5] Mr Chen remained at home in Zhuhai city with the

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[1] *Kunqian Catherine Zhu and Man Lavette Chen v Secretary of State for the Home Department*, C-200/02, EU:C:2004:639.

[2] Zhuhai Skyhigh Chemicals. The company has been renamed 'Skychem Corporation' since the events of this story. Man Chen still works for this company.

[3] *Man Lavette Chen and Kunqian Catherine Zhu (dependent) v Secretary of State for the Home Department*, Ruling on a reference to the Court of Justice of the European Communities (Immigration Appellate Authority, Hatton Cross, 23 April 2002), paras. 9 and 12.

[4] *Chen and Zhu v Secretary of State* (Immigration Appellate Authority), para. 9.

[5] Interview with Adrian Berry, 3 March 2014.

family's firstborn, Huixiang, just under two years old at the time.[6] Man Chen was very rich and travelled to the United Kingdom with only one goal: to break the law. She felt she was capable of deciding herself how many children she wanted, refusing to leave this issue to the Chinese government.

Her actions, independence and determination helped shape European law, moving the Union forward: the *Chen* case appears in every textbook. The story behind it is much more fascinating than the accounts of commentators made it, however, hence the need to retell it once again (removing our legal hats, we must add). The story is telling: Mrs Chen's resounding success in finding an indigenous way of breaking an oppressive *Chinese* law has profoundly reshaped the law of the *European Union*. Moreover, as a consequence of this case, also the law of the *Irish Republic* has also been changed, and the *United Kingdom* has come to find itself much less compliant with European law than previously, refusing – implicitly – to support its lowest immigration courts in referring questions to the ECJ.[7] At least four jurisdictions were thus profoundly affected by the actions of one brave woman.

The *Chen* play involved beauty, wealth, governmental sloppiness, recently jailed Adjudicator Michael Shrimpton's outrage, and the great Sir Richard Plender arguing against himself. The case came as a definitive reaffirmation of the importance of EU citizenship, thus moving it closer to the 'fundamental status of the nationals of the Member States'[8] ideal. It also created a moral panic in Ireland and backfired in the United Kingdom, undermining the latter's adherence to EU law. It showed with particular clarity the sickness of the European mass-media and the strength of the Eurocentric and profoundly prejudiced world-view many Europeans seem to espouse. A charismatic millionaire mother thus turned in the public imagination into a poor Asian coming to rich Europe to abuse welfare. Her beautiful Irish baby, in turn, became a parasitic Chinese child abusing the law by the very act of her birth.[9] This perverted new orientalism – less refined than the one described by Said,[10] but with just as little to do with reality – reached such humongous proportions that the whole Irish nation – silly as it might sound (though not for the first time)[11] – felt obliged to resort to a national referendum,

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[6] Chen and Zhu v Secretary of State (Immigration Appellate Authority), para. 11.

[7] Interview with Adrian Berry, 3 March 2014.

[8] *Rudy Grzelczyk v Centre public d'aide sociale d'Ottignies-Louvain-la-Neuve*, C-184/99, EU:C:2001:458.

[9] Conversations with Sir Richard Plender, 2011, Groningen and Sevenoaks.

[10] E.W. Said, *Orientalism* (Vintage Books 1979).

[11] Another recent example is described in detail by Michael D. Goldhaber and concerns the effectiveness of US money in introducing a ban on abortions into the Irish constitution (the Eighth Amendment) by a popular vote:

this time to change the basic rules for the acquisition of nationality: voting down *ius soli*.[12] The reasons cited which informed this change had nothing to do – not surprisingly, but no less sadly – with the case at hand '[*ius soli* is] a shortcut many asylum seekers used to win residency'.[13] The Irish voted to ensure that the poor Asians of their imaginations would not flock to their rich Republic using the 'anchor baby' technique, citing the case of a Chinese millionaire who had *never ever visited their country* as a reason to inflate their fears to such a degree that the Constitution had to be changed.

This chapter first briefly presents what we cherish in *Chen*: the rule of the case and its key political implications, including the revision of Irish nationality law and of the UK immigration authorities' practice of referring questions to the ECJ, and then proceeds to the main reason behind the whole story as it evolved: the one-child-policy in Chinese law. The chapter then turns to its key part: simply telling the story as it happened based on the available documents and the interviews the authors conducted with all the key lawyers involved in the case at various London cafés and at a mansion not far from Sevenoaks. Our task is to walk the reader through all the stages of the case's evolution. Finally, the conclusions focus on the complete disconnect between the reasons behind Mrs Chen's actions and what has actually happened and the image of the case created in the media, thereby revealing the two winners, two losers and two basic truths promised in the title.

II. The Law: *Chen*'s Legacy, Added Value and Implications

The *Chen* case came as a strong reaffirmation of the importance of the status of EU citizenship, demonstrating its ability to extend the material scope beyond the situations which are either connected to the physical crossing of the borders or the economic activity (including the intent to pursue such an activity) within the internal market. In this sense *Chen* was probably expected, but nonetheless played an important role in the Court's line leading to endowing the status of EU citizenship with a true sense of a 'fundamental status' as promised in *Grzelczyk*.[14]

M.D. Goldhaber, *A People's History of the European Court of Human Rights* (Rutgers University Press 2009), 26–32.

[12] Of those who voted (with a turnout of 59.95%), 79.17% voted for removing the *ius soli* provision from the Constitution, making the 27th Amendment of the Irish Constitution a reality.

[13] J. DePearle, 'Border Crossings: Born Irish, but with Illegal Parents', *New York Times* (25 February 2008).

[14] *Grzelczyk*, C-184/99, EU:C:2001:458.

It is one of the first 'pure' EU citizenship cases decided by the ECJ, where the citizenship provisions in the Treaty proved usable and consequential. On this point all the later cases where the 'cross-border situation' is either fictitious or not required at all – from *Schempp*[15] to *McCarthy*[16] are definitely *Chen*'s progeny to a certain extent. Moreover, the case presented an important reaffirmation of the obligation lying on the Member States to recognise each-other's nationalities, which are legally acquired, thus tacitly reaffirming *Micheletti*[17] and paving the way to *Rottmann*.[18] Lastly, at the level of protecting the rights of family members – not a well-lit corner of ECJ's case-law – the case played an essential role in reaffirming that having 'sufficient resources' does not imply 'personal resources', thus fully extending the protections of the law to EU-citizen children. Allowing a parent-caregiver to stay with a child is a fundamentally important rule that the case reinforced. Problematically, the judgment constantly emphasised money: the rich can stay with their children, unless something truly extraordinary – as in *Ruiz Zambrano*[19] – happens, the Court told us. This emphasis on being 'rich', which would have been expected to recede as EU citizenship matured, has not deminished.[20] From *McCarthy* to *Alokpa*[21] and *Dano*,[22] the Court has refused the 'poor' the rights that the 'rich' enjoy: not to burden the Member States' social security systems is thus more important than keeping the families together,[23] an approach which potentially violates the ECHR.[24] All in all, however, *Chen* has been a huge success in terms of making a significant contribution to Union citizenship, which is entirely grounded in the law.

The same cannot be said about the reactions to this case at the national level. Therefore, while United Kingdom's lowest immigration courts simply do not refer cases to the ECJ any

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[15] *Egon Schempp v Finanzamt München V*, C-403/03, EU:C:2005:446.

[16] *Shirley McCarthy v Secretary of State for the Home Department*, C-434/09, EU:C:2011:277.

[17] *Mario Vicente Micheletti and others v Delegación del Gobierno en Cantabria*, C-369/90, EU:C:1992:295.

[18] *Janko Rottmann v Freistaat Bayern*, C-135/08, EU:C:2010:104.

[19] *Gerardo Ruiz Zambrano v Office national de l'emploi (ONEm)*, C-34/09, EU:C:2011:124.

[20] For a global critical analysis, see D. Kochenov, 'On Tiles and Pillars: EU Citizenship as a Federal Denominator' in D. Kochenov (ed.), *EU Citizenship and Federalism: The Role of Rights* (Cambridge University Press 2017).

[21] *Adzo Domenyo Alokpa and Others v Ministre du Travail, de l'Emploi et de l'Immigration*, C-86/12, EU:C:2013:645.

[22] *Elisabeta Dano and Florin Dano v Jobcenter Leipzig*, C-333/13, EU:C:2014:2358.

[23] G Davies, 'The Right to Stay at Home: A Basis for Expanding European Family Rights' in Kochenov (ed.), *EU Citizenship and Federalism* (n. 20).

[24] S. Adam and P. Van Elsuwege, 'EU Citizenship and the European Federal Challenge through the Prism of Family Reunification' in Kochenov (ed.), *EU Citizenship and Federalism* (n. 20).

more – which in itself is a blunt violation of EU law, as references are the lifeblood of the ECJ[25] – the developments in Ireland went even further that that. The *Chen* case was abused and misrepresented in the public debate as an example of why *ius soli* should be abolished, leading to a referendum, in 2004, and an amendment of the Irish Constitution.[26] Considerations of space preclude any detailed analysis of the amusing referendum campaign here, but one thing was absolutely clear: the connection between *Chen* and any problems whatsoever that the Irish were willing to ascribe to their immigration system whatsoever was simply not there.[27]

III. What Mrs Chen Was Running Away From: China's One-Child-Policy

The one-child-policy in China was introduced in 1979 in an effort to halt a population explosion whereby China's approximately 540 million people in 1949 has risen to more than 800 million people by 1979.[28] In the 1950s, a massive government campaign urged Chinese citizens to have large families to increase China's workforce dramatically for the construction of a Maoist agrarian society.[29] Chairman Mao called birth control 'a way of slaughtering the Chinese people without drawing blood',[30] and the campaign for larger families was accompanied with the slogan 'the more babies the more glorious are their mothers'.[31]

In the 1970s, the Chinese government realised that rapid population growth posed a threat to China's economic development, and tried to reverse its 1950s campaign by starting a 'Later,

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[25] See further M. Broberg and N. Fenger, *Preliminary References to the European Court of Justice*, 2nd edn (Oxford University Press 2014).

[26] For an analysis, see, M. Maguire and T. Cassidy, 'The New Irish Question: Citizenship, Motherhood and the Politics of Life Itself' (2009) 12 *Irish Journal of Anthropology* 18.

[27] For a legal analysis of the evolution of the Irish nationality law, see, e.g., J. Handoll, 'Country Report: Ireland', *EUDO Citizenship Observatory Paper* (EUI, Florence, 2012).

[28] These projections are, however, very uncertain. See N.M. Skalla, 'China's One-Child Policy: Illegal Children and the Family Planning Law' (2004) 30 *Brooklyn Journal of International Law* 329, 332; referring to G.J. MacDonald, 'How Reliable Are Population Statistics From China?' (International Institute for Applied Systems Analysis 1999).

[29] L.B. Gregory, 'Examining the Economic Component of China's One-Child Family Policy under International Law: Your Money or Your Life' (1992) 6 *Journal of Chinese Law* 45, 48.

[30] S.W. Mosher, *A Mother's Ordeal: One Woman's Fight Against China's One-Child Policy* (Hartcourt Brace 1993), 56–57.

[31] X. Li, 'License to Coerce: Violence Against Women, State Responsibility, and Legal Failures in China's Family-Planning Program' (1996) 8 *Yale Journal of Law & Feminism* 145, 148.

Longer, Fewer' program.[32] This program promoted a maximum of two children per family.[33] Pushing the program further, a one-child policy was put into effect in 1979.[34]

For decades, the one-child policy only had a vague basis in constitutional or other law,[35] until 1 September 2002, when the Family Planning Law was adopted.[36] Article 18 states: 'The State maintains its current policy for reproduction, encouraging late marriages and childbearing and advocating one child per couple. Where the requirements specified by laws and regulations are met, plans for a second child, if requested, may be made.'

According to the National Population and Family Planning Commission of China, more than 400 million births have been prevented in the history of the one-child policy.[37] The birth rate dropped from 5.9 children per woman in the late 1960s to 1.7 children per woman in 2004.[38] These figures notwithstanding, scholars have questioned the ultimate success of the policy.[39]

The one-child policy is implemented from the top down. Central government issues directives and resolutions for local and regional governments and sets birth quotas binding on

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[32] T. White, *China's Longest Campaign: Birth Planning in the People's Republic, 1949–2005* (Cornell University Press 2006).

[33] X. Peng, 'Population Policy and Program in China: Challenge and Prospective' (2000) 35 *Texas International Law Journal* 51, 52–53.

[34] *Report on Implementation of CEDAW in the People's Republic of China*, Human Rights in China (1998), 73ff; T. Hesketh et al., 'The Effect of China's One-Child Family Policy After 25 Years' (2005) *New England Journal of Medicine* 1171.

[35] Art. 25 Constitution of the People's Republic of China (1982) stipulates that 'The state promotes family planning so that population growth may fit plans for economic and social development'. Furthermore, Art. 2 Marriage Law of the People's Republic of China (1980) states that 'Family planning shall be practised'.

[36] P.T.C. Hui, 'Birth Control in China: Cultural, Gender, Socio-economic and Legislative Perspectives in Light of CEDAW Standards' (2002) 32 *Hong Kong Law Journal* 187, 188.

[37] J. FlorCruz, 'China Copes with Promise and Perils of One-Child Policy', *CNN* (29 October 2011), at http://edition.cnn.com/2011/10/28/world/asia/china-one-child/.

[38] Hesketh et al., 'The Effect of China's One-Child Family Policy' (n. 14), 1172.

[39] Ibid. See further on inter alia the skewed sex ratio in China, the ongoing neglect, malnourishment and infanticide, and the high suicide rate among Chinese women: W.X. Zhu et al., 'China's Excess Males, Sex Selective Abortion, and One-child policy: Analysis of Data from 2005 National Intercensus Survey' (2009) *British Medical Journal* 338; P.S.F. Yip et al., 'Suicide Rates in China during a Decade of Rapid Social Changes' (2005) 40 *Social Psychiatry and Psychiatric Epidemiology* 792; and S.W. Mosher, *A Mother's Ordeal: One Woman's Fight Against China's One-Child Policy* (Hartcourt Brace 1993).

them.[40] Enforcement takes place at the regional and local levels on an ad hoc basis.[41] The rules are simple. All couples must be married and obtain a birth permit before being allowed to conceive a child. This can take years if many couples within the region want to have children.[42] In the urban areas, where approximately one-third of the population resides, the one-child policy is strictly enforced, while exceptions sometimes apply in rural areas.[43]

In the policy's early years, practical enforcement was characterized by severe brutality, including forced sterilization of couples after their first child,[44] while forced abortion,[45] imprisonment,[46] fatal beatings[47] and infanticide have also been reported.[48] Non-compliance has also frequently led to unbearable fines of up to two or three times the annual income, depending on the region.[49] Such enforcement methods seem to have primarily resulted from the unfettered discretion of low-quality and corrupt local government officials.[50]

The entry into force of the Family Planning Law officially condemned both physical punishments and the imposition of fines.[51] While probably not much has changed in practice, as compliance came to be enforced through 'social compensation fees', last year saw a gradual departure from one-child policy nation-wide. During the run-up to *Chen* this was very difficult to anticipate, however. Like the fines imposed earlier, 'social compensation fees' then in force were based on income and varied greatly between regions. In poor rural areas, the fee was

[40] Li, 'License to Coerce' (n. 31), 151–52.

[41] J. Chen, *Chinese Law: Towards an Understanding of Chinese Law, Its Nature and Development* (Martinus Nijhoff 1999), 262.

[42] Li, 'License to Coerce' (n. 31), 152; Human Rights in China, *Unfair Burdens: Impact of the Population Control Policies on the Human Rights of Women and Girls* (1995).

[43] Hesketh et al., 'The Effect of China's One-Child Policy' (n. 34), 1171.

[44] A. Noonan, 'One-Child Crackdown', *National Review* (16 August 2001).

[45] Human Rights in China, *Unfair Burdens* (n. 42).

[46] S.T. Masson, 'Cracking Open the Golden Door: Revisiting US Asylum Law's Response to China's One-Child Policy' (2009) 37 *Hofstra Law Review* 1135, 1138.

[47] H. Beech, 'Enemies of the State?', *Time* (12 September 2005), 61.

[48] H. Wu, 'Controlling China: The US Congress Should Not Fund State-Mandated Abortions', *National Review Online* (9 July 2004), cited in Masson, 'Cracking Open the Golden Door' (n. 46), 1138.

[49] Skalla, 'China's One-Child Policy' (n. 28), 339.

[50] G. Zhang, 'US Asylum Policy and Population Control in the People's Republic of China' (1996) 18 *Houston Journal of International Law* 557, 569.

[51] Art. 4 Family Planning Law, e.g. states that 'When promoting family planning, the people's governments at all levels and their staff members shall perform their administrative duties strictly in accordance with law, and enforce the law in a civil manner, and they may not infringe upon legitimate rights and interests of citizens'.

around 10 per cent of the annual family income, whereas in the urban areas it could be as high as three to seven times the annual family income.[52] The one-child policy remained highly intrusive and largely unpredictable because of decentralized enforcement and ad hoc nature, thus turning it into an ideal subject to corruption, taking into account the social and political influence of the 'perpetrators' this policy had.

IV. Pursuing Catherine's Best Interests: The Story of Breaking and Making the Law

A. Giving Birth to Catherine: Wise Legal Advice

It is the uncertainty inherent in the relevant Chinese law, coupled with the determination to have two children, that led Mrs Chen to explore all the possibilities available outside China. Adrian Berry, a lawyer involved in the case is very clear on this: 'Her only motivation was to have the second child'.[53] Mrs Chen used one of her business trips to the United Kingdom to investigate the legal possibilities of raising her second baby in Europe. Two elements had to coincide: the baby's nationality had to not be Chinese and the Chinese national mother needed to acquire a resident right outside of China.

The *Chen* case started when Mrs Chen, shortly after arriving on her own in the United Kingdom, walked into Malloy & Barry Solicitors, a well-known law-firm in Cardiff and immediately asked for an immigration lawyer. Not surprisingly, there were none available – *Chen* was the first immigration case in which the eminent commercial law firm was involved, probably not to disappoint their important Chinese client.[54] Michael Barry, partner at this firm, decided to call Ramby de Mello, a barrister in London who specialised in European and immigration law. Along with Mrs Chen, they discussed the legal options.

Mr. de Mello vividly remembers these elaborations and recalls the impressive presence of Mrs Chen: 'She was by all means a very attractive young lady. She was about 5'4" tall, wore a pale-smooth made-up complexion and was very well dressed. In fact, when Michael [Barry] had his tie knot slightly crooked, Mrs Chen did not hesitate from adjusting the knot, while emphasising with a smile that it was very important to dress smartly.'[55] 'It was fully clear', De

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[52] *The United Nations Population Fund in China: A Catalyst for Change* (Catholics for a Free Choice 2003), 6.

[53] Interview with Adrian Berry, March 3 2014, London.

[54] Ibid.

[55] Interview with Ramby de Mello, 18 October 2014, London.

Mello emphasises, 'that the *Chen* case is not a story about a poor immigrant abusing the law, or a search for European welfare. It is a story about an intelligent, independent woman who only pursued the best interests of her child.' Moreover, as Adrian Berry confirmed, securing non-Chinese nationality for the baby rather than the right to stay in the United Kingdom was the crux of the matter: the family was wealthy enough to have plentiful alternatives. Particularly so, given that the United Kingdom is one of the historical jurisdictions, alongside the US and Canada, which allow easy and immediate acquisition of residence by investors[56] – a route which could be pursued anytime should EU law fail to help for some reason. Using EU law was just one option among many and came naturally, as it was admittedly the cheapest.

In order not to be Chinese, the child needed to acquire a nationality of a any other state in the world at birth.[57] A European nationality would come with the EU citizenship status.[58] The easiest way to endow the child with such a status was to ensure that she be born on the isle of Ireland – the Republic of Ireland was then the only Member State recognising the *ius soli* nationality principle.[59] Under the law of the Irish Republic at the time, the babies born in Northern Ireland, which is part of the UK, would automatically receive Irish nationality – a rare example in the world of conferral of nationality practice where *ius soli* applies on a territory larger than the actual territory of the state concerned. Ensuring that the child would not be Chinese in the eyes of the law was thus relatively easy.

Residence proved a different matter, however. The right of residence of the baby's mother (and thus the child, too) could not be based on Irish law in itself, as the Irish approach to this issue was undergoing change around the time of Catherine's birth. The Irish Supreme Court, previously welcoming of the idea of family unity prevailing over the Republic's interest to remove the irregularly resident parents of Irish-born citizen-children,[60] changed its approach

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[56] See e.g., M. Sumption and K. Hooper, 'Selling Visas and Citizenship', *Migration Policy Institute Report* (2014); K. Surak, 'Global Citizenship 2.0 – The Growth of Citizenship by Investment Programs', *Investment Migration Paper* No. 03/2016 (Investment Migration Council, Geneva).

[57] Art. 5 Nationality Law of the People's Republic of China states that 'a person whose parents are both Chinese nationals and have both settled abroad, or one of whose parents is a Chinese national and has settled abroad, and who has acquired foreign nationality at birth, shall not have Chinese nationality'.

[58] Arts. 9 TEU and 20 TFEU. For an analysis, see, e.g., D. Kochenov, 'The Essence of EU Citizenship Emerging from the Last Ten Years of Academic Debate: Beyond the Cherry Blossoms and the Moon?' (2013) 62 *International and Comparative Law Quarterly* 97.

[59] In general, see, I. Honohan, '*Ius Soli* Citizensihp', EUDO CITIZENSHIP Policy Brief No. 1 (not dated), at <http://eudo-citizenship.eu/docs/ius-soli-policy-brief.pdf>.

[60] Supreme Court of Ireland, *Fajujonu v. Minister for Justice* [1990] 2 IR 151.

radically in 2003, before *Chen* was decided by the ECJ, and no longer sees any problem in deporting citizen-children from Ireland along with their parents,[61] a practice, which is now at odds with ECJ's *Ruiz Zambrano* and *McCarthy* line of cases.[62] Under purely UK law, neither the Chinese mother nor the Irish baby would be allowed to reside in UK territory, unless investments are made. While money could talk, human rights law was clearly out of the picture, since the case predated the entry of the Human Rights Act 1998 had not yet entered into force.[63] It soon became clear, however, that EU law could possibly offer a solution to the residence question: 'It is always nice to try out something new', as Adrian Barry put it.[64]

Mrs Chen's lawyers' initial thoughts on the legal options were based on two core ideas. Academic literature from the 1990s had suggested that the introduction of EU citizenship in the Maastricht Treaty could possibly stretch the scope of EU law further than previously thought possible.[65] For the baby there were two possible arguments. First, Article 18 of the Treaty on the European Community (EC) (now Article 20 of the Treaty on the Functioning of the European Union) could possibly bring her automatically within the material scope of EU law and give her a right of residence throughout the Union. Supplemental to that, De Mello recalls that even if the baby's EU citizenship did not automatically grant her a right of residence in the United Kingdom, 'I intuitively reckoned that the very circumstance that someone possesses the nationality of one Member State, but lives in another, would bring the matter within the scope of EU law'.[66] This matter was by no means undisputed[67] and success was not guaranteed.

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[61] Supreme Court of Ireland, *A.O. & D.L. v Minister for Justice* [2003] 1 IR 1.

[62] *Ruiz Zambrano*, C-34/09, EU:C:2011:124; *McCarthy*, C-434/09, EU:C:2011:277. See also P. Van Elsuwege and D. Kochenov, 'On the Limits of Judicial Intervention: EU Citizenship and Family Reunification Rights" (2011) 13 *European Journal of Migration and Law* 443.

[63] Interview with Adrian Berry, 3 March 2014, London

[64] Ibid.

[65] For crucial contributions, see, e.g., S. O'Leary, *The Evolving Concept of Community Citizenship* (Kluwer Law International 1997); M. LaTorre (ed.), *European Citizenship: An Institutional Challenge* (Kluwer Law International 1998).

[66] Interview with Ramby de Mello, 18 October 2014, London.

[67] The grounds on which the ECJ ultimately accepted the right of residence of both Catherine and Mrs Chen leaned heavily on the concepts of a 'purely internal situation outside the scope of EU law' and 'derivative right of residence' which were developed in, respectively, *Carlos Garcia Avello v Belgian State*, C-148/02, EU:C:2003:539; and *Baumbast and R v Secretary of State for the Home Department*, C-413/99, EU:C:2002:493. Neither case had been handed down when Mrs Chen consulted Barry and De Mello.

The second idea related to the legal position of Mrs Chen herself. In the event that the baby would have a right of residence in the United Kingdom, Mrs Chen's residence would only be secured if she could derive a right from her baby's EU citizenship rights. At that time, however, the ECJ's 'derivative right' *à la Baumbast*[68] had not yet been formulated, and the legal team had to construct their advice cautiously. They intended to proceed based on the 'dependency' criterion in Directives 73/148/EEC and 90/364/EEC, construing it as capable of granting a residence right, in the sense that the baby would not only be dependent on Mrs Chen's care and finances, but Mrs Chen would also be emotionally dependent on the baby.

De Mello and Barry advised Mrs Chen that they could definitely make a case depending on a number of circumstances. They stressed to her, however, that there was no certainty as to the result on either of the points. Fully aware of the legal consequences of the available options, Mrs Chen was left with the final decision either to return to China and risk possible problems with the authorities there or to remain in the United Kingdom and take the risk of a battle for the right to stay. For a few months then, Barry and De Mello then lost sight of the case.

Meanwhile, Mrs Chen decided to take the risk. In July 2000, being seven months pregnant, she travelled to Belfast. She stayed at a hotel at first but found a temporary accommodation after a while. On 16 September 2000, Kunqian Catherine Zhu, national of Ireland and citizen of the European Union, was born in Ulster Hospital, Belfast. Subsequently, Mrs Chen and Catherine travelled back to Cardiff and started living at Atlantic Wharf, an attractive area adjacent to Cardiff Bay.[69] For the next few years, mother and daughter would live on their own. Although she was definitely an independent woman, according to De Mello, Mrs Chen did miss her husband and son who remained in China and could only pay her visits.[70]

Giving birth to Catherine in Northern Ireland surely had significant and irreversible consequences: the acquisition of Irish nationality automatically meant that Catherine would be excluded from Chinese nationality. It appeared to De Mello that after Mrs Chen became pregnant for the second time, Mr and Mrs Chen genuinely feared that raising Catherine in China might jeopardise her future and the family's social and political position. With the enforcement of the one-child-policy being both unpredictable and possibly far-reaching, the Chens had concluded at an early stage of the pregnancy that bringing the baby to the United

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[68] *Baumbast*, C-413/99, EU:C:2002:493.

[69] *Chen and Zhu v Secretary of State* (Immigration Appellate Authority), para. 15.

[70] Interview with Ramby de Mello, 18 October 2014.

Kingdom – which both of the parents frequently visited, after all – was the safest option for the baby.

B. In Court From Birth

So the *Chen* saga began. Ramby de Mello recalls the exact moment when Michael Barry called him. '"We have to get to work, Ramby," he said, "we have a baby." In fact, I saw a picture of young Catherine soon thereafter. She truly was a beautiful baby. At that moment I realised this was not just an interesting citizenship case, it was a hugely significant case for the life of Catherine.'[71] Mrs. Chen's legal team sent a letter to the Secretary of State for the Home Department, requesting a long-term residence right in the United Kingdom for Catherine and Mrs Chen. A rejection came soon thereafter. On appeal the case was brought before the Immigration Appellate Authority (IAA).

The hearing was held at Hatton Cross on 23 April 2002. It was one of those days on which, according to Ramby de Mello, all the pieces of the puzzle suddenly fell together.[72] Moreover, the Adjudicator in charge of the case was a colourful man. His Ruling on a Reference to the Court of Justice is a truly remarkable read: 'you absolutely have to see it', Adrian Berry said, pulling out a copy.[73] The referral is filled with indignation concerning the Secretary of State's handling of the case – who had even failed to show up at Hatton Cross without stating any reason.

In the IAA proceedings, De Mello constructed his plea under three headings. First, he argued that Catherine was receiving services within the meaning of Article 1(1)(b) of Council Directive 73/148/EEC: a logical argument given that the ECJ has traditionally used services to move factual constellations within the material scope of EU law[74] before EU citizenship got traction of its own.[75] The obvious problem with this approach relates to the temporary nature of services, arguably the reason why the ECJ itself switched to EU citizenship after Maastricht. Be that as it may, it was argued that Catherine was receiving full-time childcare and medical services in Cardiff. Moreover, Mrs Chen would have to qualify as a '*dependent* relative in the

[71] Ibid.

[72] Ibid.

[73] Interview with Adrian Berry, 3 March 2014, London (IAA decisions are not readily available and can be difficult to come by).

[74] *Ian William Cowan v Trésor public*, 186/87, EU:C:1989:47; *Criminal proceedings against Donatella Calfa*, C-348/96, ECLI:EU:C:1999:6.

[75] *María Martínez Sala v Freistaat Bayern*, C-85/96, EU:C:1998:217.

ascending line' within the meaning of Article 1(1)(d) Directive 73/148/EEC. Although Catherine was undisputedly emotionally and financially dependent upon her mother, it was argued that Mrs Chen was also dependent on her child's citizenship rights and qualified as 'dependent' for the purpose of her own immigration status.[76]

Second, Catherine fell under the Article 1(1) of Directive 90/364/EEC, which reads:

> 'Member States shall grant the right of residence to nationals of Member States […] provided that they themselves and the members of their families are covered by sickness insurance in respect of all risks in the host Member State and have sufficient resources to avoid becoming a burden on the social assistance system of the host Member State during their period of residence.'

It was clear that Catherine would have sufficient resources not to become a burden on the social assistance system of the United Kingdom: the wealth of the Chen family was undisputed. De Mello emphasised that the fact that Catherine's resources were not hers, but stemmed from her parents, was not relevant. As for Mrs Chen, De Mello also repeated his 'dependency' argument which would grant her a right of residence under Article 1(2) of the Directive.

Such an interpretation of 'dependency' in the two Directives could be interpreted as rather artificial.[77] A third argument was therefore submitted, namely that even if Catherine and Mrs Chen could not derive a right of residence from secondary law, they might be brought within the material scope of EU law by Article 18 EC (now Art. 20 TFEU) *in itself*. This would imply that Article 18 would give Catherine and, necessarily, Mrs Chen a 'free standing or direct right of free movement'.[78] De Mello based this argument on the Opinion of AG Geelhoed in the *Baumbast* case, which was pending before the ECJ at the time. In that Opinion, AG Geelhoed suggested that there might be special circumstances in which Article 18 EC would confer a self-standing right.[79]

In conclusion to his three major pleas, De Mello emphasised that the present case and the arguments he raised were not governed by authority, and should ultimately be brought before

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[76] *Chu and Zhu v Secretary of State* (Immigration Appellate Authority), paras. 23 and 25.

[77] As De Mello himself admitted in our interview.

[78] *Zhu and Chen v Secretary of State* (Immigration Appellate Authority), para. 26.

[79] Opinion of AG Geelhoed in *Baumbast and R v Secretary of State for the Home Department*, C-413/99, EU:C:2001:385, para. 126.

the ECJ. 'Getting the reference was key', as Berry confirmed.[80] He therefore constructed seven preliminary questions for the ECJ to determine the validity of his skeleton argument.

C. The Bar's Maverick

The case was handled by Adjudicator Michael Shrimpton, expert in intelligence and defense policy and known for advancing several conspiracy theories.[81] We managed to interview him before his incarceration: on 6 February 2015, he was sentenced to twelve months imprisonment for communicating false rumours to the UK government about alleged nuclear terrorist attack plans at the 2012 London Olympic Games, organised by the Nazi Continuum Agency *Deutsches Verteidigungs Dienst*, underground since the end of World War II, using a nuclear warhead stolen from the sunken Russian submarine Kursk.[82] Though suffering from a narcissistic personality disorder, as his lawyer alleged,[83] Mr Shrimpton played a crucial role in ensuring that justice in the *Chen* case prevailed, as he was bold enough to go against the highly problematic British practice of not taking EU law seriously in immigration matters.[84]

At that time, the well-known policy of many British courts was to leave the dialogue with the ECJ to the Court of Appeal and the then House of Lords. It is therefore absolutely unique that the *Chen* case was referred to the ECJ at first instance, and in that respect Shrimpton played a quintessential role. Recalling the case vividly, Shrimpton felt proud of referring a case to the ECJ for the second time – emphasising that his first reference was *the first ever* by an IAA Adjudicator.[85] 'It was fully clear to me that it was not a matter of *acte clair*', said Shrimpton,

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[80] Interview with Adrian Berry, March 3 2014, London.

[81] Shrimpton sets out his view on the world most elaborately in his recent book *Spyhunter* (June Press 2014).

[82] 'Michael Shrimpton: Barrister who claimed Nazi spies were planning to attack London Olympics with nuclear bomb is jailed', *The Mirror* (7 February 2015).

[83] Ibid.

[84] For an overview, see, J. Shaw, N. Miller and M. Fletcher, *Getting to Grips with EU Citizenship: Understanding the Friction between UK Immigration Law and EU Free movement Law* (Edinburgh Law School 2013).

[85] Interview with Michael Shrimpton, 14 October 2014, London. Shrimpton's first reference was *Nour Eddline El-Yassini v Secretary of State for Home Department*, C-416/96, EU:C:1999:107, in which the ECJ indeed scrutinised whether an Immigration Adjudicator should be regarded as a 'court or tribunal' within the meaning of (now) Art. 267 TFEU (paras. 16–22). Shrimpton writes about this first reference: 'I did not get a reputation for being in awe of authority … The Home Office once decided that they needn't send a senior barrister along to resist an application by a German barrister for a reference of questions of European Community law to the European Court of Justice in Luxembourg … For some reason they decided that … as a Eurosceptic [I] would not be keen to become the first Immigration Adjudicator to refer a point of law to Luxembourg' at his blog post 'MH-

'and I was always of the view that cases should be settled at the earliest possible stage. I knew the case would have inevitably had to end up in Luxembourg and saw no reason to refrain from using the preliminary reference procedure immediately.'[86] Shrimpton's referral of the case was reportedly much to the disgust of Henry Hodge, then Chief Immigration Adjudicator and later High Court Judge,[87] and did not contribute to his popularity in judicial circles, showing how fragile the position of EU law is on the ground in the UK immigration circles. Shrimpton's peculiar and intractable character was a factor of major significance in bringing the case to the ECJ.

Shrimpton's urge to refer the case was not just a product of his experience and logical reasoning however (under a subtle guidance from De Mello). Another, probably even more crucial reason for *Chen*'s quick route to Kirchberg was the attitude of the Secretary of State in the IAA proceedings, who decided not to defend his previous decision *at all*, and remained completely absent from the hearing. While Mrs Chen was present with all her legal team, all convinced of the high importance of the case for themselves *and* for the development of EU law, the Secretary of State invested no effort, beyond a rather bland letter refusing residence. According to Shrimpton, not showing up and ignoring the plaintiff's submitted skeleton argument reflected a common tactic: the Secretary of State hoped the case would be adjourned, in order to save time and prepare a stronger defense.[88]

This tactic proved to be a major mistake in this particular case, however. Shrimpton was not pleased with this absence at all. From his referral ruling, it is clear that he was quite upset – if not outraged – by the defendant's attempt to adjourn the case, as he also confirmed at our interview.[89] Paragraph 6 of Mr Shrimpton's decision reads as follows: 'Whilst it is a matter of regret that the Secretary of State has gone unrepresented today, it is not a matter for me. I must take the case as I find it and if one party chooses to absent himself from hearing then so be it. I say no more'. It takes to be a 'brave judge' to write like this.[90]

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370 Shoot Down – The Plot Thickens' (23 March 2014), at www.veteranstoday.com/2014/03/23/mh-370-shoot-down-the-plot-thickens/.

[86] Interview with Michael Shrimpton, 14 October 2014, London.

[87] Ibid.

[88] Ibid.

[89] Ibid.

[90] Interview with Adrian Berry, 3 March 2014, London.

D. 'This isn't a baby case, it's a Catherine case'

After the hearing before the IAA on 23 April 2002, it took more than eighteen months for the case to be heard at the ECJ. In November 2003, Mrs. Chen's legal team – Michael Barry, Ramby de Mello and Adrian Berry – travelled to Luxemburg for the oral hearing of the Full Court. Assignment of the case to the grandest composition unquestionably pointed to its huge legal significance for the development of EU law. Although Mrs Chen wished to attend the hearing as well, she and Catherine were forced to remain in the United Kingdom because, their case pending, they only possessed a provisional single entry visa:[91] another remarkable example of the United Kingdom's chronic failure to comply with EU law. 'They were busy doing business',[92] Adrian Berry opined – not going to Luxembourg was not such a tragedy after all. Mrs Chen stayed in close contact with her lawyers before and after the hearing. Between the proceedings before the IAA and the hearing in Luxemburg, the ECJ's ruling in the *Garcia Avello* case had strengthened Mrs. Chen's position: staying in one Member State with a passport of another could bring a person within the scope of EU law. Nonetheless, de Mello recalls that until the actual hearing, 'I was wholeheartedly convinced that we would lose the case.'[93] Berry, who was the junior member of the team, told us he was more optimistic.

De Mello feared that the Court would qualify the act of travelling to Northern Ireland to give birth as abuse of EU law – a position wholeheartedly endorsed by Sir Richard Plender, representing the British Crown at the ECJ.[94] Secondly, he thought that his major point regarding the derivative residence right of Mrs. Chen, namely that she was dependent on Catherine, was artificial. Thirdly, De Mello doubted whether the ECJ would extend the *Baumbast* case law to a very young baby. 'The whole idea of bringing this case within the scope of EU law was, at that time, completely out of the box,' according to De Mello. 'So, after having called Mrs Chen on the day before the hearing, we [the legal team] had a bottle of wine in the evening and said to each other: "we've done our best, but we will get lynched tomorrow".'

Yet the Commission also argued in favour of Catherine and Mrs. Chen. According to De Mello, the Commission's representative contended that 'we initially thought this was a baby

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[91] Interview with Ramby de Mello, 18 October 2014, London.

[92] Interview with Adrian Berry, 3 March 2014, London.

[93] Interview with Ramby de Mello, 18 October 2014.

[94] Conversations with Sir Richard Plender, 2011, Groningen and Sevenoaks.

case. But it was not a baby case, it was a *Catherine case*.'[95] The Commission subsequently argued that indeed Catherine would indeed have a right of residence in the United Kingdom under Directive 90/364/EEC, and submitted that Mrs Chen had a *sui generis* derivative right of residence along the lines of the *Baumbast* case.

The UK government submitted three arguments against Mrs Chen and Catherine. It first contended, along with the Irish government, that the action was inadmissible because the case fell outside the material scope of EU law. According to both governments, neither Catherine nor Mrs Chen had crossed any border and could therefore not benefit from any EU citizenship rights.[96] For this qualification as a 'wholly internal situation', the United Kingdom specifically relied on the *Saunders* case,[97] which involved a British national invoking free movement law against British measures restricting her free movement rights.[98] According to Sir Richard Plender, representing the UK government, bringing the present case within the scope of EU law was an extension of EU citizenship to wholly internal situations, and hence, a dramatic extension of the scope of EU law.[99] The story of what is 'cross-border' and what is not has been at the heart of the EU's federal balance of competences, before the ECJ started turning to the citizenship as such and changing, as argued by Sarmiento and Sharpston,[100] the whole logic of construing the connection with the material scope of EU law is thus being changed[101] – and *Chen* definitely played a role in this.[102]

Secondly, the UK government argued, again along with the Irish government, that Catherine could not benefit from Directive 90/364 because Article 1(1) thereof only applies to nationals who have sufficient financial resources. This condition meant, the governments

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[95] Interview with Ramby de Mello, 18 October 2014.

[96] *Zhu and Chen*, C-200/02, EU:C:2004:639, para. 18. Sir Richard later departed from this approach: R. Plender, 'Nationality Law and Immigration Law' in R. Prender (ed.), *Issues in International Migration Law* (Brill Nijhoff 2015), 1.

[97] *R v Vera Ann Saunders*, 175/78, EU:C:1979:88

[98] R. de Mello, 'Oral submissions on behalf of the applicants', 10 November 2003 (unpublished notes, on file with the authors), para. 11.

[99] Interview with Ramby de Mello, 18 October 2014.

[100] D. Sarmiento and E. Sharpston, 'European Citizenship and Its New Union: Time to Move On?' in Kochenov (ed.), *EU Citizenship and Federalism* (n. 20).

[101] K. Lenaerts, '"*Civis europaeus sum*": From the Cross-border Link to the Status of Citizen of the Union' (2011) 3 *Online Journal on Free Movement of Workers in the European Community* 6, 18.

[102] D. Kochenov, 'Annotation of Case C-135/08, *Rottmann*' (2010) 47 *Common Market Law Review* 1831.

contended, that, unlike Catherine, the national concerned must possess such resources personally.[103]

Finally, the United Kingdom argued that neither Catherine nor Mrs Chen could rely on EU citizenship law because Mrs Chen's move to Northern Ireland with the aim of her child acquiring Irish nationality constituted an attempt to improperly abuse EU law. As the citizenship provisions concerned were neither intended for, nor served by attempts to circumvent the immigration and nationality laws of Member States, and Member States are entitled to prevent abuse of provisions of EU law, the claim must be rejected.[104] 'One must prevent the law from working not as intended', according to Richard Plender.[105] Ironically, Sir Richard profoundly saddened by the case in which the 'interests of the Crown'[106] were violated through making the law 'work not as it was intended'[107] – was the mastermind behind *Singh*,[108] which redefined free movement in the 1990s by seriously limiting the Member States' discretion in this field by allowing returning Member State nationals with third-country national family members to benefit from EU free movement of persons law, thus disapplying national regulations. If *Singh* is not 'abuse' – and by the time of the hearing it was clear that it was not – than *Chen* cannot possibly be abuse either.

The Irish government additionally advanced an argument based on Catherine's age. Since Catherine was not factually capable of exercising her right to move and choose a place to live independently, the government argued, she could not be regarded as a person to which Directive 90/364 granted any rights. More generally, Catherine could not invoke any right of movement or residence under EU law for this reason.[109]

De Mello made the oral submissions before the Court, which were based on two major points largely in response to the Irish and UK government's contributions. De Mello first contended that Catherine's case fell within the personal scope of EU law because all Member State nationals 'wore the hat of EU citizenship irrespective of chronological age'.[110] Whereas

[103] *Zhu and Chen*, C-200/02, EU:C:2004:639, para. 29.

[104] Ibid. para. 34.

[105] Conversations with Sir Richard Plender, 2011, Groningen and Sevenoaks.

[106] Ibid.

[107] Ibid.

[108] *R v Immigration Appeal Tribunal and Surinder Singh, ex parte Secretary of State for Home Department*, C-370/90, EU:C:1992:296.

[109] *Zhu and Chen*, C-200/02, EU:C:2004:639, paras. 41–42.

[110] Interview with Ramby de Mello, 18 October 2014.

in his initial thoughts about the case and during the IAA proceedings, De Mello had to construct the material link with EU law intuitively, at the hearing he leaned on *Garcia Avello*,[111] *Carpenter*[112] and *Gambelli*[113] to illustrate that EU law covers situations in which a person resides in another Member State than the one of which he is a national.[114] Moreover, it would be unreasonable to expect a national of Member State A, born in Member State B, to first leave Member State B before exercising his EU rights in Member State B.[115]

Second, at the hearing De Mello argued robustly against the abuse allegation. He emphasised that the Adjudicator had already found that Mr. Chen's company had not been set up in connection with Mrs Chen's intention to reside in the United Kingdom, that the company actually existed and was commercially successful.[116] He also contended that Mrs Chen's reason to give birth to Catherine could not, absent fraud, constitute an abuse of EU law in itself. She was lawfully present in the United Kingdom at that time and free to travel to Belfast.[117]

Finally, Mrs Chen's lawyers reiterated the dependency of Mrs Chen on Catherine, but linked it to the doctrine of derivative rights in *Baumbast*. During the hearing, de Mello slowly but surely got the impression that the judges were on his side.[118] Mrs Chen's legal team left the hearing in surprise and with much more confidence than they had had a few hours before. After the hearing, Richard Plender came to de Mello and told him: 'Well done! I think you've just won the case.'[119] Moreover, when the Irish barristers who had represented the Irish government met de Mello, Berry and Barry after the hearing in the robing rooms, they (jokingly, one would assume) told them: 'Well chaps, when you ever come to fucking Ireland, we're going to fucking break your legs!'[120]

[111] *Carlos Garcia Avello v Belgian State*, C-148/02, EU:C:2003:539, paras. 27–28.

[112] *Mary Carpenter v Secretary of State for the Home Department*, C-60/00, EU:C:2002:434, paras. 29 and 34.

[113] *Criminal proceedings against Piergiorgio Gambelli and Others*, C-243/01, EU:C:2003:597, para. 54.

[114] De Mello, 'Oral submissions on behalf of the applicants', 10 November 2003 (unpublished notes), para. 8.

[115] Ibid. para. 9.

[116] Ibid. para. 15.

[117] Ibid. paras. 17–21.

[118] Interview with Ramby de Mello, 18 October 2014.

[119] Ibid.

[120] Ibid.

E. AG Tizzano's Opinion

Plender's prediction proved to be well-founded. On the 18 May 2004, Advocate General Antonio Tizzano delivered his Opinion. He rephrased the preliminary questions so as to narrow the legal issues down to two main questions of law: first, whether Catherine was entitled to a permanent right of residence under Directive 73/148 on the basis of the childcare and medical services she received in the United Kingdom, under Directive 90/364 on the basis of her economic self-sufficiency, or under Article 18 EC directly.[121] Second, the learned AG turned to the possibility of a right of residence for Mrs Chen herself.[122] Finally, he considered the abuse argument raised by the UK government.[123]

Before these substantive questions, however, Tizzano had little difficulty in rejecting the UK and Irish objection of inadmissibility for lack of jurisdiction. Catherine's Irish nationality sufficed to establish that the case was not purely internal to UK law.[124]

Turning to the Irish objection that Catherine's youth and lack of physical and mental independence, allegedly prevented her from relying on EU free movement and citizenship law, Tizzano rejected this argument in its entirety: the Irish standpoint confused the capacity of a person to be the subject of rights (i.e. legal personality) and the capacity of that person to take action which produces legal effects (i.e. legal capacity).[125] Moreover, the reception of services would be violated if very young persons, who are likely to be the recipients of various health- and childcare services, were not entitled to rely on those provisions.[126]

As regards the existence of a concrete right of residence for Catherine, Tizzano first rejected De Mello's reliance on Directive 73/148. Although the childcare and medical services Catherine received brought her within the scope of the Directive, Catherine could only invoke Directive 73/148 in order to claim a *temporary* residence right for the duration of her childcare and medical services.[127]

A permanent right of residence could, however, be conferred on Catherine on the basis of Article 18 which grants her, a citizen of the EU, the right freely to move and reside throughout

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[121] Opinion of AG Tizzano in *Kunqian Catherine Zhu and Man Lavette Chen v Secretary of State for the Home Department*, C-200/02, EU:C:2004:307, paras. 19, 20 and 25.

[122] Ibid. para. 25.

[123] Ibid. para. 108ff.

[124] Ibid. para. 33–34.

[125] Ibid. para. 43.

[126] Ibid. paras. 47–49.

[127] Ibid. para. 61.

the Union within the limits and conditions of the Treaty and secondary law. These conditions are codified in the aforementioned Directive 90/364, and were according to the AG manifestly met in Catherine's case.[128] In response to the UK and Irish government's submission that Catherine did not actually 'in her own right' possess and/or earn sufficient resources, Tizzano rightly contended that the wording of the Directive did not offer any support for this interpretation, as its explicitly speaks of 'having' sufficient resources.[129]

As regards Mrs. Chen's right to rely on Catherine's right, Tizzano did find a derivative right for Mrs Chen along the *Baumbast* lines, repeating the ECJ's recognition that 'where children have the right to reside in a host Member State, EU law entitles the parent who is the primary carer of those children […] to reside with them in order to facilitate the exercise of that right.'[130] Tizzano added that a denial of that right would contravene the principle of respect for the unity of family life as protected by Article 8 of the European Convention on Human Rights.[131]

Finally, the Advocate General also persuasively dismissed the UK government's abuse argument was persuasively dismissed by the Advocate General as well. An abuse of law requires an underlying combination of objective circumstances which indicate that despite formal observance of EU law, the person who invokes the relevant provision of EU law betrays their spirit and scope by relying on them.[132] Mrs Chen took legitimate advantage of the citizenship rules by seeking an objective which EU citizenship upholds, namely a child's right of residence.[133] The UK government's argument would ultimately entail that the objection of abuse could be raised in virtually all cases of *intentional acquisition of nationality*, which would subsequently lead to the conclusion that the enjoyment of EU citizenship rights would be dependent on the condition that nationality was acquired *involuntarily*.[134] In itself, this conclusion would manifestly violate the principle that the recognition of the nationality of another Member State may not be subject to additional conditions.[135]

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[128] Ibid. paras. 65–67.

[129] Ibid. paras. 68–70.

[130] Ibid. para. 91, referring to *Baumbast*, C-413/99, EU:C:2002:493, para. 75.

[131] Ibid. para. 94.

[132] Ibid. para. 114.

[133] Ibid. para. 122.

[134] Ibid. paras. 124–27.

[135] Ibid. para. 128.

F. The Judgment of the Court

On 19 October 2004, more than four years after Catherine's birth and 2.5 years after Michael Shrimpton's reference, the ECJ spoke. In a relatively short judgment, the Court followed the AG on all points. Like AG Tizzano, the ECJ rejected the UK and Irish governments' assertion that the matter was purely internal to UK law, referring to *Garcia Avello* to conclude that Catherine's Irish nationality established a sufficient link with EU law.[136] Moreover, the Court dismissed Catherine's youth as irrelevant: it established that the capacity of a person to be the holder of rights cannot be made conditional upon the attainment of the age prescribed to acquire the legal capacity to *exercise* those rights personally.[137]

The Court then dismissed De Mello's reliance on Directive 73/148 as the reception of services can indeed not serve as a basis for a permanent right of residence. The Court specifically referred to Article 4(2) of the Directive which explicitly restricts the application of the Directive in this regard.[138]

However, again closely following the AG's reasoning, the Court found that Catherine could rely on her fundamental status as a citizen of the European Union. The conditions for a right of residence on the basis of this status as laid down in Article 1(1) of Directive 90/364 were, so the Court reasoned, undisputedly met,[139] as Catherine had both health insurance and sufficient resources, provided by her mother, for her not to become a burden on the social assistance system of the United Kingdom.[140] For the purposes of Catherine's right of residence, lastly, the Court dismissed the UK government's reliance on the doctrine of abuse. The Court briefly stated that it is for the Member States to lay down the conditions for the acquisition of their nationalities and that other Member States may not impose additional conditions for their recognition.[141]

Having established Catherine's right of residence, the ECJ quickly dissolved De Mello's dependency argument along the lines of the Advocate General, repeating that 'dependency' for the purpose of the Directive 90/364 must be characterised as the situation in which a family member is dependent on the material support of another family member.[142] The Court did,

[136] *Zhu and Chen*, C-200/02, EU:C:2004:639, para. 19.

[137] Ibid. para. 20.

[138] Ibid. para. 23.

[139] As would be the conditions based on Directive 2004/38.

[140] *Zhu and Chen*, C-200/02, EU:C:2004:639, para. 28.

[141] Ibid. paras. 34–39.

[142] Ibid. paras. 43–44.

however, grant Mrs Chen a derivative right of residence based on the *Baumbast* reasoning. According to the Court, the enjoyment of a young child's right of residence necessitates the child's entitlement to be accompanied by his or her primary carer.[143]

Leaving no discretion for the IAA to decide the case, the *Chen* case was effectively ended by the ECJ's ruling.

V. Conclusion

The story retold in this chapter had two winners. First, it is the Chinese family and their Irish baby, who managed to escape the humiliating and abusive effects of Chinese one-child policy law. Secondly, it is the European Union: EU citizenship law became more convincing and coherent as a result.

The same story also boasts two losers. The first, mostly symbolic, is the idea of having a common-sense debate about immigration on the basis of facts: the people – the Irish people in this particular case, but they are far from uniquely prejudiced in this respect – do not want to. Immigration policy is about tilting at windmills with Quixotic determination, rather than resolving outstanding issues. To say that the Irish made fools of themselves would be incorrect; the fact that the nation was misled by the unscrupulous media that deployed all the wrong arguments[144] in its pretense of a debate leading to the referendum to change the national law does not mean too much – this is how democracies work, after all.[145] The second loser is the idea of adhering to the rule of law in the United Kingdom: the case led to the current (informal) practice established in the United Kingdom, which requires the lowest immigration courts to abstain from complying with EU law in making references to the Court of Justice (ECJ) under Article 267 TFEU.[146] As a result, we can expect numerous claimants to have been barred from receiving justice in the United Kingdom, left with no access to the ECJ, the only court empowered to clarify the meaning of EU law. Without Adjudicator Shrimpton's determination (and profound irritation), Mrs. Chen could also have been denied justice by the British system.

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[143] Ibid. para. 45.

[144] This can be checked against Ali Almossawi's comic book: A. Almossawi (w) and A. Giraldo (i), *An Illustrated Book of Bad Arguments*, 2nd ed (The Experiment 2013).

[145] J. Mueller, 'Democracy and Ralph's Pretty Good Grocery: Elections, Equality, and the Minimal Human Being', 36 *American Journal of Political Science*, 1992, 983

[146] Interview with Adrian Berry, 3 March 2014.

Finally, the story confirms two well-known facts about lawyers. First, that lawyers take whatever side they are paid to argue for, their previous record notwithstanding: Sir Richard Plender, the council for the Crown, *de facto* argued against a crucial principle of EU law, which was partly of his own making, as established in *Singh*.[147] This truth can be referred to as a 'well-known' truth. Second – and this is probably less well known or at least a less popular truth – not many academic lawyers, most regrettably, care about the facts of the cases they comment on. The *Chen* case is one of the most popular; it elicited a true avalanche of notes.[148] Yet virtually none of those notes reported the facts correctly or in full. We are not arguing that you would have to speak with the Adjudicator, Michael Shrimpton or Ramby De Mello and Adrian Berry, the Chen family's representatives in Luxembourg, to write a good case note on *Chen*; not at all, as long as other sources of getting to the facts are available. Nonetheless, the facts are important – and it is worth taking the time to remind oneself of this simple fact

[147] *Singh*, C-370/90, EU:C:1992:296.

[148] C. Barnard, 'Of Students and Babies' (2005) 64 *Cambridge Law Journal* 560; M. Gautier, 'Annotation of Case C-200/02, *Zhu and Chen*' (2003) (4) *Revue des affaires européennes* 673; E. Bergamini, 'Il difficile equilibrio fra riconoscimento del diritto alla libera circolazione, rispetto della vita familiare e abuso del diritto' (2006) *Il diritto dell'Unione Europea* 347; J.-Y. Carlier in (2005) 42 *Common Market Law Review* 1121; B. Hofstötter, 'A Cascade of Rights, or Who Shall Care for Little Catherine? Some Reflections on the *Chen* Case' (2005) 30 *European Law Review* 548; U. Hühn, 'Unionsbürger aus dem Reich der Mitte' (2005) *European Law Reporter* 12; D.H. King, '*Chen v Secretary of State*: Expanding the Residency Rights of Non-Nationals in the European Community' (2007) 27 *Loyola of Los Angeles International and Comparative Law Review* 291; B. Kotschy, 'Citoyenneté. Arrêt "*Bébé Chen*"' (2004) (3) *Revue du droit de l'Union européenne* 589; B. Kunoy, 'A Union of National Citizens: The Origins of the Court's Lack of Avant-Gardisme in the *Chen* Case' (2006) 43 *Common Market Law Review* 179; M. Luby, 'La citoyenneté européenne: Quand les mots ont enfin un sens!' (2005) 94 *Petites affiches. La Loi / Le Quotidien juridique* 8; P. Robert, 'Annotation of Case C-200/02 *Zhu and Chen* ' (2004) *Revue du droit des étrangers* 645; G. Perin, 'In margine alla sentenza *Chen*: il diritto di circolazione dei familiari di cittadini comunitari' (2005) *Diritto Immigrazione e Cittadinanza* 89; A. Tryfonidou, 'C-200/02, *Kunqian Catherine Zhu and Man Lavette Chen v Secretary of State for the Home Department*: Further Cracks in the "Great Wall" of the European Union?' (2005) 11 *European Public Law* 527; H. Verschueren, 'Gezinshereniging met EU-burgers door derdelandsonderdanen. Twee opmerkelijke arresten van het Europese Hof van Justitie in de zaken *Akrich* en *Zhu en Chen*' (2005) *Tijdschrift voor vreemdelingenrecht* 113; and K. Vanvoorden, 'Annotation of Case C-200/02 *Zhu and Chen*' (2005) 12 *Columbia Journal of European Law* 305.

constantly.[149] Facts make the case and checking the facts makes all the sense in the world. This simple truth applies as much to the academic lawyers as it does to the ECJ, we might add.[150]

VI. Postscript[151]

The *Chen* case offers a striking illustration of how clever use of the law contributes to not only a better future for a young baby and her family, but also the further development of the law itself (the two 'winners' of this case). The moral virtues of the Court's judgment are thus crystal clear. What does this case – and its background story – tell us about the autonomy and legality of EU law? First of all, it gives us a remarkable insight into how 'pluralism through its denial' functions at the level of the individual case. The autonomous, 'retained' power of the Republic of Ireland to decide who its nationals are was a *conditio sine qua non* for the administration of justice in this case. This is only in combination, however, with the autonomous status of EU citizenship as a corollary of the citizenships of the Member States.[152]

Further, the substantive autonomy of EU law also prevented Ireland and the UK from questioning the fact that Catherine – from the very moment she was born – fulfilled all the conditions of Directive 90/364, including the 'having' of sufficient resources in order not to become an unreasonable burden on the UK's public finances. As the Court duly noted, nothing in the Directive required the citizen *herself* to possess such resources.[153] A logical application of textual and purposive interpretation, one might say. However, it should not be forgotten that no method of interpretation – contrary to some textualists' views[154] – is value-neutral.[155] In its interpretation of applicable EU law the Court, no doubt, took into account the factual situation

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[149] See, also, M. Olivas and D. Kochenov, 'Case C-34/09 *Ruiz Zambrano*: A Respectful Rejoinder', *Public Law and Legal Theory Series* Paper 2012-W-1 (University of Houston).

[150] See, on the facts in *McCarthy*, C-434/09, EU:C:2011:277 (mis)reported by the ECJ, N. Nic Shuibhne, '(Some of) the Kids Are All Right: Comment on *McCarthy and Dereci*' (2012) 49 *Common Market Law Review* 349.

[151] This brief postscript was added to the chapter for the purpose of this dissertation. It is not part of the original publication in F. Nicola and B. Davies (eds.), *EU Law Stories* (Cambridge University Press 2017).

[152] Art. 20 TFEU.

[153] *Zhu and Chen*, C-200/02, EU:C:2004:639, paras. 30–33.

[154] For the archetypical argument of the value-neutrality of textualism and originalism, see A. Scalia and B.A. Garner, *Reading Law: The Interpretation of Legal Texts* (Thomson/West 2012).

[155] See generally, R.H. Fallon, 'Three Symmetries between Textualist and Purposivist Theories of Statutory Interpretation – and the Irreducible Roles of Values and Judgment within Both' (2014) 99 *Cornell Law Review* 685.

of Mrs Chen and her daughter (which may point at the salience of 'common sentiment' as a source of moral content) as well as the constitutional integrity of EU citizenship law (referencing the 'constitutional identity' of EU citizenship). Finally, as regards legality, it is clear what the Court did *not* take into account: the personal motives of Mrs Chen. While the doctrine of abuse of right surely exists in the abstract, the *Chen* case shows wonderfully how it can hardly be applied in practice, for the law is unconcerned with the reasons why its subjects comply with its prescriptions.[156] The profound relevance of Kantian legality precisely entails a morally justified outcome in this particular case.

Autonomy, pluralism (through its denial) and moral reasoning are thus focal points in the story and judgment of *Chen*. However, the *Chen* case has one more hero in the person of Adjudicator Michael Shrimpton: the radical Eurosceptic who turned into a true 'EU legal official' by applying EU law and referring the case to the ECJ at the earliest possible stage. His spectacular role in this case shows that the legality of EU law is not necessarily ensured only by the ECJ and the national judges who morally endorse the project of European integration. If there is one person who proves a key point of Chapter 3 – that there is no reason why national judges would have to believe in the moral correctness of EU law in order to bring the EU legal system to life[157] – it is the remarkable (now ex-)barrister and author of *Spyhunter*.[158]

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[156] *Zhu and Chen*, C-200/02, EU:C:2004:639, para. 36.

[157] 'Legality and Autonomy of EU Law: You'd Better Believe It', Chapter 3, section VI.

[158] On 20 September 2018, Michael Shrimpton was disbarred following two charges brought by the Bar Standards Board in relation to his conviction for communicating false information about a bomb being present in the London area, as well as an earlier conviction of an offence contrary to the Protection of Children Act 1978. See 'Barrister Michael Shrimpton ordered to be disbarred following criminal convictions' (20 September 2018), at https://www.barstandardsboard.org.uk/media-centre/press-releases-and-news/barrister-michael-shrimpton-ordered-to-be-disbarred-following-criminal-convictions/.