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Judgment: approved by the Court for handing down | *Delivered:* **21/11/11**

*(subject to editorial corrections)**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

ON APPEAL FROM
THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

Bassey's (Emen) Application [2011] NICA 67

IN THE MATTER OF AN APPLICATION BY
EMEN BASSEY FOR JUDICIAL REVIEW

BETWEEN:

EMEN BASSEY

Appellant/Applicant;

-and-

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent.

Before: Girvan LJ and Coghlin LJ and Sir John Sheil

GIRVAN LJ (delivering the judgment of the court)

Introduction

[1] This is an appeal from the judgment delivered on 17 September 2010 of Morgan LCJ and the consequential order made on foot thereof in relation to a judicial review challenge brought by the appellant in relation to decisions made by the Immigration Service on 24 September 2007 whereby the appellant, a Nigerian national, was detained as an illegal entrant with a view to removal. The judicial review commenced on 25 September 2007 with the notice of motion being issued on 3 October 2007. The appellant's detention lasted 9 days before he was granted bail.

The appellant asserts that he was not an illegal entrant, that he should not have been treated as such and that he should not have been detained with a view to removal. He seeks to rely on an entitlement to be in the United Kingdom at the material times by virtue of a derivative community law right flowing from the Irish nationality of his daughter, L which she acquired under Irish law by virtue of her birth in Belfast and which entitled her to enter and be in the United Kingdom as a European Union citizen at all relevant times.

[2] Ms Higgins QC appeared for the appellant with Mr Ronan Lavery. Mr Maguire QC appeared with Miss Connolly for the respondent. The court is indebted to counsel for their full and well researched submissions which illuminated the difficult and important issues arising in this appeal.

Factual background

[3] The appellant and his wife are both Nigerian nationals. They have three children two of whom were born in Nigeria in 1996 and 2000 and L who was born in Belfast on 22 October 2004. As stated this entitled her to Irish nationality under Irish law as it then stood. L is thus entitled to hold and did hold an Irish passport from 11 November 2004 and by virtue of her Irish nationality is a citizen of the European Union. Her mother returned to Nigeria shortly after the child's birth. While in Northern Ireland at that time she rented property in Kimberly Street, Belfast and she opened a building society account which was maintained thereafter.

[4] It seems very probable that the decision to give birth to the child in Belfast was deliberate because of the importance of the nationality and citizenship benefits which flow from her birth in Northern Ireland which is both part of the island of Ireland and also part of the United Kingdom. While to some this step taken by L's parents smacks of a manipulation of the system and an improper invocation of Community law this is not the viewpoint adopted by the European Court of Justice. In the Advocate General's opinion in Chen v. Secretary of State for the Home Department [2004] 3 CMLR 43 the Advocate General set out the position clearly and apparently correctly since his argument was accepted by the Court.

> "[120] When a future parent decides, as in the present case, that the welfare of his or her child requires the acquisition of Community nationality in order to allow him to enjoy the rights associated with that status, and in particular the right of establishment under Article 18 EC there is nothing "abusive" about taking action, in compliance with the law, to ensure that the child, when born, satisfies the conditions for acquiring the nationality of a Member State.

> [121] Likewise the fact that such a parent takes action to ensure that his or her daughter can exercise her legitimately acquired right of residence and consequently applies to be allowed to reside with her in the same host state cannot be classified as abusive."

The European Court in accepting this argument rejected the argument put forward by the United Kingdom that the mother of the child in that case was abusing the Treaty rights by taking advantage of the acquisition of the nationality of a Member State by arranging birth in the territory conferring that nationality. The court accepted that Mrs Chen had deliberately but legitimately arranged the birth of the child in Northern Ireland to enable the child to benefit from Irish nationality. It was for each Member State to lay down conditions for the acquisition or loss of nationality and it was impermissible for a Member State to restrict the effects of nationality of another Member State by the imposition of conditions for recognition of the nationality in respect of the exercise of the fundamental freedoms provided by the Treaty.

[5] In March 2005 the mother returned to Northern Ireland and sought legal advice as to how she might apply for permanent residence in the United Kingdom. She took out a private health care policy for L. She returned to Nigeria in May 2005, maintaining meantime the rented address in Belfast and the building society account. On 1 August 2007 the appellant, his wife and the two older children applied for visitors visas to visit the United Kingdom. In his application form the applicant disclosed that the two older children were travelling with their parents but he did not refer to L. He was asked to give the full address and telephone number of the places where he would be staying during the visit and he provided an address at Bromsgrove. He said that he was going to be in the United Kingdom for a vacation for a period of 7 days. The applicant signed the usual declaration that the information he had given was complete and true to the best of his knowledge. A visitor's visa valid for the period from 22 August 2007 until 22 February 2008 was issued to the appellant, his wife and two older children.

[6] On 10 September 2007 the appellant and his family arrived in the United Kingdom and they duly presented their visas and L's Irish passport at Heathrow Airport. It appears there was some change to the arrangements because they initially stayed in Peckham. On 16 September 2007 the appellant's wife visited Northern Ireland to stay with friends. She booked an appointment with a firm of solicitors P Drinan on 26 September 2007. On 22 September 2007 the appellant's wife booked ferry tickets to travel to Belfast with the family on 24 September 2007.

[7] On arrival at Belfast docks the appellant's wife was interviewed by an immigration officer. When asked how long she was intending to stay in Northern Ireland she explained it was her intention to apply for residence documents on the

basis of her youngest daughter's nationality. If that application were not successful she indicated that the family would return to Nigeria.

[8] In his interview the appellant explained that an application form for employment with McDonalds found in the luggage which was searched by the Immigration Service was for his wife because she might want to work for them if she were to stay in Northern Ireland. The luggage also contained application forms for a school in Belfast and when questioned about it he stated that he wanted his three children to attend the school. He said that when he arrived at Heathrow on 10 September 2007 he told the immigration officer that he was on holiday until 25 September 2007.

[9] The immigration officer then referred the case to the Chief Immigration Officer. The officers concluded that the appellant was an illegal entrant not having properly and correctly disclosed the real purpose of his visit and the Chief Immigration Officer made the decision that he should be treated as an illegal entrant. He was detained and subsequently removed to Dungavel in Scotland.

[10] Subsequently the third child applied for a registration certificate and in an appeal on 23 May 2008 the AIT concluded that she was a self sufficient person within Regulation 4(1)(c) of the Immigration (European Economic Area) Regulations 2006 ("the EEA Regulations"). The AIT then concluded that the appellant and his wife and the other children were entitled to be with L by virtue of Regulation 257 C of the Immigration Rules. Those determinations have not been challenged.

[11] Following the Immigration Service's decision to treat the appellant as an illegal entrant and to detain pending removal Ms Muldoon of P Drinan wrote to the Immigration Service stating:

> "Eunice Bassey had an appointment with Miss Muldoon of this office arranged for Wednesday morning. The purpose of the appointment was to make an application for an EEA registration certificate on behalf of [L]. The appointment was also to make applications for residence documents for Eunice and Emen Bassey the parents of L and for D and K the minor's siblings.
>
> L is an EEA national. I enclose herein a copy of the birth certificate showing that she was born on the island of Ireland on 22 September 2004. She is entitled to Irish citizenship by virtue of the Irish Citizenship and Nationality Act 2004. She is therefore entitled to reside in the UK under the provisions of Directive 38/2004 (incorporating Directive

> 90/364/EEC, the Immigration (EEA) Regulations 2006, Article 18.1 EEC and the case of Chen C/200/02 ECJ.)
>
> In accordance with the ruling of ECJ in Chen a right to reside under Community law for EEA nationals confers the right to reside on parents so long as they are not a burden on the public finances of the host state.
>
> Eunice Bassey has £3,000 in her possession together with evidence of a regular source of funds in Nigeria. No claim has been made or will be made in respect of any member of the family from public finances or in respect of medical needs. The right to reside is not conferred by application but is already in existence being conferred by EU law."

The letter then went on to submit that the detention of the members of the family constituted an unlawful interference with the rights which each of them enjoyed under Directive 2004/38/EC, the 2006 Regulations, Article 18.1 EEC and the case of Chen and Article 8 of ECHR. It was submitted that the proposed removal of any of the members of the family would constitute an unlawful interference with the rights of the parties. Ms Muldoon also pointed out that the Immigration Service, in accordance with the case of Ulloyol and Chakmak and Chapter 7 of the Operation Enforcement Manual were bound to consider all relevant facts before making a decision to serve papers.

The judicial review challenge

[12] The appellant's primary argument at first instance was that he was entitled to enter the United Kingdom as of right as a family member of an EEA national by virtue of the Directive as explained in Metock and Others (Case C-127/08) and Chen. The appellant had a right of entry arising directly from the Treaty as confirmed in Chen. The appellant also contended that it was for the respondent to demonstrate as a precedent fact that the appellant was an illegal entrant and that it had failed to do so. Alternatively, if the appellant was an illegal entrant the respondent did not properly consider whether to treat him as such and had acted irrationally in failing to determine that he should be so treated and in deciding to detain him.

The judgment of first instance

[13] The judge rejected the appellant's argument that he had a right of entry or a right of residence under Directive 2004/38/EC ("the Citizenship Directive") or the EEA Regulations. The appellant was not a Union citizen. He was not a family

member within the class of family members so defined in Article 2 of the Directive. The appellant did not have sickness insurance at the time of entry to the United Kingdom or at the time of his detection. Correspondence from his solicitors shortly after his detention asserted that such insurance had been obtained for him but the correspondence said that no documentary evidence will be available for 5 days. After his detention the appellant did produce bank statements and material in relation to the conduct of his businesses. This included evidence of property ownership. This information post dated the detention. The judge considered that the appellant had not satisfied the conditions and limitations under which he was entitled to exercise his Chen rights. The judge concluded that the appellant had entered the UK by deception. He had obtained the visitor's visa by deception since his entry to the country was not in reality for the purposes of a vacation. His true intention was to use the visit to the UK for the purpose of establishing whether he could achieve a right of residence in the UK for himself and his family. The judge rejected the claim that this decision was only reached on or after arrival in the United Kingdom. The judge also rejected the argument that the immigration officers had given no consideration to whether the applicant should be treated as an illegal entrant. The Chief Immigration Officer's decision was not irrational and there was no basis for suggesting that he left any material considerations out of account. The principal point advanced at the hearing to justify the submission that it was irrational to detain the applicant was L's citizenship. The judge, however, concluded that the status of that child only gave the appellant a right of entry subject to limitations and conditions which he had not satisfied.

Discussion

[14] As Ms Higgins correctly pointed out the EEC Treaty and the Citizenship Directive are directed to facilitating the free movement between Member States of EU nationals. L, being an Irish national and thus by virtue of Article 17 EC and Article 20 TFEU a Union citizen, had the rights and was subject to the duties provided for in the Treaties. She had the right to move and reside freely within the territory of the Member States subject only to the limitations and conditions laid down on the Treaty and by measures adopted to give it effect.

[15] The freedom to move and reside freely is not absolute being subject to conditions and limitations laid down by the Treaty and measures adopted to give it effect. Those limitations and conditions are provided for in the Citizenship Directive. The recitals of the Directive indicate (inter alia) that Union citizens should have the right of residence in the host member state for a period not exceeding 3 months without being subject to any conditions or any formalities other than the possession of a valid identification card or passport. For periods in excess of 3 months Member States should have the possibility of requiring Union citizens to register with the competent authorities and the Directive sets out the conditions to be fulfilled for Union citizens and members of their family in order to gain residency for a period in excess of 3 months.

[16] Article 3 provides that the Directive applies to Union citizens who move to or reside in Member States other than that of which they are a national and to their "family members" as defined in Article 2.2. This defines "family members" as a spouse, the registered partner, direct descendants under 21 and who are dependants and "(d) the dependant direct relatives in the ascending line and those of the spouse or partner in (b)". L was at all material times a beneficiary of the Directive. The appellant, however, was not, since he was not a Union citizen and was not a dependant member of the family under Article 2. As the Advocate General's opinion and the ECJ's judgment in Chen make clear a dependant relative in the ascending line must under Article 2.2 be one for whom the Union citizen has responsibility, that is to say must be a person dependent on the material resources supplied by the Union citizen. As the Advocate General pointed out only the English language version uses the neutral term "dependant". In all the other language versions the term relates unambiguously to material dependency (see, for example, the French version "à charge" and the Italian "a carico"). Adult parents of a child cannot be considered to be such dependant relatives.

[17] Ms Higgins argued that the Directive falls to be given a purposive interpretation and that, notwithstanding the definition provisions of Article 2.2, dependent relative in the ascending line should be given a broad interpretation so as to fit within the principle in Chen. However, the Court in Chen makes clear in paragraph [43] of its judgment that the mother in that case could not claim to be a dependant relative in the ascending line within the then Directive 90/362, a forerunner of the Citizenship Directive which adopted the same wording clearly interpreted by the Court in Chen.

Relevant provisions of the Citizenship Directive

[18] Before turning to consider the rights of L's Nigerian parents it is necessary to understand L's rights for it was L whose rights under the Treaty and Directive give rise to any derivative entitlement vested in her parents to be in the United Kingdom. Under Article 5 Member States must grant Union citizens leave to enter their territory with a valid passport and must grant family members as defined in Article 2.2 leave to enter with a valid passport. Under Article 5.2 family members who are not nationals are only required to have an entry visa under Regulation 539/2001 (by which the UK and Ireland are not bound) and, where appropriate, under national law. Article 5.4 provides:-

> "Where a Union citizen or a family member who is not a national of a Member State does not have the necessary travel documents or, if required, the necessary visas, the Member State concerned shall, before turning them back, give such persons every reasonable opportunity to obtain the necessary

> documents or to have them brought to them within a reasonable period of time or to corroborate or prove by other means that they are covered by the right of free movement and residence."

Article 6 provides:-

> "(1) Union citizens shall have the right of residence on the territory of another Member State for a period of up to 3 months without any conditions or any formalities other than the requirement to hold a valid identity card or passport.
>
> (2) The provisions of paragraph 1 shall also apply to family members in possession of a valid passport who were not nationals of a Member State, accompanying or joining the Union citizen."

[19] If Union citizens are to reside for more than 3 months Article 7 comes into play. Under Article 7(1) they have as such a right of residence if they:-

(a) are workers or self-employed persons in the host Member State; or

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

(c) are enrolled at a private or public establishment accredited or financed by the host Member State on the basis of its legislation or administrative practice for the principal purpose of following a course of study including vocational training and have comprehensive sickness insurance cover in the host Member State and assure the relevant national authority by means of a declaration or by such equivalent means as they may choose that they have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State during their period of residence; or

(d) or family members accompanying or joining a Union citizen who satisfies the conditions referred to in points (a), (b) or (c).

Under Article 7.2 the right of residence provided for in paragraph 1 extends to family members who are not nationals of a Member State, accompanying or joining the

Union citizen in the host Member State provided that such Union citizen satisfies the conditions referred to in paragraph 1(a), (b) or (c).

[20] Article 9 provides that Member States shall issue a residence card to family members of a Union citizen who are not nationals of a Member State where the planned period of residence is for more than 3 months. The deadline for submitting the residence card application may not be less than 3 months from the date of arrival.

[21] Article 3.2 provides:-

> "Without prejudice to any right to free movement and residence the persons concerned may have in their own right, the host Member State shall, in accordance with its national legislation, facilitate entry and residence for the following persons –
>
> (a) any other family members, irrespective of their nationality not falling under the definition in point 2 of Article 2 who, in the country from which they have come, are dependants or members of the household of the Union citizen having the primary right of residence or where serious health grounds strictly require the personal care of the family member by the Union citizen;
>
> (b) the partner with whom the Union citizen has a durable relationship duly attested.
>
> The host Member State shall undertake an extensive examination of the personal circumstances and shall justify any denial of entry or residence to these people."

The effect of the decision in Chen

[22] Having set out the key provisions of the Directive we can now consider the effect of the ECJ decision in Chen. In that case Mrs Chen, a Chinese national, came to Belfast to give birth to a child in order for that child to acquire Irish nationality and thus Union citizenship. Mrs Chen who was the primary carer of the child (the father residing in China and who often travelled to Member States) sought a long term residence permit for herself and the child. Two key questions arose. Firstly, was the child entitled to reside permanently in the United Kingdom as a recipient of services under the then Directive 73/148 or as a Community national who was not active but had sufficient resources and sickness assurance within the meaning of the Directive

or Article 18 EC? Secondly, was the mother entitled to a right of residence as her primary carer or on the basis of the right to respect for family life under Article 8 of the Convention? The Court held that the child did have the right once she satisfied the self sufficiency requirement and was entitled to take advantage of Community law rights of freedom of movement and residence.

[23] The way in which the ECJ resolved the second question is of more direct relevance to the questions in this appeal. It held that while Mrs Chen was not a dependant relative and thus not within the direct purview of the Directive covering "family members" as defined in article 2.2 she was entitled by virtue of a derivative right from the Union citizen to be in the country to look after the child. The reasoning of the Court is set out in paragraphs 45 and 46 of the judgment:-

> "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 90/354 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 necessary 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 161/68 *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."

The opinion of the Advocate General at paragraphs 88 to 96 is also instructive:-

> "88. It remains to be considered whether Catherine's mother could invoke a right of residence deriving from her daughter.
>
> 89. Let me say straightaway that in my opinion that question should be answered in the affirmative.

90. I consider that the opposite conclusion would be manifestly contrary to the interests of the minor and to the requirement of respecting the unity of family life but above all, it would deprive of any useful effect the right of residence conferred by the Treaty upon Catherine because clearly, since she cannot remain alone in the United Kingdom, she would otherwise ultimately be unable to enjoy that right.

91. Those same considerations also appear to inspire the Community case law. In Baumbast and R the court recognised that "where children have the right to reside in a host Member State" Community law "entitles the parent who is the primary carer of those children, irrespective of his nationality to reside with them in order to facilitate the exercise of that right". It is clear that if a similar conclusion was valid in a case like the one cited concerning children of school age, a fortiori must be valid in the case of a very young child like Catherine.

"92. The rational of the above mentioned case law lies of course, above all in the requirement of protecting the interests of the minor having regard to the fact that it is precisely that purpose which must be pursued when the power granted to the parents (or guardian) to choose the place of establishment of the minor on behalf of the latter is exercised.

93. If she were denied a right of residence in Great Britain, the mother would only be able to exercise the right of establishment in the territory of that state on Catherine's behalf in a manner manifestly contrary to the interests of child because in such a case the child would automatically have to be abandoned by her mother.

94. For the same reason therefore that denial would likewise contravene the principle of respect for the unity of family life, as laid down by Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms to which the Court of Justice itself attributes fundamental importance.

> 95. In order to preclude such a result, therefore, Mrs Chen would simply have to decline to exercise the right of her daughter to establish her residence in Great Britain. That means, however, that contrary to the case law just referred to the right of movement and residence attaching to the Irish national Catherine under Article 18 EC and Directive 90/364 would not only not be facilitated but would even be deprived of any useful effect.
>
> 96. For that reason alone, therefore, I consider that Catherine's mother may invoke a right of residence derived from her daughter's right."

[24] Mr Maguire QC stressed that in Chen the mother as the primary carer was the person who derived the right to be in the United Kingdom because it was her presence which was necessary to enable the child to exercise her right to reside. He argued that the appellant in this case could not be treated as the primary carer and thus did not have the derivative right established in Chen. In Chen Mrs Chen was the parent who lived on her own with the child in Northern Ireland and was the primary carer and it was she who was seeking the residence permit. The case thus did not address the question of the absent father who was not seeking to assert any residence rights in the United Kingdom but as the Advocate General's opinion demonstrates the principle of respect for the unity of the family life as laid down by Article 8 of the Convention is in play. Where a mother and father are living together with their children a refusal to permit one parent to reside with the child within the Member State would be seriously detrimental to the family's unity and relationships and would be contrary to the best interests of the child who is entitled to the differing caring roles of mother and father.

[25] In the recent decision of the ECJ in Zambrano v. Office Nationale de l'Emploi [2011] EUECJ C/34/09 (8 March 2011) the Court held that the refusal to grant a right of residence to a third party national with dependant minor children in the Member State where those children were nationals and resided would be incompatible with the Union citizenship enjoyed by those children to enjoy the substance of the rights attaching to their status under Union law. In that case the Belgian children had a permanent right as Belgian citizens to remain in Belgium and thus would not have to satisfy the conditions for residence after the three months provided for in Article 7. The effect of that decision was to confer a right on the third country parents to be in Belgium as long as the children were dependant on them. In its reasons the court cited and applied Chen (paragraph 41). In paragraph 44 of its judgment the court said:-

> "It must be assumed that a refusal to grant a work permit would lead to a situation where those

> children, citizens of the Union, would have to leave the territory of the Union in order to accompany their parents. Similarly if a work permit were not granted to such a person he would risk not having sufficient resources to provide for himself and his family which would also result in the children, citizens of the Union, having to leave the territory of the Union. In those circumstances those citizens of the Union would as a result be unable to exercise the substance of the rights conferred on them by virtue of their status as citizens of the Union."

[26] The reasoning in Chen leads logically to the conclusion that during the three month period of L's unconditional entitlement to reside in the United Kingdom under Article 6 of the Directive she is entitled to have her caring parents with her in order to enable her to effectively enjoy the fruits of her entitlement to be in the country unconditionally during that period.

[27] Since the appellant does not qualify as a family member under Article 2.2 for the purposes of the Directive Article 6.2 does not directly assist him. Under Article 3.2 the host Member State shall in accordance with its national legislation facilitate entry of members of the family who do not fall within Article 2.2, irrespective of nationality. This category covers members of the household of the Union citizen who has the primary right of residence. Article 3.2 obliges the Member State to undertake an extensive examination of the personal circumstances and must justify a denial of entry or residence of those people. Article 5.2 provides that family members who are not nationals of a Member State shall only be required to have an entry visa in accordance with national law and Member States must grant such persons every facility to obtain the necessary visas free of charge as soon as possible and on the basis of an accelerated procedure.

[28] In the United Kingdom new rules were introduced with effect from 1 October 1994 to cover situations not governed by the 2006 Regulations in respect of family members. Regulations 257 D and E deal with requirements for leave to enter or remain as the primary carer or parent of an EEA national self sufficient child. Regulations 257 C provides:-

> "The requirements to be met by a person seeking leave to enter or remain as the primary carer or relative of an EEA national self sufficient child are that the applicant:
>
> (i) is –
>
> (a) the primary carer or

(b) the parent or

(c) the sibling

of an EEA national under the age of 18 who has a right of residence in the United Kingdom under the 2006 EEA Regulations as a self sufficient person; and

(ii) is living with the EEA national or is seeking entry to the United Kingdom in order to live with the EEA national; and

(iii) in the case of a sibling of the EEA national –

(a) is under the age of 18 or has current leave to enter or remain in this capacity; and

(b) is unmarried and is not a civil partner, has not formed an independent family unit and is not leading an independent life; and

(iv) can, and will, be maintained and accommodated without taking employment or having recourse to public funds; and

(v) if seeking leave to enter, holds a valid United Kingdom entry clearance for entry in this capacity.

In this paragraph "sibling" includes a half brother or half sister and a stepbrother or stepsister."

Regulation 257 D provides:

"Leave to enter or remain in the United Kingdom as the primary carer or relative of an EEA national self-sufficient child may be granted for a period not exceeding five years or the remaining period of validity of any residence permit held by the EEA national under the 2006 EEA Regulations, whichever is the shorter, provided that, in the case of an application for leave to enter, the applicant is able to produce to the Immigration Officer, on arrival a valid entry clearance

> for entry in this capacity or in the case of an application for leave to remain the applicant is able to satisfy the Secretary of State that each of the requirements of paragraph 257 C (i) to (iv) is met. Leave to enter or remain is to be subject to a condition prohibiting employment and recourse to public funds."

Regulation 257 E provides:

> "Leave to enter or remain in the United Kingdom as the primary carer or relative of an EEA national self sufficient child is to be refused if, in the case of an application for leave to enter, the applicant is unable to produce to the Immigration Officer on arrival a valid United Kingdom entry clearance for entry in this capacity or, in the case of an application for leave to remain, if the applicant is unable to satisfy the Secretary of State that each of the requirements of paragraph 257 C (i) to (iv) is met."

[29] The Rules do not provide for the situation of a Union citizen entering pursuant to an unconditional right of entry under Article 6 who, and whose family members, do not during that three month period have to establish sufficiency of resources so as not to become a burden on the state and can show that they have comprehensive sickness insurance. The requirements imposed by Rule 257 C are designed to impose requirements on primary carers, parents and siblings of a person who has a right of residence in the United Kingdom "under the 2006 Regulations as a self-sufficient person". A Union citizen entitled to exercise an unconditional right under Article 6 is not residing in the United Kingdom as a self-sufficient person but in the capacity of a Union citizen with an unconditional right to remain in the country for 3 months before having to establish self sufficiency.

[30] Once it becomes clear that Rule 267 C, D and E do not cover the situation arising within the relevant 3 month period, in the absence of a provision of national law covering the situation (which would in any event have to be compatible with community law) the appellant's position falls to be considered in the light of the logical application of the Chen principle.

[31] The Immigration Service effectively took four decisions. Firstly, it concluded the appellant was an illegal entrant on the grounds of verbal deception towards the visa officer and the immigration officer on entry at Heathrow. Secondly, it decided to treat the appellant as an illegal entrant. Thirdly, it decided to remove him to Nigeria under Section 10 of the Immigration and Asylum Act 1999 to Nigeria. Fourthly, it decided in the meantime to detain him on the basis that his removal was imminent.

[32] The judge considered, correctly in our view, that the appellant had indeed entered the United Kingdom deceptively. He concluded, with justification, that the appellant had obtained a visitor's visa on a false premise namely that he was coming on a holiday whereas his true intention was at least to explore the possibility of remaining on a long term basis. We see no reason to differ from the judge's analysis of the evidence leading to the conclusion that the appellant entered the United Kingdom by deception.

[33] In fact, at the point in time when the appellant was stopped at Belfast Docks and questioned, he was entitled to remain in the country as a carer by virtue of the derivative right flowing from L's Community law right which at that time under Article 6 entitled her to remain in the country unconditionally for up to 3 months and to have the benefit of her parents' care within the state.

[34] The Immigration Service, accordingly, was not entitled at that time to treat him as an illegal entrant who had no present legal entitlement to remain in the country. In deciding to treat him as such the Immigration Service failed to take into account the effect of the Article 6 rights vested in L to be in the country and her entitlement to have her parent carers with her. They concluded, according to the affidavit of Peter Bradshaw, that had the visa officer in Lagos known of the facts he would have been bound to refuse the visa application and the Immigration Officer at Heathrow if he had known the facts would have been bound to refuse the appellant leave to enter the United Kingdom. Had the true situation been spelled out by the appellant in Lagos and/or Heathrow the officers concerned would, in fact, have been bound to permit the appellant to enter for a limited period under Article 6 while L exercised her unconditional right to be in the country.

[35] Against the background of an asserted Community law entitlement to be in the country, the Immigration Service before determining that the appellant should be removed and detained pending removal was bound to carry out a proper examination of the situation to properly address the question whether the appellant had by virtue of Community law any entitlement to be in the country, even if he had misleadingly obtained a visitor's visa. The focus of the enquiry should have been on the primary rights of L as a Union citizen and then on the secondary derivative rights of the appellant. As is apparent from the authorities such as R v. Westminster City Council ex party Monahan [1990] 1 QB 87 if a decision maker fails to make the proper and necessary enquiries which a reasonable decision maker would make to inform himself properly in order to make his decision lawfully, the resultant decision will be flawed on the grounds of Wednesbury unreasonableness. There is nothing to indicate that the Immigration Service officers concerned did seek to acquaint themselves with the relevant Community law provisions and decisions governing the situation. While the affidavit evidence adduced by the respondent made clear that it was appreciated that L had an Irish passport the proper inference to be drawn from

the evidence is that the officers failed to investigate what legal consequences flowed from that fact as far as the appellant was concerned.

[36] The spirit and intent of the Directive clearly points to an obligation on the immigration authorities to properly investigate relevant personal circumstances before requiring the removal of family members. This applies both in respect of family members as defined in Article 2.2 and extended family members falling within Article 3.2. As the last three lines of Article 3.2 state:-

> "The host Member State shall undertake an extensive examination of the personal circumstances and shall justify any denial of entry or residence to these people."

[37] In these circumstances in reaching the decision to treat the appellant as an illegal entrant and to remove him and detain him pending removal the Immigration Service failed to undertake an extensive examination of the personal circumstances and it did not justify their decision to detain and remove him. They did not consider the Article 8 Convention rights of L.

[38] Furthermore, in deciding to detain the appellant as it did, the Immigration Service failed to address the question of the proportionality of detention in the circumstances of the case taking account, in particular of the Article 8 rights of L, giving rise to the appellant's derivative right to be with her. Even if the Immigration Service had legitimate doubts about the appellant's right to rely on Community law, on any reasonable view the complexity of the Community law issues raised serious questions which made immediate removal and detention disproportionate in the circumstances, resulting, as those decisions did, in the separation of the family in circumstances self evidently upsetting for each member of the family. It is difficult to avoid the conclusion that the Immigration Services treated the case as a straightforward case of illegal entry by deception by an individual with no arguable right to be in the country. The decisions failed to address the complexities of the situation. Those complexities should reasonably have led to the conclusion that pending determination of the questions or at least the obtaining of proper legal advice, detention and removal would be a disproportionate response to the situation.

[39] Accordingly, we conclude that while the Immigration Service was justified in concluding that the appellant had initially entered the United Kingdom by deception on foot of the visitors' visa, the decision to treat him as an illegal entrant and to remove him should be quashed. His detention was, accordingly, unlawful.

[40] Since the appellant's detention was unlawful he is entitled to damages for that wrongful detention. We must, accordingly, remit the matter to the trial judge to assess damages. In assessing those damages the court will take account of the conclusion that his initial entry into the United Kingdom was on foot of a visitor's

visa obtained by deception and that the appellant's lack of disclosure of his true motivation for coming into the country was a significant contributory factor leading to the appellant's detention.