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“Euro-Bonds”
The Ruiz Zambrano judgment or the Real Invention of
EU Citizenship

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Abstract

This paper aims to provide a brief analysis of the Ruiz Zambrano judgment (Case C-34/09). Traditionally, the EU citizenship has been mainly construed as a status of integration into the Member States of the Union: a status of transnational integration. The basic claim developed in these pages is that, with Zambrano, the EUCJ moved away from a concept of transnational integration to one of genuine European integration, thus fostering a new vision, based on the existence of Euro-bonds.

Key-words:

European Court of Justice, Zambrano, citizenship



1. EU Citizenship as a status of integration*

A genuine European integration

Ruiz Zambrano, a judgment of the European Court of Justice of 8 March 2011 (Case C-34/09), is an ordinary case leading to potential extraordinary consequences for the development of EU law. Let me say first where I see the main contribution of this judgment. In the case-law of the Court which gave substance to this notion, EU citizenship consisted essentially in offering the nationals of the member states the opportunity to act on a transnational plane within the Union. Nationals of member states were granted rights in order to circulate freely, to be admitted in other member states and to enjoy the same treatment as nationals of the host country. They were vested with the power to address the authorities of another member state and to claim admission, residence and welfare benefits on the same conditions as the nationals of that state. This empowerment was aimed to ensure the integration of EU citizens into the society of the host state. The status of EU citizen has been mainly construed as a status of integration into the member states of the Union: a status of transnational integration. According to this model, an individual is EU citizen by the very fact that he/she circulates within the Union and becomes a “quasi-national” of another member state. Now, what emerges from this case is the notion of integration within the territory of the Union taken as a whole. We move from a *transnational* (the fact of being assimilated in another society) and *plurinational* (the fact of multiplying affiliations within the Union) integration to a genuine *European* integration. The European territory as such is the natural place of life and integration for European citizens and their families.

‘Illegal residents’

Some interesting factual elements of the Zambrano case are worth noting. They touch upon the general issue of migration in Europe today. Mr Ruiz Zambrano is a Colombian national who decided to leave his country of origin with his family and to seek asylum in Belgium. The Belgian authorities refused his application for asylum and subsequent applications to have his situation regularized. Despite this refusal and the



absence of any resident permit, he and his wife have been registered as ‘residents’ in a Belgian municipality and he started to work regularly with a full-time employment contract. Since the rejection of his application for residence in March 2006 Mr. and Mrs. Zambrano have held special residence permits valid during the duration of the judicial action he has brought against this rejection. During this stay, Mrs Zambrano gave birth to two children, Diego and Jessica. They acquired Belgian nationality by the fact of being born in Belgium and since the parents did not take specific steps to have them recognized as Colombian nationals. This is the result of the application of the Belgian Nationality Code at the time of the case.

Their condition is typical of the condition of many migrants in Europe, who are in a transitory position, but a position which is intended to persist; they are migrants who are *recognized* and partially included in the administrative and economic life of the country but who are not *authorized* to stay in the territory. Mr and Mrs Zambrano belong to this category of people who have been provocatively labelled as ‘*illegal citizens*’ (by the French philosopher Etienne Balibar; see also the work of Enrica Rigo). More importantly for the Court in its judgment, the case concerns the children whose identity from a EU law perspective is twofold. They are Union citizens as Belgian nationals. And they are *dependent* persons, a fragile population that cannot rely on its own resources. Arguably, the issue of the *care* is an important feature in this judgment.

‘The territory of the Union’

Confronted with this case, the Court considers that EU citizenship law precludes Belgium from refusing Mr. Ruiz Zambrano a right of residence and a work permit. His minor children, who are EU citizens, should not be deprived of the right to stay within the territory of the European Union. In other words, deportation of European citizens to countries outside the territory of Europe is not permitted. It would amount to an “expatriation”. The reference to the ‘territory of the Union’ is a central reference in the judgment. This reference is not only the metaphor which designates the sum of the physical territories of the member states. It is a normative reference which refers to a new common space, a space of distribution of rights and common values. What the Court is doing here is to recognize a status to specific categories of individuals – European citizens and the persons connected to them as dependents or care-takers. This status is attached to



them wherever they happen to be, it does not depend on their physical location. It grants them rights to circulate and to *occupy* the European space. There is a strong normative dimension implicit in the reasoning. To reside in Europe means not only to be physically located in its territory but also to be granted a number of rights and ultimately to be under the protection of certain values of personal welfare and moral security.

2. Shifts in the legal theory of European citizenship

EU citizenship and mobility

The first and the most obvious shift lies in the disconnection of EU citizenship from free movement. In its first cases dealing with EU citizenship, the Court undertook to release the rights of citizenship from the economic considerations attached to freedom of movement in the realm of the internal market. The Court freed the mobility of individuals from the exercise of an economic activity. But the rights of citizenship were still dependent on mobility. This was reflected in Directive 2004/38 which codifies the jurisprudence of the Court and which states, in its preamble, that *'Union citizenship is the fundamental status of nationals of the member states when they exercise their right of free movement'*.

Following the *Zambrano* judgment, one could say that part of the EU citizenship regime is now split in two parts. The ordinary enjoyment of EU Citizenship rights (residence and non-discrimination) is established on the basis of Article 21 of the treaty and Directive 2004/38 and still dependent on mobility. As the Court recalls in a recent judgment, *"the residence to which [the directive refers] is linked to the exercise of the freedom of movement for persons"* (Judgment of 12 May 2011, *McCarthy*, Case C-434/09). However, there are 'extraordinary situation' in which the safeguard of the statute is directly concerned. EU citizenship can then be based on Article 20 of the treaty and be released from the mobility condition. In the first part of the *Ruiz Zambrano* judgment, the Court sets aside the Directive and decides to ground its decision on the basis of Article 20 TFEU (concealing the fact that this provision explicitly refers to the conditions defined by the EU legislator in the Directive). On this basis, the Court is able to state that the sole presence of a Union citizen in a member state, even if this member state is his/her country of origin, is liable to trigger 'European' protection. The right of residence of the children is sufficient on its own



to grant residence to the parents who take care of them. There is not even the need to refer to the fundamental rights of the children, their right to family life. The dispute is entirely settled on the basis of the *statutory* right of residence of the children. In ‘extraordinary’ situations, there is no need to refer to ‘fundamental’ rights; EU Citizenship works well on its own.

The status of EU citizen

Another important change concerns the reference to the ‘status’ of citizen of the Union. The Court proclaimed that “*Union citizenship is destined to be the fundamental status of nationals of the member states*” for the first time in the *Grzelczyk* case in 2001. This formula enabled the Court to broaden the scope of application of the principle of non-discrimination on the ground of nationality. Since then, in each case where this reference was introduced by the Court (*Baumbast, Garcia Avello, Zhu and Chen, Commission v. Austria*), it has always had a residual and procedural function: it was used to legitimize a comparison between nationals and non-nationals, as an argument to say that, if they are ‘Europeans’, the latter should enjoy the same treatment irrespective of their nationality (*Commission v. Austria*, C-147/03).

In that case, as already in a previous one (*Rottmann*, C-135/08), the reference to the status of those involved in the case plays a prominent role that differs somewhat from earlier decisions. It is presented as the real source of the rights and duties conferred on EU citizens and their family members. The consequence is that the status in itself has to be protected in order to protect the rights attached to it. These rights refer to the rights of citizenship (movement, non-discrimination, social integration) but one can also see a reference to the fundamental rights protected under the Charter and the ECHR. If taken seriously, the combination of citizenship and fundamental rights would have far-reaching effect in the broadening of the scope of application of EU law.

Is there a right to the European territory?

An important part of this short judgment is devoted to examining the possible consequences of not granting the right of residence to the parents. The Court relies on an ‘argument from consequences’. The use of this argument is interesting and must be put into context. First of all, this is a response to the argument put forward by the Irish



government before the Court, the ‘floodgates’ argument that the granting of a right of residence is liable to lead to ‘unmanageable results’, to a loss of control over immigration flows. The Court has already responded to a similar argument in a previous case, the *Metock* case (C-127/08). It argued that “*the refusal to grant a right of entry to the family members of a Union citizen would be such as to encourage him to leave in order to lead a family life in another member state or in a non-member country*”. In *Zambrano*, the Court states similarly that “*a refusal to grant a right of residence and a work permit to the father would lead to a situation where the children would have to leave the territory of the Union*”. In *Metock*, the Union citizens involved had circulated within the Union. The Court recognized to the Union a competence to regulate the conditions of entry and residence of third-country nationals. This competence was based on the need to protect the freedom of movement of European citizens.

In *Zambrano*, the children haven’t circulated within the Union. The EU law influence is therefore considerably widened to cover non-mobile citizens. In such reasoning, the argument from consequences in terms of individual rights prevails over the argument from consequences in terms of state control of immigration. The issue is no longer the EU competence in the field of immigration. The real issue is to know whether the right of EU citizens to enjoy the European territory prevails over the state competence to regulate entry and access to its territory.

3. The invention of Euro-bonds ?

Classifications and re-classifications

The main consequence of the case is the transformation of the status of Mr. Ruiz Zambrano. From asylum seeker, he becomes a ‘quasi’ European citizen. From transitory residence and illegal status, he gets permanent and legal residence. Not only that: the Court enables him to be granted a work permit in Belgium, to be socially integrated in this country. This case illustrates the commutability of personal statuses in Europe. The Union has multiplied the statuses conferred to migrants. These statuses are more or less protective. This inevitably fosters a phenomenon of re-classifications based on EU law and a phenomenon of self-re-classifications by the migrants themselves. One may wonder about the exportability of this solution to other types of situations. Is it a case limited to



people socially integrated in a European society, having concluded employment contracts? Is it a case of ‘care’ limited to situations concerning dependent persons like children? In the recent *MCCarthy* judgment of 12 May 2011, the Court rejects the transposition of this solution to the situation of an adult having a family member outside the territory of the Union. Is this a retreat of the Court? One has perhaps to distinguish, depending on the facts of the case. But, whatever the case, the *Ruiz Zambrano* judgment remains the one in which a new status was given to EU citizens.

Union citizens as Europeans

European citizenship has so far been presented as a means “to strengthen the protection of the rights and interests of the nationals of member states” (Art. 2 of the former Treaty on the European Union). The idea was to protect their rights against potential discrimination on the part of authorities of the member states. Now, this case highlights another dimension of European citizenship, namely the protection of the rights of Union citizens as genuine ‘Europeans’ committed to the European Union, its territory and its common values, and not only to the member states. The Court justifies its solution on the ground that Article 20 TFEU “precludes national measures which have the effect of depriving citizens of the Union [the two children] of the genuine enjoyment of the substance of the rights [circulation, residence in another member state] conferred by virtue of their status of the Union”. A rather weak justification. The strong justification lies in the fact that a deportation from the European territory would amount to an “expatriation”.

It is not by chance that this case benefits mainly a non-European, Mr. Ruiz Zambrano, a Colombian national. This shows the willingness of the Union to develop its own boundaries between individuals, its own notion of membership. The case challenges the theory of defining the European citizenship by reference to the nationals of member states who circulate within the EU. The theory is required to include all those individuals who are integrated in Europe and are willing to develop ties in this territory, including nationals of non-member states who contest the borders of Europe set up by the member states.

From recognition to allegiance





In another case, concerning the access to the profession of notary in the member states, the advocate general Cruz-Villalón stated that “European citizenship is evolving as a direct bond between the citizen and the Union” (Case C-47/08). For the sake of his demonstration, he insisted that *“the concept of loyalty as an expression of commitment to and solidarity with the political community cannot be regarded in itself as a distinctive, exclusive and preclusive characteristic of the Member States, such that it inevitably requires the bond of nationality. On the contrary, a European citizen is not as such unable to make a commitment of loyalty to the Union... The notary thus operates within a framework in which loyalty extends both to the State conferring authority and to the Union assuming it, as well as to the other Member States”*. Under this interpretation, EU citizenship is a mechanism which ensures a transfer of loyalty from one member state to another. This model is new. It is not one of recognition of a national by the society of another member state, but one of allegiance to another collectivity. Notice however that, in this case, the Union is not the final addressee of the commitment of loyalty. It is rather the guarantor that assumes the genuineness of the commitments established with different member states.

This mechanism comes into resonance with the new financial mechanism established by the Union to safeguard the stability of the euro area and to resolve the debt crisis. The Union authorizes the euro area member states to support a member state in budgetary trouble by granting financial assistance, but it does not commit itself by issuing Eurobonds. Now, the creation of financial Eurobonds may be economically and politically hard to achieve. Just in the same way, the creation of individual and symbolic Euro-bonds, which emerges at the margins in this singular case, will be legally vain if it is not supported by a political and popular mobilization akin to the consensus, was it permissive or not, that was at the birth of the setting up of the European Communities and which is more than ever imperilled.

* An early and shortened version of the article was published on the EUDO Citizenship website