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The *Bajratari* Case: Are All Resources Good Enough for EU Law?*

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ABSTRACT: The *Bajratari* case is a significant contribution of the Court of Justice of the European Union to the clarification of the meaning of the condition of sufficient resources within the regime of the Citizens Directive 2004/38 (Article 7 (1) (b)). Moreover, it is also a step towards strengthening EU citizens' right to move and reside in another Member State. In this decision the Court held that income that results from the exercise of professional activities without a lawful residence and employment permit is not to be excluded from the condition of sufficient resources imposed by EU law to a Union citizen who is residing for more than three months in another Member State.

KEYWORDS: Sufficient resources; EU citizenship; derived right to reside; Citizens Directive 2004/38, public policy.

I. Introduction

The *Bajratari*[1] case is a decision that, first and foremost, relates to the enjoyment of EU citizenship rights. In a preliminary ruling, the national court questioned the Court of Justice of the EU (hereinafter CJEU) whether income from employment that is unlawful under national law establishes the availability of sufficient resources under Article 7(1)(b) of Citizens Directive 2004/38/EC. At the heart of this decision is the question whether two children, who meet the condition of sufficient resources imposed by

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[1] Judgment of 2 October 2019, *Ermira Bajratari v. Secretary of State for the Home Department*, C-93/18, EU:C:2019:809.

the Citizens Directive 2004/38 for those EU citizens who exercise their right to move and reside in the territory of another Member State for more than three months.

The Court already had the opportunity to address the several key aspects of this regime. It was established in the seminal case *Baumbast* that Article 20 (1) of the TFEU confers EU citizens the right to reside directly on a treaty basis.[2] In *Zhu and Chen*,[3] and in relation to sufficient resources, the Court held that the origin of those resources did not determine whether the sufficiency threshold was met. This interpretation of the self-sufficiency condition was reaffirmed by the Court several times, for example, in *Alokpa*[4] and in *Singh*, with relation to resources provided by a spouse who is a third-country national.[5] In *Bajratari*, the CJEU addressed another issue that had not been under its scrutiny: whether income that resulted from the exercise of unlawful employment situation could be considered for the purposes of fulfilling the condition of sufficient resources imposed by the Citizens Directive 2004/38. For the Court (and for the Advocate General) it was clear that an additional requirement should not be imposed to the resources that are available to an EU citizen residing in another Member State. This interpretation clearly results from the previous case-law that establishes that no additional condition should be imposed on the income made available to the EU citizen. Additionally, an interpretation of the condition of sufficient resources, in line with what the UK Government has argued in the proceedings, would be not only be a "disproportionate interference" on the minor's free movement rights, but also would be against the objective of the Citizens Directive 2004/38.[6]

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[2] Judgment of 17 September 2002, *Baumbast and R v. Secretary for the Home Department*, C-413/99, EU:C:2002:493, paragraph 84.

[3] Judgment of 19 October 2004, *Kunqian Catherine Zhu and Man Lavette Chen v. Secretary of State for the Home Department*, C-200/02, EU:C:2004:639.

[4] Judgment of 10 October 2013, *Adzo Domenyo Alokpa and o. v. Ministre du Travail, de l'Emploi et de l'Immigration*, C-86/12, EU:C:2013:645.

[5] Judgment of 7 July 1992, *The Queen v. Immigration Appeal Tribunal and Surinder Singh, ex parte Secretary of State for Home Department*, C-370/90, EU:C:1992:296.

[6] Judgment of 2 October 2019, *Ermira Bajratari v. Secretary of State for the Home Department*, C-93/18, EU:C:2019:809, paragraphs 42 and 47.

II. Lawful residence in the host Member State for more than three months

There are three types of causes that can result in an EU citizen being illegally staying in another Member State to which they have migrated. The first are specific causes such as the unreasonable burden criteria and the loss of worker status. The second are general causes relating to public policy, public security or public heath codified in the Citizens Directive 2004/38.[7] The third cause is a stand-alone cause, namely abuse of rights under EU law.

The Citizens Directive 2004/38 distinguishes three types of residence status based on the criteria of temporality: a) up to three months of residence,[8] b) more than three months of residence,[9] and c) after having resided legally and continuously for five years in the host Member State.[10] The first type is granted to every EU citizen who wants to live in another Member State for up to three months: in this case, they should be granted the right of residence 'without any conditions or any formalities other than the requirement to hold a valid identity card or passport'.[11] These migrating EU citizens are less likely to lose their right to reside in another Member State as there is no financial requirement imposed on them and they enjoy an almost unconditional right of residence.[12] Only the grounds of public policy, public security, or public health may limit their right to reside in the host Member State for the first trimester.[13]

After the first three months, in order to guarantee the enjoyment of the right to reside in another Member State, EU citizens must either be workers or self-employed, or have sufficient resources for themselves and their family members to avoid becoming a burden on the social assistance

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[7] Articles 27 to 33 of the Citizens Directive 2004/38; see also Judgment of 23 November 2010, *Tsakouridis,* C-145/09, EU:C:2010:708, and the Judgment of 22 May 2012, *P.I v. Oberburgermeisterin der Stadt Remscheid*, C-348/09, EU:C:2012:300.

[8] Article 6 of the Citizens Directive 2004/38.

[9] Article 7 of the Citizens Directive 2004/38.

[10] Article 16 of the Citizens Directive 2004/38.

[11] Article 6 (1) of the Citizens Directive 2004/38.

[12] A. Dashwood and others, *Wyatt and Dashwood's European Union Law* (Hart Publishing, 2011), 472.

[13] See Article 14 (1) of the Citizens Directive 2004/38 for the retention of the right of residence of this group of migrants when they become an 'unreasonable burden on the social assistance system of the host Member State', Article 24 (2) of the Citizens' Rights Directive for the Member States' power to limit the access to social assistance on the first three months and E. Guild, S. Peers and J. Tomkin, *The EU Citizenship Directive: A Commentary* (Oxford University Press, 2014), 123.

system of the host Member State, and have comprehensive sickness insurance cover in the host Member State.[14]

If EU citizens fail to comply with these conditions, they consequently lose their right to reside in another Member State for more than three months and can thus be expelled to their Member State of origin. These are specific causes of the illegality of a stay of an EU citizen, given that they apply only to certain categories of individuals who, having lived for more than three months and not more than five years in another Member State, do not fulfil the conditions set out in Article 7 of the Citizens Directive 2004/38.

Traditionally, the wording of Article 7 of the Citizens Directive 2004/38 distinguishes three types of regimes to regulate the right to reside in another EU Member State: (i) economically active citizens,[15] (ii) economically independent or inactive citizens,[16] and (iii) students.[17] Economically active citizens are granted the widest of the three forms of residence in terms of rights and the strongest protection against expulsion.[18] The definition of economically active EU citizens is intrinsically related to the definition of 'worker' as extensively developed in the case law and the evolution of the free movement of workers under Article 45 TFEU. The loss of the status of worker, if not complemented with the conditions imposed on economically inactive citizens, may, in principle, be a cause of illegality of the stay of a Union citizen.

The second category under Article 7 are economically inactive or independent citizens residing in another Member State for more than three months, who are obliged to comply with the requirements of possession of 'sufficient resources', to avoid becoming an 'unreasonable burden' on the social assistance of the host Member State, and to have a comprehensive health insurance. The CJEU delivered its decision in the *Brey* case, a judgment dealing directly with the definition of the concept of unreasonableness.[19] Crucially for our purposes regarding the condition of owning sufficient resources to avoid becoming an unreasonable burden to the

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[14] Article 7 (1) a) and b) of the Citizens Directive 2004/38.

[15] Article 7 (1) a) of the Citizens Directive 2004/38.

[16] Article 7 (1) b) of the Citizens Directive 2004/38.

[17] Article 7 (1) c) of the Citizens Directive 2004/38.

[18] Article 14 (4) a) of the Citizens Directive 2004/38.

[19] Judgment of 19 September 2013, *Pensionsversicherungsanstalt v. Peter Brey*, C-140/12, EU:C:2013:565. H. Verschueren, "Free movement or benefit tourism: The unreasonable burden of Brey", *European Journal of Migration and Law* 16, no. 2 (2014): 147.

host Member State, the Court has seemed to be reluctant in the past to make this ground a source of illegality of EU citizens' stay. As a result, some commentators have described its scope as 'virtually meaningless as a Member State instrument for deportation'.[20]

The Bajratari children had to meet those requirements imposed by EU law to be able to exercise their right to move and reside in the host Member State, in their case the UK. Nevertheless, for the purposes of the case that will be analysed in the sections below, the issue of becoming an unreasonable burden for the host Member State was not central after all, as it will be explained. Mr. Bajratari never relied on social assistance to provide for his family. The same applies to having a comprehensive health insurance, it was not questioned at any point. Instead, what happened to Mr. Bajratari was that he lost his residence permit and consequently his work permit, so the question posed to the Court was then straightforward: is income that results from an unlawful employment situation good enough for the purposes of meeting the self-sufficiency condition imposed by the Citizens Directive 2004/38?

III. Bajratari*: the facts*

Mr. Durim Bajratari, an Albanian national residing in Northern Ireland, had a residence card authorising him to live in the United Kingdom as a result of his first marriage with Ms. Toal, a British national. This relationship came to an end in 2011, nevertheless, from May 2009 to May 2014, Mr. Bajratari was legally residing in the EU on the grounds of his relationship to a EU citizen, and his residence card was not revoked during that time. In 2011, he left the United Kingdom to marry Ms. Ermira Bajratari, also an Albanian national, who resides in Northern Ireland since 2012.

Three children were born to the Bajratari's family, all of them within the territory of Northern Ireland, and the first two were granted a certificate of Irish nationality. Any person born on the island of Ireland may be granted nationality of the Republic of Ireland under the *Belfast/Good Friday Agreement* and the Constitutional amendments that were consequently adopted.[21] In 2013, Ms. Bajratari applied to the Home Office to be recognised a derivative right of residence right under the Citizens Directive 2004/38 on the grounds of being the primary carer of an Irish

[20] N. Nic Shuibhne, "Derogating from the free movement of persons: When can EU citizens be deported?", *CYELS* 8 (2006): 210.

[21] See articles 2 and 3 of the Constitution of Ireland.

national and a EU citizen, her son, who at the time was four months old. If his mother was refused a permit to reside in the United Kingdom, baby Bajratari would be deprived of the enjoyment of EU citizenship's rights. Despite the potential restriction of the rights of a EU citizen, the Secretary of State for the Home Department rejected Ms. Bajratari's application because she could not be considered a "family member" for the purposes of the Citizens Directive 2004/38 and her son could not fulfil the requirement of self-sufficiency imposed by Article 7(1) (b) of the same directive, which was analysed before in the present commentary.[22]

During this period, and since 2009, Mr. Bajratari has continuously held lawful employment. For example, as a chef in a restaurant in Northern Ireland, until his residence permit expired in 2014, which is also the date when his employment status became irregular. For the relevant UK authorities the requirement of having sufficient resources not to "become a burden on the social assistance system of the host Member State during their period of residence" was not satisfied by the Bajratari children due to the fact that their father's unlawful employment situation was the source of their resources.

Ms. Bajratari reacted against the decision of the Home Office in the First-tier Tribunal (Immigration and Asylum Chamber) that like the Upper Tribunal (Immigration and Asylum Chamber) dismissed her appeal. Subsequently, Ermira Bajratari decided to appeal against the decision of the Upper Tribunal to the Court of Appeal in Northern Ireland.

The Court of Appeal pointed out that even if the CJEU had already addressed the content of the requirement of self-sufficiency contained in Article 7(1)(b) of the Citizens Directive 2004/38, for instance clarifying that it is fulfilled regardless of the origin of those resources, it has never considered whether income resulting from an unlawful employment situation could be taken into consideration for those purposes. As such, the court referred two questions to the CJEU for a preliminary ruling:

> *'(1) Can income from employment that is unlawful under national law establish, in whole or in part, the availability of sufficient resources under Article 7(1)(b) of [Directive 2004/38/EC]?*

[22] See section II. The concept of sufficient resources in the Citizens Directive 2004/38.

> *(2) If "yes", can Article 7(1)(b) [of that directive] be satisfied where the employment is deemed precarious solely by reason of its unlawful character?"*[23]

III.1 Advocate General Szpunar's opinion in Bajratari

Advocate General (AG) Szpunar delivered his opinion in the *Bajratari* case in June 2019.[24] In short, he concluded that the arguments put forward by the UK authorities to reject Ms. Bajratari's request to a derived right to reside were not to be followed. AG Szpunar's opinion was based in the following reasoning: firstly, would the situation of Ms. Bajratari and her children fall under the scope of EU law? Secondly, do the Bajratari's children fulfil the requirement of sufficient resources imposed by Article 7 (1) (b) of the Citizens Directive 2004/38, if those resources result from a situation of unlawful employment as it was Mr. Bajratari's case? Let us look into each of these arguments thoroughly.

In his opinion, the AG argued that the situation of the two Bajratari children was covered under the scope of EU law, in particular Article 21 TFEU and the Citizens Directive 2004/38.[25] This is so regardless of the fact they have never moved from the Member State where they were born, which could, at first sight, indicate that the Bajratari children were not included in the category of "beneficiary" in accordance with Article 3(1) of the Citizens Directive 2004/38. This provision determines that the Citizens Directive 2004/38 applies to "all Union citizens who move to or reside in a Member State other than that of which they are a national, and to their family members as defined in point 2 of Article 2 who accompany or join them".[26] The Court has, nevertheless, already clarified in its jurisprudence that the fact that a EU citizen did not move to or residence in the territory of another Member State is sufficient to conclude that that is a purely internal situation. In *Garcia Avello* or *Zhu Chen*, as referenced by Szpunar, the CJEU has determined that a link with EU law exists in relation to those

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[23] Judgment of 2 October 2019, *Ermira Bajratari v. Secretary of State for the Home Department*, C-93/18, EU:C:2019:809, paragraph 17.

[24] Opinion of Advocate General Szpunar of 19 June 2019, *Ermira Bajratari v. Secretary of State for the Home Department*, C-93/18, EU:C:2019:512.

[25] Ibid., 35 to 37.

[26] Article 3 (1) Citizens Directive 2004/38. See also, for example, Judgment of 2 October of 13 September 2016, *Alfredo Rendón Marín v. Administración del Estado*, C-165/14, EU:C:2016:675, paragraph 40. See also, Päivi Johanna Neuvonen, "EU citizenship and its 'very specific' essence: Rendón Marin and CS", *Common Market Law Review* 54, Issue 4 (2017): 1201-1220.

"who are nationals of one Member State lawfully resident in the territory of another Member State".[27] The two Bajratari siblings reside in Northern Ireland (United Kingdom) and are nationals of the Republic of Ireland, therefore, they reside in a Member State different than that of their nationality and should be granted the right to reside in the UK on the basis of Article 21 (1) and the Citizens Directive 2004/38. The AG points out that this right is subject to limitations and that leads him to examine the condition imposed by Article 7(1) (b) of the Citizens Directive 2004/38 in relation to the situation of the Bajratari children, which would allow for Ms. Bajratari to be granted a derived right to reside in the UK.[28]

In order to argue that the condition of sufficient resources is fulfilled by the Bajratari's children, the AG starts by recalling the settled case-law of the CJEU on this matter. In *Zhu and Chen*, the Court had established that the fulfillment of the condition of sufficient resources did not impose any requirement with regard to the origin of the resources and, as such, a third country national could provide for his minor children.[29]

Following this line of thought, even if the minors were granted a right to reside within the territory of the host Member State on the grounds of Article 21 TFEU and the Citizens Directive 2004/38, these provisions should also confer a derived right to reside to the primary carer of the children, who in the *Bajratari* case is Ms. Bajratari. From here the AG builds his argument with respect to the question of whether income that results from an unlawful employment situation can be considered for the purposes of the fulfillment of the condition of sufficient resources as set out in the Citizens Directive 2004/38.

Mr. Bajratari's stay was tolerated by the host Member State and despite his irregular residence and employment status he kept paying taxes and contributions to the social security system. These facts were taken into account by the AG to frame the classification of Mr. Bajratari's income as sufficient resources within the Citizens Directive 2004/38 and considered relevant to conduct the proportionality assessment of the national

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[27] Judgments of 2 October 2003, *Carlos Garcia Avello v. Belgian State*, C-148/02, EU:C:2003:539, paragraphs 13 and 27, and of 19 October 2004, *Kunqian Catherine Zhu and Man Lavette Chen v. Secretary of State for the Home Department*, C-200/02, EU:C:2004:639, paragraph 19.

[28] Opinion of Advocate General Szpunar of 19 June 2019, *Ermira Bajratari v. Secretary of State for the Home Department*, C-93/18, EU:C:2019:512, paragraph 38.

[29] Judgment of 19 October 2004, *Kunqian Catherine Zhu and Man Lavette Chen v. Secretary of State for the Home Department*, C-200/02, EU:C:2004:639, paragraphs 28 to 30. This interpretation was repeated several times by the CJEU.

measures rejecting Ms. Bajratari's residence due to the origin of her husband's income.[30]

In Szpunar's view, that rejection to recognise the income of someone who carried out professional activities in the host Member State without a work and residence permit, in the circumstances of the case under analysis, is a "disproportionate measure unjustifiably undermining the freedom to move and reside enjoyed by infants who are citizens of the Union".[31] The Citizens Directive 2004/38 aims to allow the exercise of the right to move and reside freely within the territory of Member States, however subject to the limitations and conditions laid down in the Treaty. Not becoming an unreasonable burden to the social assistance system of the host Member State is one of those conditions, and nothing in the described facts suggested that the Bajratari children could become one, negatively affecting the UK's public finances.

Furthermore, the AG clarified in his opinion the difference between the income that can fulfil the sufficient resources condition imposed by the Citizens Directive 2004/ 38 and resources that result from illegal or criminal activities, such as drug trafficking, for example.[32] Therefore, as the AG puts it, if the resources available to the minors result from the exercise of a criminal activity which may result in the imprisonment of their carer, they will not have resources to be self-sufficient in the host Member State.

This was not the scenario in which the Bajratari children lived, and the fact that Mr. Bajratari's income resulted from work carried out in absence of a work and residence permit in the host Member State does not preclude its inclusion in the concept of sufficient resources. In light of the above, for the AG, it was clear that the children were covered under the protection of Article 21 TFEU and that of the Citizens Directive 2004/38, which allowed Ms. Bajratari to derive a right of residence from her children.[33] A restrictive interpretation of the aforementioned EU law provisions and of the CJEU case-law on this matter would strip them of "useful effect".[34] Szpunar recalled the *Grzelczyk* mantra[35] to argue that depriving

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[30] Opinion of Advocate General Szpunar of 19 June 2019, *Ermira Bajratari v. Secretary of State for the Home Department*, C-93/18, EU:C:2019:512, paragraphs 54-55.

[31] Ibid., paragraph 69.

[32] Ibid., paragraph 66.

[33] Ibid., paragraph 71.

[34] Ibid., paragraph 80.

[35] Judgment of 20 September 2001, *Rudy Grzelczyk v. Centre public d'aide sociale d'Ottignies-Louvain-la-Neuve*, C-184/99, EU:C:2001:458, paragraph 31. See also Recital 3 of the Preamble to the

the minors, who cannot be considered for the status of workers within EU law, of the right to reside in the host Member State would deprive them from the enjoyment of EU citizenship.

III.2 The judgment of the Court of Justice in Bajratari

On the 2nd of October 2019, the CJEU followed the AG's opinion in its decision and held that the fact that the resources made available to a minor Union citizen derived from income that resulted from the exercise of unlawful employment of a third-country national without residence or work permit could not be excluded for the purposes of his self-sufficiency in accordance with Article 7 (1) (b) of the Citizens Directive 2004/38.[36]

The CJEU started by arguing that to meet the condition of sufficient resources as established in the Citizens Directive 2004/38, and in accordance with the Court's previous case-law on this matter, no additional requirement was imposed with regard to the origin of the income of a third-country national to provide for their minor EU citizens children.[37] In addition, the Court clarified in this regard that, in accordance with the wording of the relevant EU law provision, it is only required that Union citizens have sufficient resources available and preventing them from becoming an unreasonable burden to the social assistance of the host Member State, in the present case the United Kingdom.[38] Mr. Bajratari's lack of residence card and work permit did not, therefore, preclude the fulfilment of the self-sufficiency of his children.

The Court then moves on to its second main argument: as a "fundamental principle of EU law", the right to free movement and the conditions imposed by the Citizens Directive 2004/38 shall respect the limits imposed by EU law and the principle of proportionality.[39] Moreover, the CJEU adds that to successfully pass the proportionality test, a restrictive national measure on the right of free movement has to be "appropriate and

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Citizens Directive 2004/38: "Union citizenship should be the fundamental status of nationals of the Member States when they exercise their right of free movement and residence".

[36] Judgment of 2 October 2019, *Ermira Bajratari v. Secretary of State for the Home Department*, C-93/18, EU:C:2019:809, paragraph 53.

[37] Judgment of 2 October of 13 September 2016, *Alfredo Rendón Marín v. Administración del Estado*, C-165/14, EU:C:2016:675, paragraph 48.

[38] Judgment of 2 October 2019, *Ermira Bajratari v. Secretary of State for the Home Department*, C-93/18, EU:C:2019:809, paragraph 34.

[39] Judgment of 2 October 2019, *Ermira Bajratari v. Secretary of State for the Home Department*, C-93/18, EU:C:2019:809, paragraph 35.

necessary to attain the objective pursued",[40] which in the present case was the protection of the public finances of the host Member State. The Court recognises that the risk of becoming an unreasonable burden to the social assistance system of the host Member State is higher when the residence and employment status of parents is unlawful. However, it also held that it is not for Article 7 (1) (b) of the Citizens Directive to be interpreted in a way that includes an additional requirement which relates to the origin of those resources. This is so due to the fact that the protection of the host Member State's legitimate interests can be found elsewhere in the text of the Citizens Directive 2004/38, for instance when it regulates the retention of the right to reside.[41] Thus, interpreting Article 7 (1) (b) of the Citizens Directive 2004/3 in a way that would include an additional requirement to meeting the self-sufficiency condition would represent, in the words of the Court, "a disproportionate interference with the exercise of the Union citizen minor's fundamental rights of free movement and of residence under Article 21 TFEU".[42]

Furthermore, the fact that Mr. Bajratari never needed to resort to the UK's social assistance system to support his family for ten years, and that the condition of having comprehensive sickness insurance was not questioned, also contributed to sustain the Court's view.

Finally, the public policy argument put forward by the UK Government for derogating the right residence of Union citizens or members of their families was dismissed by the First Chamber of the CJEU by expressly joining the AG in its position. Neither of the circumstances presented could disturb the host Member State's social order, nor did they represent a "genuine, present and sufficiently serious threat affecting one of the fundamental interest of the society".[43]

IV. Comments

The *Bajratari* decision is noteworthy for several reasons. The Court establishes in this decision that no requirement shall be imposed on the condition of having sufficient resources in accordance with EU with regard to

[40] Judgment of 2 October 2019, *Ermira Bajratari v. Secretary of State for the Home Department*, C-93/18, EU:C:2019:809, paragraph 36.

[41] Article 14 (1) and (2) of the Citizens Directive 2004/38.

[42] Judgment of 2 October 2019, *Ermira Bajratari v. Secretary of State for the Home Department*, C-93/18, EU:C:2019:809, paragraph 42.

[43] Judgment of 2 October 2019, *Ermira Bajratari v. Secretary of State for the Home Department*, C-93/18, EU:C:2019:809, paragraphs 51-52.

the origin of the income that is made available to Union citizens living in the territory of another Member State. This interpretation is not novel in the CJEU's case-law. Furthermore, the Court, in *Bajratari*, importantly determines that in order to be self-sufficient, Union citizens must have enough resources to support themselves, and that the fact that the income made available to them results from the unlawful exercise of professional activities shall not be considered by the national authorities as determining. Therefore, this decision strengthened the right to free movement of people and EU citizenship related rights, which is, in fact, a reiteration of previous decisions of the Court, such as, for example, *Zhu and Chen* or *Rendón Marín*.

When the CJEU conducts the proportionality test on the measures taken by the national authorities, it values the toleration *de facto* of Mr. Bajratari, who duly paid his taxes and contributions in the host Member State and never needed to request social assistance support to provide for his family.[44] Thus, his actions could not affect the respect of the protection of the public finances of the host Member State.[45]

In general terms, being tolerated *de facto* means being acknowledged by the national authorities as unlawfully staying or unlawfully working in the host Member State. For instance, in this precise case, the UK did not deny receiving Mr. Bajratari's taxes and contributions despite his lack of residence permit. The *Zambrano* case presented a similar scenario in terms of toleration *de facto*, Mr. Zambrano a rejected asylum seeker continued to apply for residence permits and to pay his social security contributions meanwhile irregularly staying in Belgium.[46]

The ECtHR *Jeunesse* also took into account the *de facto* tolerance of the presence of the applicant by the Dutch authorities as a relevant factor when deciding whether there would be violation of Article 8 of the ECHR if the applicant should face deportation.[47] The ECtHR argued in *Jeunesse* that the fact that the national authorities tolerated the presence of the applicant within the territory of the Member State for an extended period of time

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[44] Judgment of 2 October 2019, *Ermira Bajratari v. Secretary of State for the Home Department*, C-93/18, EU:C:2019:809, paragraph 44.

[45] Opinion of Advocate General Szpunar of 19 June 2019, *Ermira Bajratari v. Secretary of State for the Home Department*, C-93/18, EU:C:2019:512, paragraph 65.

[46] Judgment of 8 March 2011, G*erardo Ruiz Zambrano v. Office national de l'emploi (ONEm)*, C-34/09, EU:C:2011:124, paragraph 20.

[47] Judgment of 3 October 2014, *Jeunesse v. The Netherlands*, ECHR (2014), App. No. 12738/10, paragraph 116.

contributed to the creation of strong family, social and cultural ties with the host State. One can then conclude that, in this case, the fifteen years of de facto tolerated non-removability played an important role in being granted the right to a residence permit in the Netherlands.

Although this was not the only factor taken into account in this judgment, the assessment of the best interests of the child was a determining factor for the outcome of this case. Nevertheless, the best interests of the children were a variable that the CJEU did not take into consideration in *Bajratari*'s proportionality test, differently from what it did in other related decisions, for example in *Chavez Vilchez*.[48]

All in all, the valorisation of a toleration *de facto* situation in *Bajratari* reflects the AG's and the Court's awareness of the difficulties that migrants, and in particular third-country nationals, may face in maintaining the legality of their stay and of their employment situation. The recognition of toleration *de facto* scenarios is also revealing of the fluidity that exists between regular and irregular migration statuses: a migrant's stay can swing back and forth from irregularity to regularity easily.[49] But most of all, it means a reinforcement of EU citizens' protection, in particular when they are dependent from the support of third-country nationals who live in precarious situations.

AG Szpunar importantly draws a distinction between sufficiency of resources and the illegality of resources derived from criminal activity. The latter would include, for example, situations where the income results from the exercise of a criminal activity as drug trafficking.[50] It is clear from the facts described in the proceedings that Mr. Bajratari's case was not one of involvement in criminal activities, but instead his residence and work card simply expired during his stay in the UK.

This distinction is relevant in terms of the regime applicable, as the exercise of criminal activities may justify a derogation of free movement on the grounds of public policy, public security or public health.[51] In *Bajratari*, the Court dismisses the argument put forward by the UK in relation to the violation of public policy by Mr. Bajratari's actions and consequently

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[48] Judgment of 10 May 2017, *H.C. Chavez-Vilchez and Others v. Raad van bestuur van de Sociale verzekeringsbank and Others*, Case C-133/15, EU:C:2017:354, paragraph 70.

[49] Benedita Menezes Queiroz, *Illegally Staying in the EU – An Analysis of Illegality in EU Migration Law* (Hart Publishing, 2018).

[50] Opinion of Advocate General Szpunar of 19 June 2019, *Ermira Bajratari v. Secretary of State for the Home Department*, C-93/18, EU:C:2019:512, paragraphs 66-68.

[51] Article 27 of the Citizens Directive 2004/38.

his children's right to reside in another Member State.[52] For claiming these grounds, national authorities must respect a set of limitations: firstly, they may not be invoked to serve economic grounds;[53] secondly, the principle of proportionality must be respected;[54] thirdly, the decision must be based exclusively on the personal conduct of the EU citizen;[55] fourthly, criminal convictions alone may not be the reason to decide under those grounds;[56] and the personal conduct of the individual concerned must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society.

Both the Court and the AG considered that these circumstances were not verified with regard to the national authorities' decision to deny the Bajratari children a right of residence on the grounds of public policy.[57] Szpunar rightly points out that accepting the view of the UK could lead to "a real risk of uncertainty" taking into consideration that, for instance, the acts which are qualified as unlawful vary considerably from Member State to Member State and even within a Member State. *In extremis* forgetting to pay the latest electricity or internet bill could put one at risk of derogation of free movement.

Not only does this interpretation of the exception of public policy, once more, reinforce EU citizens' right to reside in another Member State, but it also contributes positively in terms of the current debate on the criminalisation of migration or "crimmigration".[58] By clarifying that the exclusion of Mr. Bajratari's income from illegal employment could not be left out of the concept of sufficient resources on the grounds of public policy, the Court, even if involuntarily, says that migration does not conflate with crime and that there is, in fact, a lot separating both systems.

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[52] Judgment of 2 October 2019, *Ermira Bajratari v. Secretary of State for the Home Department*, C-93/18, EU:C:2019:809, paragraphs 49-52.

[53] Article 27 (1) of the Citizens Directive 2004/38.

[54] Ibid., Article 27 (2).

[55] Ibid.

[56] Ibid.

[57] Judgment of 2 October 2019, *Ermira Bajratari v. Secretary of State for the Home Department*, C-93/18, EU:C:2019:809, paragraph 52 and Opinion 78.

[58] JP Stumpf, "The crimmigration crisis: Immigrants, crime, & sovereign power", *Bepress Legal Series, Working Paper* 1635 (2006): 378: "I argue that the trend toward criminalizing immigration law has set us on a path toward establishing irrevocably intertwined systems: immigration and criminal law as doppelgangers". See also, JP Stumpf, "Doing time: Crimmigration law and the perils of haste", *UCLA Law Review* 58 (2011): 1726.

V. Conclusion

The *Bajratari* case sheds light into the concept of sufficient resources established by the Citizens Directive 2004/38 as a condition that needs to be met for an EU citizen to reside legally within the territory of the host Member State. Unlike other cases in the same matter, this decision dealt with the fulfilment of the self-sufficiency condition by the two Bajratari children, and it did not address the issue of Ms. Bajratari's derived right to reside in the host Member State to facilitate her children's enjoyment of EU citizenship related rights.

The Court refused to include an additional requirement to the condition of self-sufficiency reaffirmed in previous case-law in relation to the origin of the income made available to the mobile EU citizen. The novelty of this decision relates to the fact that it was clear for the Court that a third-country national's income which results from unlawful employment and residence situation could not be excluded for the purposes of his children meeting the self-sufficiency condition imposed by EU law to reside in the UK.

Further, the Bajratari decision raises several important questions that remain unanswered, for example: what will happen to Mr. Bajratari, who despite having an irregular employment and residence status was tolerated *de facto* for several years by the national authorities? Mr. Bajratari is now left in a legal limbo where he has no residence permit, but his income allows his two sons to enjoy the right to live in the UK. National authorities will have to decide whether to grant both Mr. and Ms. Bajratari derivative rights to reside. The CJEU's preliminary ruling did not have to address these issues, even if in the decision there is an implicit awareness of the hardships migrants may face to maintain the legality of both their stay and their employment.

For now, this is what we know about the Bajratari family's storyline: Mr. Bajratari's income is good enough to support his EU citizens children in accordance with EU law.

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