IN THE UPPER TRIBUNAL **Appeal No.** CF/176/2021
ADMINISTRATIVE APPEALS CHAMBER

On appeal from First-tier Tribunal (Social Entitlement Chamber)

Between:

FE

Appellant

- v –

HM Revenue and Customs

Respondent

Before: Upper Tribunal Judge Ward

Hearing date: 30 November 2021 (with post-hearing submissions)

Representation:
Appellant: In person
Respondent: Mr Admas Habteslasie, instructed by Solicitor's Office, HMRC

DECISION

The decision of the Upper Tribunal is to allow the appeal. The decision of the First-tier Tribunal made on 13 December 2019 under number SC154/17/03349 was made in error of law. Under section 12(2)(a) and (b)(ii) of the Tribunals, Courts and Enforcement Act 2007 I set that decision aside and remake it as follows:

The appellant is not disentitled from child benefit in the period from 11 July 2016 to 15 January 2020 (inclusive) on the ground of lacking a relevant right to reside. He had such a right until the latter date as the primary carer of his daughter F when a minor, in order to give useful effect to the right of permanent residence she enjoyed under art.16 of Directive 2004/38. He did not have a relevant right to reside for this purpose between 16 January and 13 September 2020 (inclusive).

The respondent must now determine any remaining aspects of the appellant's child benefit claim.

REASONS FOR DECISION

1. The appeal, which concerns a decision taken before the United Kingdom left the European Union, raises important questions about the relationship between the right enjoyed by so-called "Chen children" in consequence of the decision by the Court of Justice in Case C-200/02 *Zhu and Chen* and the right of permanent residence under

art.16 of Directive 2004/38 and about the ability of a minor to enjoy the latter. It is not in dispute that as the decision was taken at a time when the UK was still a member of the European Union, European law as it stood at the time of the decision should be applied. I note that the period agreed to be under consideration (see below) ended during the "implementation period" for the United Kingdom's withdrawal from the EU but during that period also European law applied with only limited modifications, none of which as it transpires are relevant to the present case.

2. It arises because of a dispute between the parties as to the appellant's right to child benefit for his four children during the period from 11 July 2016 to 13 September 2020. There was a delay before the present appeal was launched, as a result of which only incomplete papers are available. The decision-taking history is convoluted but does not need to be set out; it is not in dispute that the date of the relevant decision was 14 August 2017 and that its substantive effect was as set out above.

3. Although child benefit by its nature is intended to benefit a child (or qualifying young person) the entitlement is that of the "person who is responsible" for them: Social Security Contributions and Benefits Act 1992, s.141. The combined effect of section 146(2) of the 1992 Act and reg.23(4) of the Child Benefit Regulations 2006/223 is that it is a condition of entitlement that such a person has a qualifying right to reside in the United Kingdom.

4. The appellant's appeal to the First-tier Tribunal ("FtT") was dismissed on 13 December 2019 on the basis that he had lacked sufficient resources and comprehensive sickness insurance cover ("CSIC") at what the FtT regarded as the material time (since 2009). The appellant delayed, in particular in applying for permission to appeal once he had received the FtT's statement of reasons and to a lesser extent subsequently. Nonetheless, I saw fit to extend time so as to admit the application to the Upper Tribunal for permission to appeal received on 29 January 2021 and gave permission to appeal.

5. The appellant is a Nigerian national, as his wife. He has four children, the youngest three of whom are now British nationals. The eldest child, F, is his daughter by a previous marriage. She is an Irish national and has spina bifida. There is no evidence before me directed to the resulting extent of any disablement F experiences. She was born on 16 January 2002 and the period from 16 January 2020 (when F turned 18) to 13 September 2020 requires separate additional consideration.

6. The family's immigration status has proved a complex issue over the years. However, on 13 March 2012 (then Deputy) Upper Tribunal Judge O'Connor ruled in the Immigration and Asylum Chamber (inter alia) that F became entitled to a right of permanent residence in or around December 2009, having been exercising EU Treaty rights under the 2000 and 2006 Immigration (European Economic Area) Regulations from December 2004. He held that she had done so by having had sufficient resources and comprehensive sickness insurance cover during that period; both were, understandably in view of her age, provided by her father. There was no appeal against that decision.

7. The position in the present case has been complicated by the fact that the appellant undoubtedly is entitled to a derivative right of residence based on C-34/09 *Ruiz Zambrano*. That may have been the basis on which, prior to 2012, the respondent had accepted that he had a sufficient right to reside for child benefit

purposes, but following the amendments made with effect from 8 November 2012 by reg 3 of the Child Benefit and Child Tax Credit (Miscellaneous Amendments) Regulations 2012/2612, a *Zambrano* right became insufficient for such a purpose; a similar restriction was applied to means-tested benefits. Further, the appellant was on 15 September 2020 awarded settled status by the Home Office, on the basis of having been a *Zambrano* carer. While *Zambrano* rights may be sufficient for residence purposes, for the reasons above they are inferior for social security purposes, thus the question before me remains an important live one.

8. Article 20 TFEU (ex Article 17 TEC) provides:

> "1. Citizenship of the Union is hereby established. Every person holding the nationality of a Member State shall be a citizen of the Union … ."

9. Article 21 TFEU (ex Article 18 TEC) provides:

> "1. Every citizen of the Union shall have the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in the Treaties and by the measures adopted to give them effect.
> …"

10. "Limitations and conditions" are to be found in this context principally in Directive 2004/38 (the Citizenship Directive), which had an implementation date of April 30, 2006. Its recitals materially provide:

> "(3) Union citizenship should be the fundamental status of nationals of the Member States when they exercise their right of free movement and residence. It is therefore necessary to codify and review the existing Community instruments dealing separately with workers, self-employed persons, as well as students and other inactive persons in order to simplify and strengthen the right of free movement and residence of all Union citizens.
>
> (17) Enjoyment of permanent residence by Union citizens who have chosen to settle long term in the host Member State would strengthen the feeling of Union citizenship and is a key element in promoting social cohesion, which is one of the fundamental objectives of the Union. A right of permanent residence should therefore be laid down for all Union citizens and their family members who have resided in the host Member State in compliance with the conditions laid down in this Directive during a continuous period of five years without becoming subject to an expulsion measure.
>
> (18) In order to be a genuine vehicle for integration into the society of the host Member State in which the Union citizen resides, the right of permanent residence, once obtained, should not be subject to any conditions."

11. Chapter III of the Citizenship Directive provides by art.6 for an initial right of residence for up to three months without conditions. Thereafter it provides by art.7 for a continuing right subject to fulfilment of one of a number of conditions (in domestic law expressed as being a "qualified person"), one of which is a requirement to have sufficient resources and CSIC. A similar requirement existed under the predecessor legislation, Directive 90/364 (see below).

12. The Citizenship Directive did break new ground in creating a right of permanent residence under art.16, which provides:

> "1. Union citizens who have resided legally for a continuous period of five years in the host Member State shall have the right of permanent residence there. This right shall not be subject to the conditions provided for in Chapter III.
>
> 2. Paragraph 1 shall apply also to family members who are not nationals of a Member State and have legally resided with the Union citizen in the host Member State for a continuous period of five years.
>
> 3. Continuity of residence shall not be affected by temporary absences not exceeding a total of six months a year, or by absences of a longer duration for compulsory military service, or by one absence of a maximum of twelve consecutive months for important reasons such as pregnancy and childbirth, serious illness, study or vocational training, or a posting in another Member State or a third country.
>
> 4. Once acquired, the right of permanent residence shall be lost only through absence from the host Member State for a period exceeding two consecutive years."

"Resided legally" in this context means (to summarise) that a person resided in accordance with the Citizenship Directive or provisions in national legislation prior to a Member State's accession: see C-424/10 and C-425/10 *Ziolkowski and Szeja*. It does not extend to residing by virtue of derivative rights: see C-529/11 *Alarape and Tijani*.

13. It was, accordingly, under this provision that F obtained her right of permanent residence. As Recital (18) and art.16 make clear, such right is not to be subject to conditions. The only way of losing it, absent expulsion on public policy or public security grounds, is through two years' absence as envisaged by art.16(4).

14. Where then does this leave the appellant? The discussion before me focussed on two authorities. In C-200/02 *Zhu and Chen*, Catherine Zhu was an Irish national, born to Chinese parents. Catherine, at the material time still an infant, benefitted from sufficient resources for EU law purposes and from comprehensive sickness insurance cover, each provided by her parents. That was sufficient for her to enjoy a right of residence derived from her citizenship of the Union under art. 18 EC (now art. 21 TFEU), as she fulfilled all the "limitations and conditions laid down in the Treaties and by the measures adopted to give them effect." Her mother (Mrs Chen) had a right of residence not as a "family member", for she was not dependent on Catherine; what she had was a right as Catherine's primary carer to reside in order to give useful effect to Catherine's right.

15. The relevant limitations and conditions at that time arose under Directive 90/364/EEC which materially provided:

> "Article 1
> 1. Member States shall grant the right of residence to nationals of Member States who do not enjoy this right under other provisions of Community law and to members of their families as defined in paragraph 2, 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.
> …
> 2. The following shall, irrespective of their nationality, have the right to install themselves in another Member State with the holder of the right of residence:
> (a) his or her spouse and their descendants who are dependants;
> (b) dependent relatives in the ascending line of the holder of the right of residence and his or her spouse.
> …
> Article 3
> The right of residence shall remain for as long as beneficiaries of that right fulfil the conditions laid down in Article 1."

16. The position of Mrs Chen was addressed by the Court of Justice of the European Union in the following terms:

> "42. Article 1(2)(b) of Directive 90/364, which guarantees 'dependent' relatives in the ascending line of the holder of the right of residence the right to install themselves with the holder of the right of residence, regardless of their nationality, cannot confer a right of residence on a national of a non-member country in Mrs Chen's situation either by reason of the emotional bonds between mother and child or on the ground that the mother's right to enter and reside in the United Kingdom is dependent on her child's right of residence.
>
> 43. According to the case-law of the Court, the status of 'dependent' member of the family of a holder of a right of residence is the result of a factual situation characterised by the fact that material support for the family member is provided by the holder of the right of residence (see, to that effect, in relation to Article 10 of Regulation No 1612/68, Case 316/85 *Lebon* [1987] ECR 2811, paragraphs 20 to 22).
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> 44. In circumstances such as those of the main proceedings, the position is exactly the opposite in that the holder of the right of residence is dependent on the national of a non-member country who is her carer and wishes to accompany her. In those circumstances, Mrs Chen cannot claim to be a 'dependent' relative of Catherine in the ascending line within the meaning of Directive 90/364 with a view to having the benefit of a right of residence in the United Kingdom.
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> 45. On the other hand, a refusal to allow the parent, whether a national of a Member State or a national of a non-member country, who is the carer of a child to whom Article 18 EC and Directive 90/364 grant a right of residence, to reside with that child in the host Member State would deprive the child's right of residence of any useful effect. It is clear that enjoyment by a young child of

a right of residence necessarily implies that the child is entitled to be accompanied by the person who is his or her primary carer and accordingly that the carer must be in a position to reside with the child in the host Member State for the duration of such residence (see, *mutatis mutandis*, in relation to Article 12 of Regulation No 1612/68, [C-413/99] *Baumbast and R*, paragraphs 71 to 75).

46. For that reason alone, where, as in the main proceedings, Article 18 EC and Directive 90/364 grant a right to reside for an indefinite period in the host Member State to a young minor who is a national of another Member State, those same provisions allow a parent who is that minor's primary carer to reside with the child in the host Member State.

47. The answer to be given to the national court must therefore be that, in circumstances like those of the main proceedings, Article 18 EC and Directive 90/364 confer on a young minor who is a national of a Member State, is covered by appropriate sickness insurance and is in the care of a parent who is a third-country national having sufficient resources for that minor not to become a burden on the public finances of the host Member State, a right to reside for an indefinite period in that State. In such circumstances, those same provisions allow a parent who is that minor's primary carer to reside with the child in the host Member State."

17. Nowhere in the Court's decision is it stated in terms that the primary carer is required to fulfil a condition of having sufficient resources and comprehensive sickness insurance cover, nor that s/he is not.

18. *W v Secretary of State for the Home Department* [2006] EWCA Civ 1494 also concerned the Chinese parents (W and X) of a *Chen* child (Q). The parents had entered the UK illegally, then moved to Ireland apparently illegally and Q was born there shortly afterwards. They then re-entered the UK, once again illegally unless they could rely on EU rights derived from Q's status as an Irish citizen. They also made unsuccessful applications for asylum. The case came before the Court of Appeal as a challenge to removal directions. The relevant legislation was still Directive 90/364.

19. The principal judgment was given by Buxton LJ. At [4], having set out art.18 TEC (as it then was) and art.1 of Directive 90/364, he explained that

"The right of movement and residence of a citizen of the EU is therefore subject to two pre-conditions: (i) cover by sickness insurance in respect of all risks in the host state; (ii) possession of resources sufficient to avoid becoming a burden on the social assistance system of the host state. Those are logical requirements for the exercise of the right under article 18. The EU citizen does not need to rely on article 18 in order to install himself in another member state unless he is not an economic operator, assumed to contribute to the economy of the host state. If he is in that position, he will have a right of entry in any event either under article 39 as a worker; or under article 43 as a self-employed person; or under article 49 as a provider of services. Those who do

not make that contribution, the article 18 cases, are thus reasonably required to establish that they will nonetheless not be a burden on the host state."

20. At [6] he records the CJEU's view that "enjoyment by a young child of a right of residence necessarily implies that the child is entitled to be accompanied by the person who is his or her primary carer…," continuing:

> "That meant that the mother could enter in that capacity and for that purpose but, as the court also held, subject to the Directive's regime for the protection of the host state. In the specific case of *Chen*, therefore, the court regarded it as relevant that the child had both health insurance and sufficient resources, provided by her mother, not to become a burden on the host state.
>
> 7. The ECJ did not deal specifically with whether the accompanying carer or carers needed to have health insurance, or sufficient resources so that they themselves, as opposed to the child, did not become a burden on the host state. However, in both those cases I with respect find compelling the treatment of the IAT at §§ 14 and 16 of its Determination:
>
> As the Court pointed out in Chen, the accompanying parent in circumstances like this is not claiming under the provisions of Article 1 of Directive 90/364 because the parent is not dependent upon the child. It therefore follows that the Directive's requirements in respect of medical insurance do not apply precisely to the accompanying parents. But, as Chen establishes, the residence of the accompanying parents in the Member State is simply a consequence of the child's right. And the child's right is a right to reside only in such circumstances as will not place on the Member State a financial burden arising out of his residence. When the person exercising the right of residence is an adult, this result is secured by the requirement that accompanying dependent family members also have medical insurance. We think it inconceivable that a similar requirement does not apply to the family members who accompany under the Chen principle and are not dependent on the person exercising the right of residence. If it were otherwise, the exercise of the right of residence would in fact impose a financial burden on the Member State.
>
> The next requirement we consider is that of sufficient resources generally. Again, so far as Chen was concerned, there was no doubt that the parents had sufficient resources for themselves and for the child. The Court expresses the requirement in terms again based on Directive 90.364 that the accompanying parents have *"sufficient resources for that minor not to become a burden on the public finances of the host Member State".* Again, it is not entirely clear whether the resources have to be sufficient to maintain the minor only or sufficient for the carer as well. We would apply the same reasoning as we have applied to medical insurance. Article 90/364 requires that the resources be sufficient for the person exercising the right of residence and all the accompanying dependent family members; it is inconceivable that accompanying family members who are not dependent should not need to be properly supported; and, if they were not, the residence of the child would in practice impose a burden on the public finances of the Member State because of the parent's needs.
>
> 8. I conclude therefore that the IAT was correct in holding that in order to fulfil the requirements of Directive 90/364 all of Q, W and X had to demonstrate (i) the possession of sickness insurance; and (ii) sufficient resources to avoid becoming a burden on the social assistance system of the United Kingdom. …"

21. At [16] he noted that

> "As interpreted by the ECJ in *Chen*, the article 18 right of Q and the associated right of her custodians can only be lawfully asserted under the strictly limited conditions imposed by Directive 90/364. Those conditions are pre-conditions not merely to the exercise but also more fundamentally to the existence of the right in any particular case: article 18 stating in terms that "the right" to move and reside is subject to the limitations and conditions laid down in, e.g., Directive 90/364. The right accordingly does not exist if Q does not have access to the relevant resources."

22. Buxton LJ was able to distinguish C-60/00 *Carpenter v Secretary of State for the Home Department*, on which counsel for W had sought to rely, on the basis (at [21]) that

> "Mr Carpenter had an established Community right, the existence of which, and Mr Carpenter's right to exercise it in the United Kingdom, had nothing to do with, and did not depend on, Mrs Carpenter. By contrast, Q has no Community right at all, or at least cannot exercise any potential article 18 right, without the contribution provided by W's resources."

23. As the Court of Appeal considered that W would have no lawful right to work, there was a lack of the "sufficient resources" which Q and, as the Court of Appeal held, W and X needed before Q and, through Q, W and X, could have a right via the *Chen* principles.

24. Mr Habteslasie helpfully took me through the UK domestic legislation with regard to derivative rights at the relevant time. The Immigration (European Economic Area) Regulations 2006/1003 ("the 2006 Regulations) were amended in 2012 to give effect to certain derivative rights. Regulation 15A materially provided:

> "(1) A person ("P") who is not an exempt person and who satisfies the criteria in paragraph (2), (3), (4), (4A) or (5) of this regulation is entitled to a derivative right to reside in the United Kingdom for as long as P satisfies the relevant criteria.
>
> (2) P satisfies the criteria in this paragraph if—
> (a) P is the primary carer of an EEA national ("the relevant EEA national"); and
> (b) the relevant EEA national—
> (i) is under the age of 18;
> (ii) is residing in the United Kingdom as a self-sufficient person; and
> (iii) would be unable to remain in the United Kingdom if P were required to leave.
> …"

25. This has to be read along with reg 4, which so far as material provides:

> "(1) In these Regulations—
> …

> (c) *"self-sufficient person"* means a person who has—
> (i) sufficient resources not to become a burden on the social assistance system of the United Kingdom during his period of residence; and
> (ii) comprehensive sickness insurance cover in the United Kingdom;
>
> (2) For the purposes of paragraph (1)(c) or (d), where family members of the person concerned reside in the United Kingdom and their right to reside is dependent upon their being family members of that person—
> (a) the requirement for that person to have sufficient resources not to become a burden on the social assistance system of the United Kingdom during his period of residence shall only be satisfied if his resources and those of the family members are sufficient to avoid him and the family members becoming such a burden;
> (b) the requirement for that person to have comprehensive sickness insurance cover in the United Kingdom shall only be satisfied if he and his family members have such cover.
>
> (5) For the purpose of regulation 15A(2) references in this regulation to *"family members"* includes a *"primary carer"* as defined in regulation 15A(7)."

…

26. The Immigration (European Economic Area) Regulations 2016/1052 ("the 2016 Regulations") made similar provision, which need not be set out here. Provision made by the 2006 and 2016 Regulations reflects the Court of Appeal's decision in *W*, so far as the conditions to be fulfilled by a prospective *Chen* child (and his or her primary carer) in order to acquire a right of residence are concerned.

27. However, I am not concerned with whether F could obtain such a right of residence. Judge O'Connor has already decided that between 2004 and 2009, she could. The issue for me is whether, F having obtained a right of permanent residence by virtue of having previously been a *Chen* child, the appellant as her primary carer is required to have sufficient resources and comprehensive sickness insurance cover.

28. I have already referred to art.16 of the Citizenship Directive. To complete the picture, I note that the domestic legislation implementing the right of permanent residence provided (in the 2006 Regulations) that:

> "(1) The following persons shall acquire the right to reside in the United Kingdom permanently—
> (a) an EEA national who has resided in the United Kingdom in accordance with these Regulations for a continuous period of five years;
> …
> (2) The right of permanent residence under this regulation shall be lost only through absence from the United Kingdom for a period exceeding two consecutive years."

29. There is thus nothing in the legislation which directly addresses the issue before me.

30. The appellant submits, in summary, that:

a. F has had a right of permanent residence, derived from having met the *Chen* requirements;
b. that right is not subject to conditions at to self-sufficiency and CSIC;
c. as her primary carer he is entitled to a right of residence to enable F to exercise her right;
d. there is no provision permitting a condition to be imposed on him that he have CSIC and sufficient resources;
e. to deny him such a right is discrimination on the ground of nationality contrary to art.12 TEC [now art.18 TFEU];
f. he has in the past been issued with residence documentation and indeed been paid benefits by HMRC on the basis of being the carer of a *Chen* child and it is not open to the state to change its mind;
g. the child benefit is for the benefit of the children and the refusal of it on the grounds put forward by the respondent is in conflict with provisions he identified of the UN Convention on the Rights of the Child and section 1 of the Children Act.

31. The respondent submits, in summary, that:

a. it is accepted that once she obtained a right of permanent residence, F was no longer required to demonstrate that she had sufficient resources and CSIC;
b. F's acquisition of a right of permanent residence does not affect the basis on which the appellant seeks a right to reside in the UK, which remains as primary carer of a *Chen* child and reg 16(2) of the 2016 Regulations [replicating the position set out at [24] and [25] above], governs the position. Reliance is placed on [42]-[44] of *Chen*.
c. Even if not now a *Chen* case, the position set out in *W* in relation to the requirement for self-sufficiency and CSIC to be required of the primary carer of a *Chen* child should nonetheless apply;
d. the appellant can point to nothing which entitles him to a right as F's primary carer without complying with such requirements;
e. the Court of Appeal in *W* recognised that those reliant on art.18 should not be a burden on the state;
f. the logic of the Court of Appeal, accepting the reasoning of the Immigration Appeal Tribunal in the passage I have set out at [20] should be followed.

32. In my view, the respondent's position is wrong in principle. It overlooks the creation by the Citizenship Directive of a right of permanent residence. It insufficiently heeds that the right of residence is the right of F, a child.

33. At the time EU law applied and the EU Treaties were paramount. The rights conferred by (now) art.21 were subject to the conditions and limitations contained in the Citizenship Directive. If the issue before me had been whether F was entitled to rights as a *Chen* child, I should have had to apply the requirements of art.7, which essentially replicates the provisions of art.1 of Directive 90/364, which are among those "conditions and limitations". While I do not have to decide the point, there would appear to be a strong argument that the Court of Appeal's judgment, even

though evidently conditioned by their distaste for the illegality of W and X's conduct (of which there is no suggestion of any equivalent here) provides authority that a requirement for self-sufficiency and CSIC attaches to the primary carer in such circumstances. However, once F obtained her right of permanent residence under art.16, that right was not subject to conditions, save to the limited extent mentioned at [13] above.

34. Buxton LJ's remarks at para.4 of his judgment (see [19] above) were derived (note his use of "therefore") from his consideration of the wording of art.1 of Directive 90/364. Neither that, nor its successor provisions in the Citizenship Directive, have any purchase on a right of permanent residence under art.16. Paragraph 4 is expressed in terms of a "right of entry" and even to that extent has been superseded by art.6 of the Citizenship Directive. Nor, following the coming into force of the Directive, can its logic be extended to those who have a right of residence to remain under art.16, whose "entry" will have been in the past.

35. Similarly, the words of the Immigration Appeal Tribunal ("IAT") endorsed by Buxton LJ were predicated on the existence of the limitations on Directive 90/364:

> "But, as Chen establishes, the residence of the accompanying parents in the Member State is simply a consequence of the child's right. And the child's right is a right to reside only in such circumstances as will not place on the Member State a financial burden arising out of his residence."

36. The appellant's right is "simply a consequence" of his daughter's right. But F's right, unlike that of Catherine Zhu, has no material limitation. Having obtained a permanent right of residence, there is nothing in law to prevent her from relying on the social assistance system of the UK if that is the course events take. The logic of the IAT, endorsed by the Court of Appeal, is aimed at ensuring the State obtains the same protection against claims on public finances by primary carers as existed under Directive 90/364 (and exists under the Citizenship Directive) in respect of claims by *Chen* children. As the State has no protection against claims by a person with a right of permanent residence, an argument seeking to create equivalent protection against claims by a primary carer in the present context can have no purchase. The reasoning of *W* is therefore not binding upon me.

37. Nonetheless, it is true that a family member of an adult with a right of permanent residence would only be freed from the art.7 conditions once the family member had themselves resided "legally" (as understood above) for a 5 year period: see art.16(2) and also arts.12(2) (retention of the right of residence by family members in the event of death or departure of the European citizen) and 13(2) (retention of the right of residence by family members in the event of divorce, annulment of marriage or termination of registered partnership). However, a right of permanent residence is not what the appellant needs in these proceedings. Not as a matter of applying *W and X* therefore, but in terms of attempting to discern and apply the intention of the European legislator, should those whose presence is to give useful effect to the right of permanent residence of a former *Chen* child be better placed in terms of their ability to draw on the public finances than family members of an adult with a right of permanent residence who have not themselves yet clocked up the 5 year period of lawful residence?

38. That minors are just as entitled as anyone else to take advantage of the rights now conferred by art.21 TFEU was made very clear in *Chen* at [20]. It is the child who has the rights; the parent is given a derivative right in order to give useful effect to the child's right: see the decision in *Chen* at [42]-[45] (and the consistent, and more developed, position of Advocate General Tizzano at [90]-[93] of his Opinion) Without the parent, the child's right would be illusory.

39. The Court took a similar approach in *Baumbast*, where the children's right arose under Regulation 1612/68. Granted, art.12 of that Regulation refers to the child's right to "pursue, under the best possible conditions, his education in the host member State" and that was a consideration relied upon by the Court in that case (at [73]) to support its conclusion that the primary carer should have the right to remain and such a provision is not present in the legislative material before me; nonetheless, the Court has on two separate occasions in two different contexts recognised that a child's right of residence necessitates their primary carer also having such a right.

40. *Baumbast* is also relevant as demonstrating that the principle is not confined to infants, such as Catherine Zhu (Chen); both the children of the Baumbast family were of school age. Domestic law (see [24] above) accepts that the principle applies to children under the age of 18.

41. There is then the question whether, if the primary carer has a right of residence in order to give effect to a child's right of permanent residence, it is a qualifying right for child benefit. I begin by noting that the reason why *Zambrano* rights do not qualify is because there is domestic legislation (summarised at [7]) saying so. The decision of the Supreme Court in *R (HC) v SSWP* [2017] UKSC 73 addressed, in the context of universal credit, the compatibility of that legislation with EU law. In the present case however, there is no such domestic legislation. At [21] of *HC*, Lord Carnwath contrasted C-310/08 *Ibrahim v Harrow LBC*, where

> "entitlement under the national legislation turned on whether [Mrs Ibrahim] had a right of residence conferred by EU law, but was otherwise unlimited. The issue was whether it was implicitly subject to a self-sufficiency condition derived from EU law."

42. I was not taken to *Ibrahim*, but it seems to me that the CJEU's approach to deciding that issue may profitably be referred to when deciding the present case. *Ibrahim* was again a case under Regulation 1612/68. The key paragraphs where the Court found there was no requirement to be self-sufficient were the following:

> "51. It remains to be determined whether the exercise of that right of residence is conditional on the persons concerned having sufficient resources and comprehensive sickness insurance cover in the host Member State.
>
> 52. It must be stated at the outset that there is no such condition in Article 12 of Regulation No 1612/68 and that, as the Court has already held, that article cannot be interpreted restrictively and must not, under any circumstances, be rendered ineffective (*Baumbast and R*, paragraph 74).

53. Nor does a requirement as to the self-sufficiency of the members of the family of a worker who is a national of a Member State and their protection in the host Member State in the case of illness follow from the case-law of the Court.

54. …

55. In the *Baumbast and R* case Mr Baumbast, the father of the children whose right of residence in the host Member State under Article 12 of Regulation No 1612/68 was at issue, had resources which allowed him and his family not to be dependent on social assistance. None the less, the answers to the questions referred for a preliminary ruling concerning the right of residence of the children and their mother who cared for them were based not on their self-sufficiency but on the fact that the aim of Regulation No 1612/68, namely freedom of movement for workers, requires the best possible conditions for the integration of the worker's family in the host Member State and that a refusal to allow the parents caring for the children to remain in the host Member State during the period of their children's education might deprive the children of a right granted to them by the European Union legislature (*Baumbast and R*, paragraphs 50 and 71).

56. Directive 2004/38 likewise does not make the right of residence in the host Member State of children who are in education and the parent who is their primary carer depend, in certain circumstances, on their having sufficient resources and comprehensive sickness insurance cover.

57. The interpretation that the right of residence in the host Member State of children who are in education there and the parent who is their primary carer is not subject to the condition that they have sufficient resources and comprehensive sickness insurance cover is supported by Article 12(3) of Directive 2004/38, which provides that the departure or death of the citizen of the Union does not entail the loss of the right of residence of the children or the parent who has actual custody of them, irrespective of their nationality, if the children reside in the host Member State and are enrolled at an educational establishment for the purpose of studying there, until the completion of their studies.

58. While that provision is not applicable in the main proceedings, it illustrates the particular importance which Directive 2004/38 attaches to the situation of children who are in education in the host Member State and the parents who care for them."

43. Mr Habteslasie was unable to suggest how a primary carer lacking a right to reside conferring an entitlement to benefit could fulfil the function of a primary carer if, for instance, they were to become long-term sick. Applying a similar approach to that in *Ibrahim*, as F's right is unqualified it sems to me that any attempt to require her primary carer to meet conditions of sufficiency of resources and comprehensive sickness insurance cover where there is no such limitation in the European legislation exists is to derogate, unacceptably and unlawfully, from the steps necessary to give F's right useful effect. Where a derogation exists, it is construed

narrowly. It would be wrong in principle to create a derogation when there is not one at all.

44. Nor is there any requirement for sufficient resources and CSIC in such a context to be found in the caselaw of the Court.

45. The aims of the European legislator in creating a right of permanent residence are plainly set out in the recitals to the Citizenship Directive. Those aims included strengthening the right of free movement and residence (recital 3), which is something that the creation of a right of a right of residence, free of conditions, after 5 years' residence in accordance with the Directive achieved. The creation of a right of permanent residence was seen as a key element in promoting social cohesion (recital 17) and as "a genuine vehicle for integration into the society of the host Member State" (recital 18).

46. Finally, while perhaps not the part of the Court's reasoning in *Ibrahim* on which it placed greatest reliance, nor is it in the present case, paras 56-58 of *Ibrahim* may be applied by analogy.

47. In my view, given the aims at [45] and the recognition that children are as entitled to the benefit of the rights conferred by the TFEU and the Citizenship Directive as anyone else, it is likely that the European legislator was intending to move from a situation where a *Chen* child and (let it be assumed in the light of *W*) her primary carer had to have sufficient resources in order to acquire the right of residence to one where, after the child had acquired a right of permanent residence, they did not. The situation is different from that of the family member of an adult with a right of permanent residence to whom the art.7 requirements will continue to apply until the family member has clocked up 5 years' qualifying residence, in that the primary carer is not on the way to obtaining a permanent right, but is facilitating the right of another and will only continue to do so for as long as that facilitation is required, at which point that right will cease.

48. Both parties were invited to address in post-hearing written submissions whether if the appellant were to have a right to reside as the result of being F's primary carer, that would continue on and after 16 January 2020 when she turned 18, and if so, why?

49. The appellant submitted as follows (with my consideration of each point immediately following it):

> a. He was no longer subject to immigration control in the UK and hence would be able to continue to live in the UK after F turned 18 on 16 January 2020.
>
> There is no evidence before me of the basis on which he was no longer subject to immigration control at that time. However, given that it is common ground that he has rights as a *Zambrano* carer for his three younger children, that would have the effect that he was not required to have leave to remain (see Immigration Act 1988, s.7), something which does not help him for present purposes (whether before or after F turned 18).

b. He had been issued with a derivative residence permit on 13.11.13 as a result of being the primary carer for F.

Even if that be so, such permits are declaratory, not constitutive, and at that time F was still under 18. It does not assist with the post-18 position.

c. Having had a derivative residence permit for 5 years, he was entitled to permanent residence.

As indicated above, derivative rights do not count for the purpose of acquiring a right of permanent residence.

d. Now it is a question of settled status/pre-settled status, the appellant continues to qualify, either through F or through his British children.

The grant of settled status post-dates the decision in this case and cannot be taken into account because of Social Security Act 1998, s.12(8).

e. It is unlawful for a public authority to act incompatibly with a Convention right.

The appellant does not say which provision(s) of the European Convention on Human Rights would be breached by denying him a derivative right to reside derived from F once she turned 18 and on the material before me, none is.

f. He seeks to distinguish *Chen* and *W and X* on the basis of his prior residence, business interests in the UK and similar matters whereas the parties in those two cases were applying for their first residence cards.

That is not a relevant distinction for the purposes of the topic on which a submission was sought and (as will be seen from earlier parts of this decision) it is not a distinction the appellant needs in order to succeed for the period before F turned 18.

50. Despite the very specific terms in which the supplemental submission was invited, the respondent failed to address them, instead reiterating the respondent's view that the appellant had no right to reside at all (whether before or after F turned 18). The submission appears to be that while a person could be a *Chen* child until they turned 18, once they got a right of permanent residence there was no longer any room for them to be a *Chen* child nor for the appellant to have a right of permanent residence. This was attempting to relitigate the issues from the oral hearing. Similarly an attempt to relitigate the issues from the hearing was the submission that while F could have a right of permanent residence and be self-sufficient, she did not need to, but did need to be self-sufficient in order for the appellant to be a *Chen* carer. The respondent's suggestion that once F became what the submission describes (strictly speaking, incorrectly) as a "qualified person" (i.e. acquired a right of permanent residence), the appellant was no longer able to claim any right under *Chen* is countered in that, for the reasons above, the appellant is not claiming a right under *Chen*, but a right to give useful effect to F's right of permanent residence. None of this helped me with the question which was posed on my behalf.

51. I am aware that there are contexts, such as that of who is a "family member" under Directive 2004/38 where the European legislation will extend to those who have reached the age of 18. Rights as *Zambrano* carer may, in tightly defined circumstances, be enjoyed by the primary carer of an adult: see *Patel v Secretary of State for the Home Department* [2019] UKSC 59. C-529/11 *Alarape and Tijani* envisages that there will be circumstances when the parent of a child in education may continue to assert a derivative right under Regulation 1612/68 (now Regulation 492/2011). There is no authority of which I am aware extending the principle of *Chen* beyond a child.

52. However, even if it be legally possible (which I should not be taken as deciding), is there anything like the evidence of the effects of F's condition and consequent requirement for continuing care after reaching the age of majority (nor is any case put forward on that basis) to justify extending the application of the doctrine of useful effect in the present case beyond when she reached adulthood, when she was freed from legal constraints which might previously have justified the involvement of a primary carer.

53. Consequently, the appellant's derivative right based on being F's primary carer stopped when she turned 18, leaving him only with *Zambrano* rights derived from his three younger children, and so from F's 18th birthday he lacked a right to reside entitling him to child benefit. I consider that the FtT's position summarised in [4] is in error of law and set it aside. I remake the decision as set out at the head of this Decision, taking account of the position after F turned 18.

54. In view of the conclusions I have reached I do not need to deal more than briefly, or at all, with a number of the appellant's arguments. It is not necessary to consider whether to refuse the appellant a relevant right of residence during F's minority would amount to discrimination contrary to art.18 TFEU. It is in general open to different parts of the State in the exercise of their respective responsibilities to take differing decisions, while the same part is (subject to any legislative provision) permitted to exercise its decision-taking powers from time to time. Protection against arbitrariness arises from the requirements of public law for (for instance) rationality and adequacy of reasons. Section 1 of the Children Act is not relevant to the issues I have to consider. The United Nations Convention on the Rights of the Child is not part of English law.

55. As the appellant is representing himself, the respondent was directed to provide a bundle of authorities to the Upper Tribunal and to the appellant 7 days before the hearing, to allow the appellant to assimilate its contents. Regrettably, it was provided late (it has not been suggested that this was due to any difficulty in agreeing its contents with the appellant) and to the appellant only following intervention by the Upper Tribunal. Material from the 2006 and 2016 Regulations was included in the wrong version. All of this, contrary to rule 2(4), failed to help the Upper Tribunal to further the overriding objective, in particular by "ensur[ing], so far as practicable, that the parties are able to participate fully in the proceedings."

56. Nonetheless, when the appellant suggested I should disapply the correct version of the Regulations when it was handed up at the hearing, I refused. The

Upper Tribunal has to apply the law as it is. I reassured the appellant that if he risked being disadvantaged by the material which he had only latterly seen, I would give him the opportunity to make post-hearing written submissions in relation to that material. However, in the event, I do not consider he has in any way been disadvantaged by that material, so such a step is not necessary.

C.G.Ward
Judge of the Upper Tribunal
Signed on the original on 5 January 2022