European Union citizenship: after Zambrano

by Adrian Berry

On 8th March 2011 the Court of Justice of the European Union (CJEU) handed down judgment in the case of Zambrano v Office national de l’emploi (ONEm), Case C-34/09. The judgment marks a step-change in the development of the Court’s case law concerning EU citizenship under article 20 of the Treaty on the Functioning of the European Union (TFEU). It is an unambiguous statement that EU citizenship is a status deserving of protection across the Union, regardless of whether or not free movement rights have been exercised by a person moving from his or her EU Member State of nationality to another Member State, and in particular that EU citizenship may be relied on by a person in their own Member state.

EU citizenship: after the Treaty of Lisbon
Following the entry into force of the Treaty of Lisbon on 1st December 2009, EU citizenship is provided for by article 20(1) TFEU, which states: ‘Citizenship of the Union is hereby established. Every person holding the nationality of a Member State shall be a citizen of the Union. Citizenship of the Union shall be additional to and not replace national citizenship.’

As was the case prior to the Treaty of Lisbon, EU citizenship is a derivative status conferred on persons holding the nationality of a Member State. It is an additional status. The States themselves define the criteria for acquisition and loss of their own respective nationalities, subject to any emerging requirements of EU law. At present, no-one who lacks the nationality of a Member State may be an EU citizen, so persons who are lawfully present on the territory of the EU Member States, even as a consequence of international obligations owed by Member States such as the 1951 Refugee Convention or the 1954 Stateless Convention, cannot be EU citizens absent acquisition of the nationality of a Member State.

However, it is clear following Zambrano that persons who are not EU citizens may derive a right of residence and a right to work in an EU citizen’s own Member State where required for that EU citizen’s ‘genuine enjoyment of the substance of the rights’ conferred by virtue of his or her status as an EU citizen.

The rights of an EU citizen
By article 20(2) TFEU EU citizens enjoy the rights and are subject to the duties provided for in the EU treaties. Among other things, these include (i) the right to move and reside freely within the territory of the Member States, (ii) the right to vote and to stand as candidates in European Parliament elections and municipal elections in the Member State of residence (on the same terms as its
own nationals), (iii) in a country outside the EU where their State of nationality is not represented, the right to enjoy diplomatic and consular protection from any Member State on the same conditions as nationals of that State, and (iv) the right to petition the European Parliament, to apply to the European Ombudsman, and to address the EU institutions and advisory bodies. These rights are to be exercised in accordance with the conditions and limits defined by the EU treaties and by the measures adopted under them. As can be seen only (i) and to some extent (ii) relate to free movement rights within the EU. Rights under (iv) plainly require no movement within the EU.

Zambrano
In Zambrano two Colombian nationals, husband and wife, sought asylum in Belgium but were refused asylum and refugee status. However the relevant Belgian Court Order included a non-refoulement clause on the basis that they could not be returned to Colombia on account of the civil war there. During their time in Belgium the couple sought permission to remain lawfully without success. In this period two children were born to them. Colombian law required Colombian national parents who sought Colombian nationality for their children born outside Colombia to take steps to enable Colombian nationality to be acquired by those children. As the parents did not take those steps the children did not acquire Colombian nationality at birth or thereafter. Under Belgian law at the time, a strong anti-statelessness provision provided that children born in Belgium, who while minors were otherwise stateless, acquired Belgian nationality. In this way the children acquired Belgian nationality and, additionally, EU citizenship.

During this time in Belgium Mr Zambrano worked without permission and paid social security contributions. By virtue of his work, his family were self-sufficient. When he was found to be working without permission his employment was terminated. He sought unemployment benefit and was refused on the basis that he had not had permission to work and reside in Belgium during his period in work. He challenged this decision relying on EU law. The Belgian employment tribunal hearing the case then referred questions to the CJEU for a preliminary ruling. In essence Mr Zambrano sought to rely on his children’s status as EU citizens to derive a right to reside and work in Belgium.

The CJEU held that national measures that have the effect of depriving EU citizens of the genuine enjoyment of the substance of rights conferred by virtue of their status as EU citizens are precluded. It stated that a refusal to grant a right of residence to a non-EU citizen (third country national) with dependent minor children in the Member State where those children are nationals and reside, and the refusal to grant a work permit to that person, has such an effect. The Court reasoned that ‘it must be assumed’ that refusal to grant a right of residence would lead to those EU citizen children having to leave the territory of the EU in order to accompany their parents. Equally, if a work permit were not granted to such a person he would risk not having sufficient resources to provide for his family, which would result in those EU citizen children having to leave the EU. Thus, EU citizens would be unable to exercise the substance of the rights conferred on them by virtue of their status as EU citizens.

Two points should be noted about the Court’s reasoning. First, this was not a case about free movement and in particular no reliance was placed on Directive 2004/38/EC, known colloquially variously as the citizens’ directive, residence directive or free movement directive. Second, the Court was not concerned to protect the right to respect for family life for EU citizens, per se, or to set out a rule regarding a right to family re-unification for EU citizens, but rather to decide the case by reference to what was required so that the genuine enjoyment of the substance of the rights of an EU citizen, conferred by virtue of his or her status as an EU citizen, was not impaired.

Such rights as the Zambrano parents have under EU law derive from the need to give effect to and protect the rights of their EU citizen children under EU law. However that begs the question, what rights do EU citizens enjoy under EU law? From the judgment it appears that under article 20 TFEU they enjoy, among other things, the right as EU citizens to live and reside in their EU Member State of nationality and not to be driven out of the territory of the EU as whole by the need to be with their parents who look after them.

In effect EU law recognises that EU citizens have a right of abode in their EU Member State of nationality, which EU law will protect from being rendered ineffective because they are EU citizens who are accorded certain rights under the TFEU by virtue of holding such status. A national of an EU Member State automatically

Socialist Lawyer October 2011 35
acquires the additional status of EU citizen and may rely on rights acquired thereby against his or her own EU Member State of nationality where required to save him or her from being driven out of his or her country of nationality and thereby the territory of the EU.

**Member State nationality and citizenship**

The judgment in *Zambrano* is further evidence of the development of EU citizenship. It is a status conferred under EU legislation, the TFEU, and applied by the CJEU across the EU increasingly – although unevenly – as if the Member States were one territory. The reference in *Zambrano* to the EU citizen children having to leave ‘the territory of the Union’ is particularly interesting. The EU has no ‘territory’ of its own. Rather its territorial scope extends to the territories of the states who are parties to the Treaty on European Union (TEU), subject to the modifications made by the TFEU (see article 52 TEU, article 355 TFEU). However the approach of the CJEU in *Zambrano* is to consider EU citizens’ rights in the context of a territory to which they may be said to belong, the EU.

This approach recognises that by and under the EU treaties the EU had been allocated and performs supranational functions across the territories of its Member States, in a context where nationals of those States enjoy rights and are subject to duties created as part of the same legal order. EU citizenship is not citizenship in the sense of nationality, i.e. a person’s international identity as belonging to a sovereign state, but it increasingly displays incidents associated with nationality. This can be seen in the provision made for consular and diplomatic protection under article 20(1) TFEU as well as rights of entry and residence for an EU citizen and his or her family members into other Member States and, now, in *Zambrano* the emphasis on a right of abode protected by EU law in an EU citizen’s own Member State of nationality and across the territory of the EU.

The increasingly complex inter-relationship between holding the nationality of an EU Member State and holding the additional status of EU citizen had been considered in the earlier judgment of *Rottman v Freistaat Bayern* Case C-135/08, 2nd March 2010, prior to *Zambrano*, where, in a case concerning deprivation and loss of the nationality of a Member State and thus of EU citizenship, the quickening of EU citizenship rights absent free movement rights, can be detected prior to the delivery of the judgment in *Zambrano*. In some respects *Rottman* is even more important than *Zambrano* for it makes it clear that the conditions governing loss of nationality of an EU Member State may nonetheless be subject to judicial review under EU law where EU citizenship is also in issue.

**After Zambrano**

After *Zambrano* the CJEU handed down judgment in the case of *McCarthy v Secretary of State for the Home Department* Case C-434/09, 10th May 2011. In that case, where a dual national British/Irish/EU citizen who had always remained in the UK and who had never been economically active or self-sufficient sought recognition of an EU right of permanent residence in the UK for herself and – more importantly – for her unlawfully present non-EU citizen third country national spouse by reference to her right of abode in the UK, the CJEU held that refusal of a residence permit to her and therefore a residence document to her husband *did not oblige* her to leave the territory of the EU, otherwise interfere with the genuine enjoyment of the substance of her rights as an EU citizen conferred by virtue of that status, or impede the exercise of her right of free movement and residence within the territory of the Member States. Thus there was no violation of her rights as an EU citizen as protected by the TFEU.

While *McCarthy* is a case of some complexity, one difference between *Zambrano* and *McCarthy* is that in the former case the non-EU citizen, third country nationals, enabled the EU citizen children to live in their EU state of nationality and thus the territory of the EU by looking after them. By contrast, notwithstanding the spousal relationship between Mr McCarthy and Mrs McCarthy, the former’s presence in the UK was not considered to be a requirement for Mrs McCarthy to live in the UK. If nothing else the judgment in *McCarthy* is an indication that in cases where there is an absence of the exercise of free movement rights and where the EU citizen remains in his or her EU Member State of nationality, the right to respect for family life and family re-unification principles may play no meaningful role in circumstances where his or her right of abode in the EU Member State of nationality and his or her presence in the territory of the EU as a whole is not considered to be impeded.

At present no-one who is not a national of an EU Member State may be an EU citizen. It would require revision of the EU treaties for it to be otherwise. However, non-EU citizens may derive rights, including rights of residence and permission to work, from the rights accorded to EU citizens by virtue of that status. The full plenitude of these derivative rights remains to be explored.

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