Loyola of Los Angeles International and Comparative Law Review

Volume 29 | Number 2 Article 3

3-1-2007

Chen v. Secretary of State: Expanding the Residency Rights of Non-Nationals in the European Community

David H. King

Chen v. Secretary of State: Expanding the Residency Rights of Non-Nationals in the European Community

I. INTRODUCTION

The recent immigration debates in the United States have shed light on a variety of methods used by immigrants to reach the U.S. and gain its benefits.[1] One such method is the rise of so-called "birth tourism," that is, wealthy people flying to the U.S. so that their children born here may become citizens.[2] Holding onto the promise of the U.S. Constitution's principle of *jus soli*—that "[a]ll persons born or naturalized" on U.S. soil become citizens[3]—each year thousands of foreign pregnant women give birth to new U.S. citizens after traveling to the United States.[4]

However, birth tourism is not only a U.S. phenomenon.[5] In fact, the European Court of Justice recently decided a

---

1. *See, e.g.*, Anna Gorman, *The Great Divide of Citizenship*, L.A. TIMES, May 6, 2006, at A1, A25; Peter Nicholas, *Gov. Says Borders Are Vulnerable*, L.A. TIMES, May 6, 2006, at B3.

2. Holly Yeager, *US Conservatives Turn Screw on Immigration*, FIN. TIMES (U.K.), Dec. 15, 2005, at 12; *Special Report: Born in The USA* (KNBC Los Angeles television broadcast May 26, 2006) (transcript on file with the Loyola of Los Angeles International and Comparative Law Review).

3. U.S. CONST. amend. XIV, § 1. Although the drafters of the Fourteenth Amendment only envisioned extending citizenship to the newly freed slaves, the Supreme Court later interpreted the amendment as granting citizenship to all children born to immigrants. United States v. Wong Kim Ark, 169 U.S. 649, 703 (1898); *see* RUTH RUBIO-MARIN, IMMIGRATION AS A DEMOCRATIC CHALLENGE 178 (2000); *see also infra* note 21 and accompanying text.

4. *See* Yeager, *supra* note 2 (estimating that as many as 380,000 babies are born to illegal immigrants in the U.S. each year).

5. For example, Ireland has also experienced "birth tourism." In 2001, a Dublin Hospital reported one in five births were to non-nationals. *Unique Attitude to Irish Citizens: Nuala Haughey Takes a Look at This Country's Unique Citizenship Laws*, IRISH TIMES, Feb. 21, 2002, Home News section, at 6 [hereinafter *Unique Citizenship Laws*]. In the same year, 2,474 asylum-seekers were granted residency in Ireland because they were parents of Irish-born children, compared to just 909 asylum-seekers granted residency in 2000 (the year Catherine Chen was born). *Id.*

controversial case regarding birth tourism in Northern Ireland—*Zhu and Chen v. Secretary of State for the Home Department*.[6] The case centered on the plight of a Chinese couple who avoided China's restrictive "one-child policy" by planning that their second child be born in Northern Ireland.[7] The child, Kunqian Catherine Zhu ("Catherine"), was born in Belfast[8] and automatically became an Irish citizen because of Irish law at the time.[9] Soon thereafter, the mother and newborn daughter relocated to Cardiff, Wales in the United Kingdom.[10] However, the UK Secretary of State refused to grant Catherine and her mother a long-term residence permit.[11] The family appealed the decision to the Immigration Appellate Authority, which thereafter sought advice from the Court of Justice of the European Communities ("ECJ").[12]

In its decision, the ECJ pragmatically decided that not only did Catherine have a right to permanently reside in the UK, but her mother did as well.[13] The ECJ's decision rested on its interpretation of several European Community ("EC") principles,

---

6. Case C-200/02, Zhu v. Sec'y of State for the Home Dep't, 2005 E.C.R. I-9923 (*Chen*). It is noteworthy that the judgment was rendered by the ECJ sitting as a full court, proving the "exceptional importance" of this case. Kristien Vanvoorden, *Case-200/02, Zhu and Chen v. Secretary of State for the Home Department*, 12 COLUM. J. EUR. L. 305, 305 (2005).

7. *Id.* at 306; Catherine Cosgrave, Immigrant Council of Ireland, Freedom of Movement and Residence in the European Union: The Chen Case, http://www.immigrantcouncil.ie/chen.pdf (last visited Nov. 15, 2006).

8. *Chen*, *supra* note 6, paras. 2, 8. Belfast is the capital of Northern Ireland, and part of the United Kingdom. Paul Gulbenkian, United Kingdom, *in* ENTRY AND RESIDENCE IN EUROPE: BUSINESS GUIDE TO IMMIGRATION RULES 3 (Paul Gulbenkian, ed.) (1997). A person born in Northern Ireland can also be considered an Irish citizen from birth. David Cantrell, Ireland, *in* ENTRY AND RESIDENCE IN EUROPE: BUSINESS GUIDE TO IMMIGRATION RULES 172 (Paul Gulbenkian, ed.) (1997).

9. *See* The Republic of Ireland Nationality and Citizenship Act, § 6(1) (1986). *See generally* Cantrell, *supra* note 8, at 170-71; Michael Robert W. Houston, Note, *Birthright Citizenship in the United Kingdom and the United States: A Comparative Analysis of the Common Law Basis for Granting Citizenship to the Children Born of Illegal Immigrants*, 33 VAND. J. TRANSNAT'L L. 693 (2000); Claire Breen, *Refugee Law in Ireland: Disregarding the Rights of the Child-Citizen, Discriminating Against the Rights of the Child*, 15 INT'L J. REFUGEE L. 750 (2003); *Law Report: Right of Residence After Irish Birth*, TIMES (London), Oct. 21, 2004, at 41. The law has since changed, in part because of the controversy surrounding this case. Carl O'Brien, *Residency for Nearly 17,000 Under New Parent Law*, IRISH TIMES, Dec. 27, 2005, Ireland section, at 4; Vanvoorden, *supra* note 6, at 306 n.6.

10. *Chen*, *supra* note 6, para. 8. The case only addresses the issues connected with the mother and daughter—the father is referenced only peripherally.

11. *Id.* para. 14.

12. *See Chen*, *supra* note 6.

13. *Id.* para. 46

specifically the Freedom of Movement and Residence, and the Right to Enjoyment of Family.[14] The ECJ's interpretation of these principles was unprecedented.

This Note will evaluate the *Chen* decision and its significant expansion of these EC principles. While the outcome of *Chen* is equitable, and applauded by some,[15] the legal standards it creates could prove problematic, in particular for EC Member States.[16] Further, it is apparent the ECJ did not decide *Chen* based on existing EC precedent, but rather, engaged in judicial activism.[17] Part II of this Note gives the factual background of the case. Part III analyzes the ECJ's decision and explains how it is a noteworthy expansion of Community law. Part IV discusses the effects from the ruling, and Part V concludes.

II. BACKGROUND

Man Chen and her husband are both Chinese nationals.[18] The Chens decided to have a second child, but due to the birth control policy in China, Mr. and Mrs. Chen knew that having another child would be problematic and possibly illegal.[19] Thus, in 2000, on the advice of their lawyers,[20] Mr. and Mrs. Chen arranged to have the child born in Northern Ireland, since the Irish constitution granted

14. *Id.* para. 19.

15. *See Not so much the 'Right to Family Life' but the 'Right to Have a Family,'* NCADC NEWSZINE, Oct. 2004, http://www.ncadc.org.uk/archives/filed%20 newszines/newszine51/chen.html (the UK's National Coalition of Anti-Deportation Campaigns applauded the ruling).

16. *See generally* COURTS CROSSING BORDERS: BLURRING THE LINES OF SOVEREIGNTY (Mary L. Volcansek & John F. Stack eds., 2005).

17. Bernhard Hofstotter, *A Cascade of Rights, or Who Shall Care for Little Catherine? Some Reflections on the Chen Case*, 30 EUR. L. REV. 548, 551 (2005).

18. *Chen*, *supra* note 6, para. 7.

19. *Id.* Under Chinese law, each family may have only one child unless they satisfy the special criteria for a second child. Population and Family Planning Law (promulgated by the Standing Comm. Nat'l People's Cong., Dec. 29, 2001, effective Sept. 1, 2002), art. 18, *available at* http://english.gov.cn/laws/2005-10/11/content_75954.htm (P.R.C.). *See also* Nicole M. Skalla, Note, *China's One-Child Policy: Illegal Children and the Family Planning Law*, 30 BROOK. J. INT'L L. 329, 334 (2004). Despite its national codification, the one-child policy is enforced *ad hoc* throughout China. *Id.* at 337-38. Women who become pregnant a second time face the imposition of fines, the disqualification of benefits, the deprivation of farmland, the destruction of homes, and/or "psychological mauling, sleep deprivation, arrest and grueling mistreatment." *Id.* at 338-40.

20. Hofstotter, *supra* note 17, at 549.

jus soli citizenship[21] — i.e., anyone born on the island at the time would acquire Irish nationality.[22]

It was the intent of the Chens to then take advantage of the child's EC nationality as a way to establish themselves in the UK.[23] Soon after Catherine was born in Belfast, Mrs. Chen and her newborn daughter moved to Cardiff, Wales.[24] However, the family's plans were interrupted when the UK's Secretary of State denied their application for long-term residence.[25] In the main, the UK officials cited several directives as their rationale for denying the permit.[26] These directives aim to prevent "nationals of other Member States [from] becoming a financial burden to the host Member State."[27]

Because their application for residency had been denied, Mrs. Chen and her daughter suddenly found themselves in a difficult situation. Mrs. Chen was neither an Irish nor a UK citizen; therefore, she could not legally stay in the UK without long-term residency status.[28] Moreover, since baby Catherine was not a

---

21. The principle of *jus soli* refers to "birth on the soil of the sovereign's territory." Douglas Klusmeyer, *Introduction* to FROM MIGRANTS TO CITIZENS: MEMBERSHIP IN A CHANGING WORLD 1, 5 (T. Alexander Aleinikoff & Douglas Klusmeyer eds., 2000). Also referred to as "birthright citizenship," the principle has recently fallen into disfavor among many nation-states. *See* John D. Snethen, Comment, *The Evolution of Sovereignty and Citizenship in Western Europe: Implications for Migration and Globalization*, 8 IND. J. GLOBAL LEGAL STUD. 223, 244 (2000); Miriam Feldblum, *Managing Membership: New Trends in Citizenship and Nationality Policy, in* FROM MIGRANTS TO CITIZENS: MEMBERSHIP IN A CHANGING WORLD, *supra*, at 475, 485-86 (noting restrictions on birthright citizenship in Australia, Canada, and France).

22. *See* The Republic of Ireland Nationality and Citizenship Act, § 6(1) (1986). In 2002, Ireland was the only country in Europe that granted citizenship by birth. In 2001, a Dublin Hospital reported one in five births were to non-nationals. *See Unique Citizenship Laws*, *supra* note 5, at 6; *see also* Anne Lucey, *Group Seeks Change to Citizenship Law*, IRISH TIMES, Nov. 3, 2000, Home News section, at 8 ("Ireland is the only EU state which confers automatic citizenship on all children born on the island, according to Ms. Ni Chonaill. 'This puts Ireland in a uniquely vulnerable situation.'").

23. *Chen*, *supra* note 6, at para. 11; Vanvoorden, *supra* note 6, at 306.

24. Press Release No. 84/04, Judgment of the Court of Justice in Case C-200/02 (Oct. 19, 2004) [hereinafter Press Release]; Vanvoorden, *supra* note 6, at 307.

25. Hofstotter, *supra* note 17, at 550.

26. *Id.* (citing Council Directive 73/148, 1973 O.J. (L 172) 14 (EC) and Council Directive 90/364, 1990 O.J. (L 180) 26 (EC)). Directives give binding guidelines for national legislation, and are binding upon the Member States. Ted Badoux, EC Nationals, *in* ENTRY AND RESIDENCE IN EUROPE: BUSINESS GUIDE TO IMMIGRATION RULES 26 (Paul Gulbenkian, ed.) (1997).

27. *Id.*

28. *Chen*, *supra* note 6, para. 12. The status of "resident" in Europe also entails access to health care, education, social services, welfare, and, in some member states, local voting rights. Feldblum, *supra* note 21, at 484.

Chinese citizen, Chinese law only allowed Catherine to stay in China "for not more than 30 days at a time and then only with permission from the [Chinese] government."[29] Thus, Mrs. Chen could not permanently return to China with Catherine. Faced with these difficult circumstances, the Chens appealed the Secretary of State's denial of their application to the Immigration Appellate Authority, which thereafter sought advice from the ECJ.[30]

III. ANALYSIS

The ECJ pragmatically decided that not only did Catherine have a right to reside in the UK, but her mother did as well.[31] The ECJ's decision is noteworthy in two particular ways: first, because it applies free movement Community law to Catherine's situation, and second, because it grants a "derivative" right of residency to Mrs. Chen.[32] Both of these two groundbreaking developments will be analyzed in turn.

A. Community Law Applied to Catherine: Free Movement and Residence

A major premise of the *Chen* case was the principle of free movement within the European Community.[33] In fact, this fundamental EC principle gave the Court its jurisdiction in the

29. *Chen*, *supra* note 6, para. 13.

30. The ECJ "plays an important part in the development of Community law. . . . In the field of immigration law its jurisprudence, which is also a binding source of supra-national law for the Member States, has had a major impact." Badoux, *supra* note 26, at 26. For more information regarding the ECJ, *see generally* L. NEVILLE BROWN & TOM KENNEDY, THE COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES (5th ed. 2000); RENAUD DEHOUSSE, THE EUROPEAN COURT OF JUSTICE: THE POLITICS OF JUDICIAL INTEGRATION (1998). "If a national court is in any doubt about the interpretation or validity of an EU law it may, and sometimes must, ask the Court of Justice for advice." Europa: European Union Institutions and Other Bodies: The Court of Justice, http://europa.eu/institutions/inst/justice/index_en.htm (last visited Feb. 24, 2007). This procedure is crucial to achieve the purpose of the EC, since it ensures Community law is applied uniformly.

31. *See Chen*, *supra* note 6, para. 46.

32. Hofstotter, *supra* note 17, at 557.

33. The free movement of workers is guaranteed by Article 39 of the Treaty Establishing the European Community. *See* A.P. van der Mei, *Freedom of Movement for Indigents: A Comparative Analysis of American Constitutional Law and European Community Law*, 19 ARIZ. J. INT'L & COMP. LAW 803, 830-31 (2002); *see also* ELSPETH GUILD, IMMIGRATION LAW IN THE EUROPEAN COMMUNITY 8 (2001) (describing the history of "free movement" in Europe).

case.[34] In this section, this Note will discuss the origin of the principle of free movement, the ECJ's recent expansion of the principle in *Chen* and other cases, and the criticism of that expansion.

1. The Origin of Freedom of Movement and Residence

Although the concept of free movement between European States has always been associated with European citizenship, the Treaty to the European Community of 1957 ("EC Treaty") formally articulated the concept.[35] In addition to the right of free movement among Member States, the EC Treaty also includes the right to reside within a Member State of which a person is not a national. Although the EC Treaty is a tremendous step toward European integration, the treaty itself is criticized for not adequately defining the rights (such as free movement) that it bestows.[36]

Originally, the concept of free movement was closely associated with economic activity.[37] Thus, the EC Treaty was originally interpreted as allowing free movement for employed and self-employed people.[38] This was based on the presumption that such persons would not be a financial burden on the Member State, and that they could provide for themselves and their family members. Indeed, the traditional purpose of the principle of free movement was to ensure the Community's objective of a fully-integrated free market economy.[39] Fundamental rights, such as free

34. Vanvoorden, *supra* note 6, at 307.

35. *See* Treaty Establishing the European Economic Community art. 3, Mar. 25, 1957, 298 U.N.T.S. 16 (known as the EEC Treaty); Treaty on European Union, Feb. 7, 1992, 1992 O.J. (C 191) 1 (known as the Maastricht Treaty). Note that the Maastricht Treaty, in its incorporation of the EEC Treaty, changed the name of the EEC Treaty to the European Community ("EC Treaty"). *See* T.C. HARTLEY, THE FOUNDATIONS OF EUROPEAN COMMUNITY LAW: AN INTRODUCTION TO THE CONSTITUTIONAL AND ADMINISTRATIVE LAW OF THE EUROPEAN COMMUNITY 7 (5th ed. 2003); Sara L. Uberman, Note, *The Brussels II Convention: A Tool Necessary to Enforce Individual Rights Relating to Matrimonial Matters within the European Union*, 23 SUFFOLK TRANSNAT'L L. REV. 157, 168 (1999).

36. *Id.*

37. van der Mei, *supra* note 33, at 829-30.

38. *Id.* at 830; *see also* GUILD, *supra* note 33, at 7.

39. Heather Hunt, Note, *Diversity and the European Union: Grant v. SWT, the Treaty of Amsterdam, and the Free Movement of Persons*, 27 DENV. J. INT'L L. & POL'Y 633, 652 (1999).

movement, have been described as "capitalist principles that promote free trade and movement across national borders."[40]

In fact, the ECJ has confirmed the economic objective of the right to free movement. In *Levin v. Staatssecretaris van Justitie*, the Court noted in particular the Community's goal of the promotion of a "harmonious development of economic activities" and an increase in the standard of living.[41] Based on this economic objective, the Court held that Mrs. Levin, as a part-time worker, had the right to freely move and work in any Member State. According to the Court, the determination as to whether an individual is entitled to the right of free movement stems from "whether he or she is an active participant in the economy."[42]

It is important to note that, although the free movement principle is established in EC treaties, it was never intended to be absolute. Member States have had the ability to impose limitations on the right of Community citizens "to enter and take up work within their territories."[43] In fact, "Member States may base these limitations on public policy, public security, and/or public health. In addition, states are free 'to determine the requirements of public policy in light of their national needs,'" as long as those requirements comply with EC purposes.[44]

2. The Expansion of Freedom of Movement

In the early 1970s, however, the ECJ began to interpret the principles of free movement of workers broadly in order to achieve a general right of residence for all European citizens.[45] This general right of residence would be one "no longer linked to, or conditional on, the pursuit of economic activities."[46] Indeed,

---

40. *Id.*
41. *Id.* at 653.
42. *Id.*
43. *Id.* at 652.
44. *Id.*
45. van der Mei, *supra* note 33, at 830. The expanding interpretation of the free movement doctrine met high-ranking criticism. In 1987, Prime Minister Margaret Thatcher complained that "[W]e joined Europe to have free movement of goods . . . not to have free movement of terrorists, criminals . . . and illegal immigrants." George Katrougalos, *The Rights of Foreigners and Immigrants in Europe: Recent Trends*, 5 WEB J. CURRENT LEGAL ISSUES (1995), http://webjcli.ncl.ac.uk/articles5/katart5.html.
46. van der Mei, *supra* note 33, at 840; Malcolm Anderson et al., *European Citizenship and Cooperation in Justice and Home Affairs*, *in* MAASTRICHT AND BEYOND: BUILDING THE EUROPEAN UNION 107 (Andrew Duff et al. eds., 1994) (noting the ECJ's "expansive interpretation of freedom of movement").

Member States' nationals would, as European citizens, enjoy the general right of residence contemplated by the EC.[47]

For example, the ECJ expanded the general right of free movement to encompass the family members of workers.[48] The term "family members" eventually came to include the workers' spouse, their children and grandchildren under the age of twenty-one years or financially dependent, and the dependent parents and grandparents.[49] These family members were allowed to move and reside along with the worker under the assumption that the worker, and not the host state, would provide for the family member. However, over the years, the ECJ strengthened the legal status of family members of workers, so that they no longer had to depend on the worker.[50]

Similarly, two recent ECJ cases demonstrate the EC's desire for a general right of residence. First, in *Mary Carpenter v. Secretary of State of the Home Department*, the ECJ was faced with the UK's imminent deportation of Mrs. Carpenter, a third-country national.[51] In *Carpenter*, the Court created a necessary link with Community law to help avoid the deportation: the Court "contented itself with the fact that Mr. Carpenter, although resident in the United Kingdom, provided services in other Member States."[52] Thus, the Court granted Mrs. Carpenter a right of residence based on her husband's trade and established the ECJ's preliminary step towards expanding the right of residence.

The ECJ went even further in the recent *Garcia Avello* decision.[53] There, the Court *did not require* the movement-based argument with regard to the Community law link that it had

---

47. van der Mei, *supra* note 33, at 830; *see also* Flora Goudappel & Silvia Romein, *Evolving Legal Personality: The Case of European Union Citizenship*, 11 IUS GENTIUM 1, 15-16 (2005).

48. van der Mei, *supra* note 33, at 830.

49. *Id.* at 836.

50. *Id.*

51. Case C-60/00, Carpenter v. Sec'y of State for the Home Dep't, 2002 E.C.R. I-6279, para. 2. *See generally* Goudappel & Romein, *supra* note 47, at 30 (explaining key facts of *Carpenter*). Throughout this Note, the term "third-country national" is used to reference individuals from non-European Community nations who are attempting to use EC law and a legal relationship with one European Country in order to justify residency in another European Country.

52. Hofstotter, *supra* note 17, at 551.

53. Case C-148/02, Garcia Avello v. Belgian State, 2003 E.C.R. I-11613, para. 45. *See generally,* Goudappel, *supra* note 47, at 27-28 (detailing the background of the *Avello* case).

required in *Carpenter*. Instead, the *Garcia Avello* court ruled that, "in the absence of any cross-border movement, having the nationality of a Member State other than that of the host state's would be sufficient in order to open up the scope of application of Community law."[54] As *Garcia Avello* and *Carpenter* demonstrate, the EC is leaning closer to a general right of residence, one that is no longer dependent on free movement or on its economic purposes.

3. Freedom of Movement in *Chen*

As we have seen, the right of free movement was originally intended only for economic actors and purposes. In recent years, however, the ECJ has gradually expanded the language of the treaties to grant the right to the worker's family members and spouses. In addition, the Court has shunned the movement-based requirement for the Community rights associated with free movement.[55] The result has been the achievement of a general right of residence.

Indeed, *Chen* picks up where *Garcia Avello* left off. Since Belfast is in the UK, young Catherine in *Chen* was born in the host Member State.[56] Thus, Catherine never made use of the right of free movement because she and her mother only traveled from Belfast to Wales.[57] The UK argued to the ECJ that this meant the situation was purely internal, so that the ECJ would not have jurisdiction in the case.[58]

Surprisingly, the ECJ disagreed. In the Court's opinion, the fact that Catherine had never traveled between Member States did *not* make the case a purely internal situation, and the Community had authority in the matter.[59] The Court's decision has led many to believe that the ECJ is more than willing to find jurisdiction in controversial cases.[60] For Community lawyers, however, the ECJ did not provide a legal criteria or foundation for its decision,

---

54. Hofstotter, *supra* note 17, at 552.
55. *Id.* at 551.
56. Vanvoorden, *supra* note 6, at 306.
57. Hofstotter, *supra* note 17, at 549.
58. *Id.* at 552. "The ECJ has consistently maintained that a person cannot invoke Community rights dealing with free movement and residence of persons against a Member State, when the situation is wholly internal to the Member State." Vanvoorden, *supra* note 6, at 311.
59. Hofstotter, *supra* note 17, at 552.
60. *See* Vanvoorden, *supra* note 6, at 311.

leaving the legal area in flux.[61] Rather, European lawyers are left merely with the narrow holding that "a national of a Member State who was born in the host Member State and has not made use of the right of free movement cannot, for that reason alone, be assimilated to a purely internal situation."[62]

Since Catherine's lack of movement between Member States proved problematic for the ECJ, the Court was forced, in a sense, to make an exception for the young girl and her mother. In its decision, the Court emphasized the fact that Catherine had received Irish nationality, while residing in the UK.[63] Thus, in addition to movement between Member States, another sufficient condition is having the nationality of a Member State other than the one you are residing in.[64] For the Court, this was the fact that allowed them to find in the Chens' favor. Indeed, if the facts had been different, if Catherine had been born in the Republic of Ireland (and not in Northern Ireland) and continued to reside there, "reliance on a right of residence flowing from Union citizenship would have been forestalled."[65] While she would have been entitled to reside in Ireland on the basis of her Irish nationality,[66] her mother would not have been able to derive any rights of residence from Catherine's nationality.[67] Under Irish law, Mrs. Chen most assuredly would have been deported.[68]

The *Chen* ruling creates a new standard for attaining Community rights of residence.[69] Under the current EC Treaty,

---

61. Hofstotter, *supra* note 17, at 552.

62. *Chen*, *supra* note 6, para. 19.

63. *Chen*, *supra* note 6, paras. 38-40.

64. Vanvoorden, *supra* note 6, at 312.

65. Hofstotter, *supra* note 17, at 553.

66. *Id.* ("[N]o one may be expelled from the territory of a state of which he or she is a national.").

67. Protocol No. 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms art.3(1), Sept. 16, 1963, Europ. T.S. No. 46.

68. *See* Lobe v. Minister for Justice, Equality and Law Reform, [2003] I.E.S.C. 3 (23rd January, 2003) (S.C.) (Ir.). In *Lobe*, "[t]he [Irish] Supreme Court, by a five-two majority, subsequently upheld the decision of the High Court in deciding that non-national parents of Irish-born children and their non-national siblings were not entitled to live in Ireland by virtue of having an Irish-born child." Breen, *supra* note 9, at 780. *See also* Joined Cases 35 & 36/82, Morson, Jhanjan v. Neth., 1982 E.C.R. 3723. In *Morson*, the ECJ decided that third-country nationals who were parents of "Dutch citizens [were] not entitled to rely on Community law to invoke a right of residence since their claim concerned a wholly internal situation, in light of the fact that the Dutch children had never exercised their right to free movement." Vanvoorden, *supra* note 6, at 313 n.60.

69. Vanvoorden, *supra* note 6, at 312.

crossing the borders of Member States triggers the operation of European Union citizenship and its provisions.[70] Thus, for those in Europe who are residing in a Member State, and have never moved to another Member State, these people are "in a wholly internal situation and are thus excluded from relying on Community provisions."[71] However, *Chen* recognizes that the exercise of the right of free movement is not a prerequisite to the invocation of Community rules on residence. This might mean that such "second class citizens"—those who have not moved from more than one Member State—might soon receive Community benefits. This development would be a first in the EC and would constitute an abandonment of the original purpose of the principle of free movement.

It is believed that cases such as *Garcia Avello* and *Chen* are expansive decisions regarding residency and citizenship that represent the Court's attempt at constitutionalizing Union citizenship.[72] As such, the Court decided that the law should reward the "cross-border active citizen over the Union citizen who by and large has stayed at home."[73] In addition, at least one European scholar suspects the Court is trying to create a legal "loophole," which would "act as a trigger to completely dispose of the 'link with Community law' requirement in future cases."[74] Evidently, the ECJ is willing to accept facts that are "more and more aloof from a movement-based argumentation."[75] The *Chen* decision, and the Court's refusal to view the decision as a UK internal situation, clearly support these theories.

---

70. Anderson et al., *supra* note 46, at 105.

71. Vanvoorden, *supra* note 6, at 313 (referring also to these people as "second class citizens."); *see also* Goudappel & Romein, *supra* note 47, at 33-34.

72. Hofstotter, *supra* note 17, at 551; *see also* Goudappel & Romein, *supra* note 47, at 15-16.

73. Hofstotter, *supra* note 17, at 551. "Indeed the invocation of a meaningful concept of *citizenship* fits uneasily with the classical economic actor centred [sic] view, which looks at the disadvantaged non-moving citizen and reverse discrimination as undesirable and yet unavoidable consequences of the limited scope of application of Community law." *Id.* (emphasis in original).

74. *Id.* at 552.

75. *Id.* at 558.

4. Criticism of the Expansion of the Right of Freedom of Movement in *Chen*

Although the results in cases like *Garcia Avello* and *Chen* are compelling, they set a troubling precedent within the EC. Among other arguments, (1) the expansion of the right of residency necessarily results in a loss of Member State sovereignty, and (2) the ECJ's decisions are not legally supported. Each of these criticisms will be analyzed in turn.

First, the *Chen* decision inherently undermines the sovereignty of the Member States, specifically in their ability to decide their own residency requirements.[76] As previously mentioned, traditionally the States were allowed to restrict the free movement to meet each State's public policies. This sovereign right gradually has been removed by the ECJ,[77] thus laying the groundwork for decisions like *Chen*.

Decisions like *Chen* contradict the desires of Member States, as evidenced in numerous EC documents. In those documents, the States have collectively emphasized their right to take such measures as they consider necessary for the purpose of controlling immigration.[78] But the ECJ has apparently disregarded those explicit qualifications on the part of Member States.

Community law has not only removed the Member States' right to decide who is a resident in their country, but also has arrested their right to decide who can come into their country via citizenship of another state. For example, the ECJ has previously held that "the conditions for the acquisition and loss of nationality are a matter for each Member State and *a Member State cannot restrict the effects* of the grant of the nationality of another Member State."[79] Such decisions are an assault on the traditional notions of national sovereignty.[80]

---

76. *See* GUILD, *supra* note 33, at 8, 13.

77. For example, in 1976, the ECJ held that the freedom of movement was a right "which the national courts must protect and take precedence over any national rule which might conflict with them." GUILD, *supra* note 33, at 8, 14 (citing Case 118/75, Watson & Belmann, 1976 E.C.R. 1185).

78. *See e.g.*, General Declaration on Articles 13 to 19 of the Single European Act, *reprinted in* 25 I.L.M. 504 (1986) ("Nothing in these provisions shall affect the right of Member States to take such measures as they consider necessary for the purpose of controlling immigration from third countries."); A CITIZENS' EUROPE: IN SEARCH OF A NEW ORDER 185 (Allan Rosas & Esko Antola eds., 1995).

79. Press Release, *supra* note 24 (emphasis supplied).

80. *See* A CITIZENS' EUROPE: IN SEARCH OF A NEW ORDER, *supra* note 78, at 185.

Interestingly, the ECJ's decision in *Chen* typifies the current, worldwide trend in regards to national sovereignty. At least one scholar has noted that transnational institutions like the ECJ have challenged the national sovereignty of control and implementation of domestic migration, immigration, and citizenship policy.[81] This transnationalization of migration policy has resulted in the unfortunate displacement of traditional components of national sovereignty.[82] This trend by transnational actors has forced states—like the UK in *Chen*—to fight to maintain their sovereignty in domestic issues. But contrary to some studies in the area,[83] cases like *Chen* suggest that nation-states worldwide are losing this modern-day power struggle.

Another criticism of the *Chen* decision is that the ECJ's legal arguments are questionable. Common complaints regarding the decision argue it is "dogmatically unsatisfactory" and "merely instrumental to the result pursued."[84] As noted above, the ECJ's interpretation of Article 8 of the EC Treaty on free movement was unprecedented, and only tenuously supported by previous ECJ decisions. Thus, critics have come to view *Chen* as an unfortunate milestone of the Court's practice of constructive interpretation of Community principles.[85]

The ECJ's use of constructive interpretation is well known in Europe.[86] In fact, "[t]here is a commonly held opinion that the court 'finds' in the EC Treaty ideas, values, concepts, norms, [and] principles that are totally absent from the explicit words. Here arises the worry about 'invention masquerading as interpretation.'"[87] While some in Europe rationalize this practice,[88]

---

81. Feldblum, *supra* note 21, at 489-90.

82. *Id.* at 490.

83. *E.g., id.* at 492 (noting scholar Christian Joppke's research of Germany, Britain, and the United States which suggests the control of states in areas like citizenship and immigration is "not declining").

84. Hofstotter, *supra* note 17, at 551.

85. Joxerramon Bengoetxea, et al., *Integration and Integrity in the Legal Reasoning of the European Court of Justice*, *in* THE EUROPEAN COURT OF JUSTICE 44-45 (Grainne de Burca & J.H.H. Weiler eds., 2001).

86. *See* BROWN & KENNEDY, *supra* note 30, at 324. Undoubtedly, one of the rationales for this practice is the general vagueness of the Treaties. *Id.* at 325.

87. Bengoetxea, et al., *supra* note 85, at 44-45.

> [T]he Court may be led to disregard the plainest of wording in order to give effect to what it deems the overriding aims and objects of the Treaties. In other words the literal interpretation is displaced by the contextual or teleological approach, although the Court may speak rather in terms of looking to 'the spirit' of the text in question.

the Court's habit of "finding" principles from the plain words of the treaties creates tenuous legal precedents. Thus, criticism of the *Chen* case includes both a concern over Member States' sovereignty, and an ongoing complaint over the interpretational methods used by the ECJ.

B. Derivative Right of Residency for Mrs. Chen

As we have seen, the *Chen* decision was an expansion of the free movement and the right of residency in the EC. In addition, the *Chen* case also dealt with whether Mrs. Chen could benefit from Catherine's right of residence, that is, whether Article 18(1) of the EC Treaty could confer a derivative right of residence on a third-country national.[89] This section will briefly evaluate the ECJ's decision to confer that right, and provide criticisms of the Court's ruling.

1. A Derivative Right of Residence

As a starting point, the ECJ noted that Mrs. Chen was the primary caregiver for Catherine. As such, the Court relied heavily on its 2002 ruling in *Baumbast and R.*[90] In that case, a third-country national had married a European migrant worker, and had several children by that worker.[91] After the parents divorced, the third-country national hoped to rely on her children's right of residence.[92] While the children clearly had the right to finish their respective educations in the host member state,[93] there was no law applicable regarding the third-country national.[94]

Upon these facts, the ECJ found that "[t]he right conferred . . . on the child of a migrant worker to pursue, under the best possible conditions, his education in the host Member State

---

BROWN & KENNEDY, *supra* note 30, at 324.

88. Bengoetxea, et al., *supra* note 85, at 44-45. "All legal interpretation is 'constructive' interpretation . . . . [C]onstructive interpretation has to be highly sensitive to context, and the context of any particular act of legal interpretation is the need to find a way of making sense of a test in the context of a large-scale normative scheme." *Id.*

89. Hofstotter, *supra* note 17, at 553.

90. Case C-413/99, Baumbast v. Sec'y of State for the Home Dep't, 2002 E.C.R. I-7091. *See generally* Goudappel & Romein, *supra* note 47, at 23-27 (explaining facts of the case).

91. Goudappel & Romein, *supra* note 47, at 23.

92. Hofstotter, *supra* note 17, at 553.

93. *Id.* (citing Council Regulation 1612/68, art. 12, 1968 J.O. (L 257) 2 (EC)).

94. *Id.*

necessarily implies that *the child has the right to be accompanied by the person who is his primary carer.*"[95] In its ruling, the Court noted the child's financial and emotional dependence on a primary caregiver, so that a Member State's refusal to permit the parent to stay would in fact frustrate the Community rights of the child.[96] This form of protecting rights is known as an *effet utile* ("useful effect") legal theory.[97]

Before *Chen*, it was unclear how far the *Baumbast and R* decision could extend. In *Baumbast and R*, the right of residence for the primary caregiver flowed from ancillary rights unmistakably contingent on *the movement* of the migrant worker.[98] In *Chen*, however, the question was whether the same right of residence could be derived simply *from Union citizenship.*[99]

The ECJ's grant of the right of residence to Mrs. Chen indicates the primary caregiver argument applies with equal strength in the case of Union citizenship.[100] The interpretation of Article 18(1) as a directly effective right in *Baumbast and R* and thus conferring a tangible legal right on the Union citizen led to the acceptance of derived rights in *Chen.*[101] In fact, this finding is not inhibited by the fact that *Chen* concerns a right derived from the original right of residence.[102] The Union citizenship of the dependent child is sufficient in order to confer a right of residence on the caring third-country parent.[103]

Thus, for the first time, the *Chen* judgment applied the *effet utile* theory to grant a right of residence to the primary caregiver of a *non-economically active citizen.*[104] In so doing, "the ECJ made clear that a right of residence of a third-country national can be linked not only to the right of residence predicated on the conduct of economic activities by a Union citizen, but also from the right of

95. Baumbast, 2002 E.C.R I-7091, para. 73 (emphasis supplied).
96. Hofstotter, *supra* note 17, at 553.
97. Vanvoorden, *supra* note 6, at 318.
98. Hofstotter, *supra* note 17, at 554.
99. *Id.*
100. *Id.*
101. *Id.*
102. "Conferring a right of residence on the primary care[giver] of a Union citizen gives rise to a number of further intricate legal questions. When, for instance, does the right contingent on the child's need for emotional and financial care expire?" *Id.* at 555. Further, does the derived right of residence as a primary caregiver entitle them to equal access to the labor market and other social advantages? *Id.*
103. *Id.*
104. Vanvoorden, *supra* note 6, at 318.

residence based on the mere status of 'Union citizen.'"[105] For the first time, the ECJ thereby "equated the rights of economically active *and non-economically active* Union citizens in the field of free movement and residence."[106]

2. Criticism of the Derivative Right of Residence

One of the frustrations of *Chen* is the ECJ's silence regarding the scope of this derivative right of residence. Based on the Court's decision, it remains unclear whether this derivative right is only available on facts similar to *Chen*, and "to whom such a derivative right can be recognized."[107] In the *Carpenter* case, the ECJ granted a derivative right to the spouse and in *Baumbast and R* and *Chen* such a right was granted to the primary caregiver. But what if the primary caregiver of the Union citizen is simply a legal guardian, or not related to the Union citizen? Or, in the case of *Chen*, what if Catherine's older Chinese-national brother had asked for a right of residence? In other words, can the derivative right of residence be stretched as far as to grant a right of residence to a guardian or sibling?[108] The ECJ's decision in *Chen* is frustratingly vague as to these preceding issues. It will be up to future cases to determine the scope of this newfound right.

Critics have also complained that the *Chen* decision rewards people like Mrs. Chen who have, in effect, found a legal loophole.[109] This is argued to be particularly unjust because it rewards those in society who have both discretionary finances and legal representation.[110] At the very least, the *Chen* decision highlights problems with the current residence system in Europe and suggests that legal loopholes can be found.

IV. EFFECTS OF THE DECISION

The *Chen* case had a profound effect in Ireland, shedding light on a legal system many Irish citizens felt needed to be updated.[111] As mentioned previously, at the time the events of the case unfolded, the Irish constitution provided for automatic Irish

105. *Id.*
106. *Id.* (emphasis supplied).
107. *Id.*
108. *Id.*
109. *See* Hofstotter, *supra* note 17, at 558.
110. *Id.*
111. Lucey, supra note 22.

nationality by reason of being born on the island of Ireland.[112] This provision, although intended to enable Northern Irish to acquire Irish citizenship, opened the door to third-country nationals benefiting from Irish—and therefore Union—citizenship.[113] This "loophole," eventually magnified in the *Chen* case, "sparked off a fierce political debate in Ireland leading to a referendum on June 11, 2004."[114]

As a result of the referendum, the Irish Nationality and Citizenship Act 2004 introduced a new provision regarding the granting of Irish citizenship to non-nationals.[115] The Act requires "lawful residence of three years within the four years immediately preceding the child's birth for third-country national parents, before a child born to them can acquire Irish nationality." The Act entered into force on January 1, 2005.[116]

V. CONCLUSION

In conclusion, *Chen* typifies a recent trend of the Community undermining the sovereignty of the Member States. It is a decision that further expanded the principle of free movement, and also granted a derivative right of residence—both unprecedented decisions by the Court. It is a decision that will undoubtedly impact both immigrants and legal residents in the Member States for years to come. Unfortunately, the decisions of such transnational institutions like the ECJ are in direct opposition to what many citizens in Europe desire for their nation's residency and citizenship laws.[117]

*David H. King**

112. Hofstotter, *supra* note 17, at 557; *see also Unique Citizenship Laws*, *supra* note 5.
113. Hofstotter, *supra* note 17, at 557.
114. *Id.*
115. *Id.*; *see also* O'Brien, *supra* note 9.
116. Hofstotter, *supra* note 17, at 557.
117. *See id.* at 548.

* J.D. Candidate, May 2007, Loyola Law School, Los Angeles. Many thanks to editor Adiv Zelony and the 2006-2007 staff of the Loyola of L.A. International & Comparative Law Review. This Note is dedicated to my mother, Sharon King, and to the memory of my grandmother, June Ruth Oppelland Lange.