The Court of Justice of the European Union and Citizens of the Union: A Revolution Underway? The *Zambrano* judgment 8 March 2011

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8 March is generally celebrated as International Women's Day. This year it may be celebrated as a milestone in children's rights in the EU and as a point of transition for citizens of the Union. The key event was the handing down of the CJEU decision in the case C-34/-09 *Zambrano*.

The facts of the case are rather unusual and of a kind one would expect to find troubling the Court over the Returns Directive or some other immigration/asylum law directive. Instead, the Court is faced with an issue which is about EU citizenship. The Zambrano couple are Colombian nationals who have been resident in Belgium since 1999. They arrived on short stay visas then applied for asylum. Their asylum applications were rejected but on appeal the Belgian court while not reversing the refusal, stated that the authorities must not send the couple back to Colombia on account of the civil war there. The couple thus fell into limbo – no immigration status in Belgium but no action by the Belgian authorities to expel them. At first, the husband worked but then his workplace was raided and his employer had to sack him as Mr Zambrano did not have a work permit. He was then refused unemployment benefit because of his irregular status. The couple kept applying for residence documents but their applications were consistently refused. Eventually, an industrial tribunal which was considering yet another refusal of social security benefits to the family refers the matter to the CJEU in at the end of 2008.

What makes the case one about citizenship of the Union is that while all this was going on, the couple had two children, born in Belgium, who both acquired Belgian nationality by birth. One might well ask, how does this make the matter on about EU citizenship – is it not a matter which is outside EU law as it is wholly internal to one Member State? The eight Member States which intervened in the case argued exactly this. The CJEU held otherwise.

The operative part of the judgment is surprisingly short – only 10 paragraphs. This may indicate that there was much disagreement among the judges about the legal issues. On the positive side, this means the case is very clear and there is no space for ambiguity. The key and startling findings of the CJEU are as follows:

- The case of the Zambrano family is a matter of EU law as the children as Belgian nationals, and therefore also EU citizens, living in Belgium;
- Directive 2004/38 does not apply to them as it only applies to EU citizens who move and reside in another Member State;
- The rights of the two Zambrano children who are EU citizens comes directly from Article 20 TFEU (citizenship of the Union);
- Those rights include:
    - The right to live in Belgium 40 and 41);
    - The **right of residence** for their third country parents (both of them it would seem) to live in Belgium with them as this is necessary for the children who are EU citizens to enjoy their rights as citizens of the Union (para 42 and 43);
    - The **right to a work permit** for the third country national parents to support the children (as otherwise they might all have to leave the state on ground of penury) (para 44).

There is no mention of the EU Charter of Fundamental Rights or the ECHR. These rights for third country nationals derive directly and exclusively from Article 20 FTEU – citizenship of the European Union.

What does this mean? There are two immediate consequences:

- Any third country national family which includes at least one dependent minor child who is an EU citizen, even if that child is the citizen of the state where the family lives, is entitled to rely on the EU child's rights under Article 20 TFEU to found a **residence right** in the state. There is no clarity on the form of the residence right.
- The third country national family members of a dependent minor EU national child, even where that child is a national of the state where the family lives, are entitled to **work permits**.

Both these rights for third country national family members are based on the principle that the dependent minor EU national child might have to leave the territory of the Union in order to accompany his or her parents if those parents were not allowed to reside and work to support the child.

From this logic some corollary issues arise:

- When is a child not a dependent minor child? In the CJEU's judgment C-480/08 *Teixeira* interpreting Article 12 Regulation 1612/68, it found for the purposes of that provision, according to which a child is defined as dependent and under 21 for the purposes of education rights, that denying the right after the child passed the upper age limit would deprive the right of its force (para 82) and that even adult children may need the presence of their parents to successfully access their education rights. This line of argument could be applied by analogy;
- The same *Teixeira* judgment found that access to social welfare benefits for the parent was consistent with caring for the (adult) child in education;
- Does the logic also apply to third country national spouse and other family members? There does not seem to be any obvious reason why the argument should be any different if the third country national family member were a spouse rather than a child. The CJEU will have a chance to address this is a pending case *McCarthy*.

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