Ruiz Zambrano's Quiet Revolution: 468 Days that Made the Immigration Case of One Deprived Worker into the Constitutional Case of Two Precarious Citizens

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Introduction

Gerardo Ruiz Zambrano was a diligent worker and social security contributor failed by the rules of the Belgian welfare state. This is an often forgotten detail in accounts of the renowned case, in which the Court of Justice of the European Union (CJEU) found that denying a residence and work permit in Belgium to a Colombian father would impermissibly interfere with the substance of the European citizenship of his Belgian-born children.[2]

Commentators have characterized Mr. Zambrano as an asylum seeker turned irregular migrant who had to rely on his status as family member of two European citizens to regularize his position in Belgium.[3] In fact, when the *Tribunal du Travail* referred the case to the CJEU, Mr. Zambrano was neither an asylum seeker nor an irregular migrant any more. He held both a residence and a work permit in Belgium.[4] In order to collect the unemployment benefits he had paid for however, he needed to prove that he had been regularly resident and entitled to work in Belgium for at least 468 days during the time he had worked for a Belgian company between

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[2] Case C-34/09 Gerardo Ruiz Zambrano v Office national de l'emploi (ONEm) EU:C:2011:124.

[3] See e.g. Kay Hailbronner, Daniel Thym, 'Annotation of Case C-34/09', [2011] 48 CMLR 1253; Ilyola Solanke, 'Using the Citizen to bring the Refugee in: Gerardo Ruiz Zambrano v Office National de l'Emploi (ONEM)' [2012] Modern L. Rev. 75; Michael Olivas, Dimitry Kochenov, 'Case C-34/09 Ruiz Zambrano: a Respectful Rejoinder' [2012] University of Houston Public Law and Legal Theory Series, 2012-W-1.

[4] *Zambrano*, *supra* at n. 2, ¶ 32.

2001 and 2006.[5] It is in this latter respect that the European citizenship of his children was to make a difference.

Albeit partly lost in restatements, this social security story has been determinative for both the procedural history and the substantive outcome of the case. Recuperating this story is the first result of this chapter's attempt at uncovering the many narratives that underpin the *Zambrano* case. [6]

Two narratives ultimately emerge in the case: an *avant-garde* constitutional case on the citizenship of two children who just escaped statelessness; and a well-presented immigration case on the claims of a migrant who was as in need as he was deserving. Clarifying the respective roles of these narratives for the outcome of the case allows for important and novel considerations. First, on the role of the Court: an adjudicator perplexed about its own function, which tendered a strong answer to an easy immigration question while providing only a light-touch answer to a hard constitutional question. Second, in legal terms, the case bears relevance for the hundreds of thousands of asylum seekers and refugees who are potentially becoming regular inhabitants of Europe.[7] Third, in political terms, the case highlights the role of European citizenship in mounting rights against powers in the context of heightened debates on immigration.[8] In these three senses, the chapter goes beyond findings of comments on the case to

[5] *Id.*, ¶ 33.
[6] The interview with Mr. Pierre Robert, the lawyer from Dayez Avocats Associés who represented Mr. Zambrano, and conversations with Tim Corthaut, auditeur at the Conseil d'État and Sarah Lambrecht, référéndaire at the Cour Constitutionnelle were crucial for the author to read in between the lines of the documents of the case, and helped set the record straight. Interview with Mr. Pierre Robert, Brussels, 5 June 2015; conversation with Tim Corthaut (speaking in his personal and academic capacity), Brussels, 5 June 2015; conversation with Sarah Lambrecht, Brussels, 5 June 2015.
[7] In the EU28 626,710 applications for asylum were submitted, in aggregate, in 2014. The aggregate figure for just the first three months of 2015 is 202,950 (Eurostat Data).
[8] See Francesca Strumia, 'Walking the Blurry Line in EU Immigration: European Citizenship and its Demoicratic Bridge between the Member States' Power to Exclude and the Third Country Nationals' Right to Belong', under submission.

date, which have focused on the reach of fundamental rights protection and on the boundaries of purely internal situations.[9]

Part I revisits the factual and legal background of the case. Part II considers how the CJEU judgment transformed some of these elements, with the effect of de-linking the two main narratives (constitutional and immigration) in the story. It argues that the Court focused explicitly on the constitutional narratives, while relying implicitly on the immigration one. Part III reflects on the implications of this disaggregating strategy for the role of the Court. Part IV focuses on implications for the legal and political legacy of the case.

1 The Background – A Perfect Combination in Law and Fact

The combination of factual and legal elements in this case resulted in an immigration case – Mr. Zambrano was ultimately looking for recognition of his right to reside and work in Belgium- with a constitutional twist – recognition of such a right came to depend on protection of the supranational citizenship of his two Belgian-born children.

1.1 In Fact

[9] In the former sense see *Zambrano*, *supra* n. 2, Opinion of Advocate General Sharpston ¶¶ 151-177 (inspired by Zambrano's situation to suggest that fundamental rights protection should be based on EU competence); Koen Lenaerts, 'Civis Europeus Sum: from the Cross-Border Link to the Status of Citizen of the Union' (2011) 3 FMW-Online Journal on Free Movement of Workers within the European Union 6; Robert Schütze, 'Three Bills of Rights for the European Union' (2011) 30 Yb Eur L 131, 140-141; A. Von Bogdandy, M. Kottmann, C. Antpöhler, J. Dickschen, S. Hentrei, M. Smrkolj, 'Reverse Solange-Protecting the Essence of EU Fundamental Rights against EU Member States', [2012] C. Mkt L. Rev. 489; Chiara Raucea, 'Fundamental Rights: The Missing Pieces of European Citizenship?' (2013) 14 German Law Journal 2021; Daniel Thym, 'Towards Real Citizenship? The Judicial Construction of Union Citizenship and its Limits' in *Judging Europe's Judges: the Legitimacy of the Case Law of the European Court of Justice*, edited by Maurice Adams, Henry De Waele, Johan Meeusen & Gert Straetmans (2013) (suggesting that in the *Zambrano* case law citizenship is being used as an alternative to fundamental rights); in the latter sense see Kay Hailbronner and Daniel Thym, *supra* n. 3; Dimitry Kochenov, 'A Real European Citizenship: A New Jurisdiction Test: A Novel Chapter in the Development of the Union in Europe' [2011] 18 Col J Eur L 55.

Mr. Zambrano was a Colombian asylum seeker turned irregular migrant after Belgian authorities rejected his application for asylum when he first entered Belgium in 1999. In this respect, he was one of many. Since 1958, Colombia has been ravaged by a civil war that has claimed 220,000 lives and caused the internal displacement of over five million people.[10] Executions of civilians at the hand of the military occurred between 2004 and 2008 under the government of president Uribe, and widespread violence at the hand of guerrilla groups and paramilitaries continues to date.[11] Numerous Colombians fled to Europe, escapes which were facilitated until 2000 by the fact that Spain exempted several Latin American countries from visa requirements.[12] Several of these fleeing Colombians ended up in Belgium in the late 1990s and up until the early 2000s.[13]

Mr. Ruiz Zambrano was one of them. He and his wife left Colombia after having been subject to extortion demands backed by death threats and after having suffered the abduction of their first son.[14] While some of the Colombian asylum seekers were granted refugee status, Mr. Ruiz Zambrano belonged to the sizable group of those who were denied the latter status but whose removal order nonetheless included a *non-refoulement* clause.[15] He was, as a result, in a legal

[10] Ever since 1985. See Human Rights Watch, 'World Report 2014: Colombia' at http://www.hrw.org/world-report/2014/country-chapters/colombia (accessed 3 July 2015).
[11] *Id.* Ever since 2012 peace negotiations have been ongoing between President Santos' government and the Revolutionary Armed Forces of Colombia (FARC) and National Liberation Front (ENL).
[12] Interview with Mr. Pierre Robert, supra n. 6. A visa requirement was reintroduced in 2000, however has been lifted again just recently. See http://elpais.com/elpais/2015/06/08/opinion/1433789668_587248.html (accessed 8 July 2015). Mr. Zambrano held a Belgian visa. *Zambrano supra* n 2, at ¶ 14.
[13] According to data of the Colombian Ministry of Foreign Affairs, there were about 2,300 Colombians registered with Colombian authorities as living in Belgium in 2003, however 15,000 were estimated to live in Belgium at that date. See Myriam Bérubé, Colombia: in the Cross-Fire, Migration Policy Institute, 1 November 2005, http://www.migrationpolicy.org/article/colombia-crossfire (accessed 12 September 2015).
[14] *Zambrano*, *supra* n. 2, Opinion of Advocate General Sharpston ¶ 19.
[15] *Zambrano, supra* n. 2, at ¶ 15; interview with Mr. Pierre Robert, *supra* n. 6. *Non-refoulement* obligations prevent a country from returning an asylum-seeker to a country where his/her life or freedom would be endangered, although they do not automatically translate in an obligation to admit. See Convention Relating to the Status of Refugees, Geneva 28 July 1951, art. 33, https://treaties.un.org/doc/Publication/UNTS/Volume%20189/volume-189-I-2545-English.pdf (accessed 12 September 2015).

grey zone: irregularly present in Belgium, but protected from expulsion.[16] Despite his several attempts, Belgian authorities would not legalize his residence situation.[17]

Second, Mr. Zambrano was the father of two European citizen children born in Belgium pending the regularization of his immigration status.[18] In this respect, he was one of many immigrants who had Belgian-born, Belgian-national children and who tried to use this to regularize their residence status.[19] So common was this situation in Belgium that the *Conseil du Contentieux des Étrangeres* at one point defined Belgian children as 'its core business.'[20] Immigrant parents of Belgian children often attracted accusations of 'legal engineering' – Mr. Robert recalls having defended several Ecuadorean migrants in the 1990s in front of the *Conseil d'État* in this respect.[21] This was the case also for Zambrano whose initial application for residence as the parent of a Belgian child was rejected because he would have 'engineered' the child's acquisition of Belgian nationality.[22]

Third, and most important for the unraveling of the case, Zambrano was a worker who, despite his irregular immigration status, was registered for and had regularly paid for social security contributions from 2001 to 2006.[23] In this respect, he was one of a kind because undocumented

[16] Policy would subsequently change to deny any protection to Colombians, however for a short while after implementation of directive 2004/83 (Qualifications Directive), Belgium extended subsidiary protection to Colombian migrants who would have otherwise been covered by a *non-refoulement* clause. Interview with Mr. Pierre Robert, *supra* n. 6.
[17] *Zambrano*, *supra* n. 2, at ¶¶ 16, 21, 22.
[18] Diego, born in 2003, and Jessica, born in 2005. *Zambrano supra* n. 2, at ¶¶ 19 and 22.
[19] Interview with Mr. Pierre Robert, *supra* n. 6.
[20] *Id.* The *Conseil du Contentieux des Étrangeres* (Council for Alien Law Litigation) was introduced in 2007 and is an independent administrative jurisdiction competent to hear any appeals against decisions of the Commissariat général aux Réfugiés et aux Apatrides as well as against individual decisions in application of the 1980 Law on Foreigners (see infra n. 40). See http://www.rvv-cce.be/fr/cce/apropos-conseil (accessed 3 July 2015).
[21] Interview with Mr. Pierre Robert, *supra* n. 6.
[22] *Zambrano supra* n 2, at ¶ 23. The Tribunal du Travail in its reference to the CJEU strongly opposes the latter characterization. See Tribunal du Travail de Bruxelles, judgment n. 08/001851 of 19 December 2008, at ¶ IV. 4.1.1-4.1.3.
[23] Interview with Mr. Pierre Robert, *supra* n. 6. *Zambrano supra* n. 2, at ¶ 20.

migrants cannot register for social security. [24] Payment of contributions, however, was not enough to secure fruition of benefits. When Zambrano was dismissed from his post in 2006 due to the irregularity of his residence situation,[25] in order to qualify for unemployment benefits, he had to evidence completion of at least 468 workdays in compliance with relevant laws on the residence and work of foreigners. While he had likely accrued close to 1,000 workdays in the five years he had worked for the Plastoria company, none of those technically counted, as he had not held a work permit.[26] The Belgian social security administration had gladly taken Zambrano's social security contributions, but, once his job had been taken away, it would not pay the benefits, towards which Mr. Zambrano had regularly contributed.[27] This gave Zambrano a new legal claim distinct from the ones he had pending for regularization of his status in Belgium.[28] This very claim, centering on the argument that Mr. Zambrano did not actually need a work permit in Belgium, would bring Zambrano's case from the crowded log of the *Conseil du Contentieux des Étrangeres* to the more welcoming docket of the *Tribunal du Travail*.[29]

1.2 In Law

The latter argument rested on the combination of three areas of law. First, an international law-compliant provision of Belgian nationality law: article 10 of the Belgian nationality code provides that children born in Belgium acquire Belgian nationality if they would otherwise be

[24] This was the result of a glitch in the system whereby Mr. Zambrano's employer was able to register him regularly for social security purposes. Interview with Mr. Pierre Robert, *supra* n. 6.
[25] *Zambrano supra* n. 2, at ¶ 27.
[26] *Id.*, at ¶ 33. *Tribunal du Travail*, *supra* n. 22, at ¶ II.1-2.
[27] He was dismissed after an inspection of the Directorate General, Supervision of Social Legislation. *Zambrano supra* n. 2, at ¶ 27. Interview with Mr. Pierre Robert, *supra* n. 6.
[28] Interview with Mr. Pierre Robert, *supra* n. 6. Zambrano had more than once appealed against the refusal of the immigration authorities to regularize his residence situation. *Zambrano supra* n. 2, at ¶¶ 29-31.
[29] Interview with Mr. Pierre Robert, *supra* n. 6.

stateless at any time before reaching the age of 18.[30] Based on this provision, Diego and Jessica Zambrano acquired Belgian nationality, as well as the rights of European citizenship, at their respective births in 2003 and 2005.[31] They were born just in time for these purposes: a 2006 amendment excluded from the scope of article 10 children who could acquire another nationality upon the parents undertaking a simple administrative step, such as registering them with the authorities of the country of origin.[32] One is tempted to think that the amendment came as a response to the Zambranos' saga –in fact the Zambranos omitted to register their children with the Colombian embassy.[33] However, the 2006 amendment had little to do with the Zambranos *per se*,[34] but was rather a response to a widespread perception that migrants having children in Belgium were 'abusing' Belgian nationality law to regularize their status,[35] a perception that the CJEU *Chen* case[36] had only exacerbated.[37]

It is precisely the *Chen* case that brings in the second area of law that contributed to 'make' the *Zambrano* case, that is EU law. Because of their timely births, the Zambrano children were European citizens. Under *Chen*, caretaking ascendants may derive a right of residence from their

[30] *Code de la Nationalité Belge* of 28 June 1984 as amended, Justice 1984900065 of 12 July 1984, p 10100, art. 10. The provision is international law-compliant in the sense that an obligation for a state to grant nationality to children born on its territory who would otherwise be stateless exists under international law and is codified in the Convention on the Reduction of Cases of Statelessness, Aug. 30, 1961, available at http://www.unhcr.org/3bbb286d8.html (accessed 8 July 2015), art. 1, and in the European Convention on Nationality, Nov. 6, 1997, available at http://conventions.coe.int/Treaty/EN/Treaties/Html/166.htm (accessed 8 July 2015), art. 6(2). Belgium was not however a party to either convention at the time of the Zambrano facts. See *infra* ¶ IV.1.

[31] *Zambrano supra* n. 2, at ¶¶ 19 and 22.

[32] *Loi du 27 Decembre 2006 portant des dispositions diverses*, Moniteur Belge, 28 Decembre 2006, art. 380.

[33] Otherwise they may have acquired Colombian nationality; *Zambrano supra* n. 2, at ¶ 19.

[34] Interview with Mr. Pierre Robert, *supra* n. 12. Conversation with Sarah Lambrecht, référendaire at the Belgian Constitutional Court, Bruxelles, 5 June 2015. Also see Bernadette Renauld, 'Les Nouvelles Conditions d'Accés à la Nationalité' [2007] Revue Belge de Droit Constitutionnel 19, 23.

[35] Chambre des Représentants de Belgique (Chamber of Representatives of Belgium), Doc. 2760/001 of 21 November 2006, http://www.lachambre.be/FLWB/PDF/51/2760/51K2760001.pdf (accessed 25 June 2015) at 249.

[36] See Dimitry Kochenov and Justin Lindeboom's chapter in this book.

[37] Interview with Mr. Pierre Robert, *supra* n. 12. Also see case C-200/02 Kunqian Catherine Zhu and Man Lavette Chen v Secretary of State for the Home Department, EU:C:2004:639.

EU citizen children, in order to protect the effectiveness of the rights of the latter.[38] A difficulty remained however: the right whose effectiveness had to be protected in *Chen* was the right to reside in a Member State other than the one of nationality.[39] The Zambrano children had never moved anywhere and were residing in their country of nationality. In European jargon, theirs was a purely internal situation and thus beyond the scope of EU law.

A third area of law could help turn around the internal situation difficulty: Belgian immigration law. The 1980 Law on Foreigners expressly provided for extension to Belgian nationals of the family reunification rights with third country national family members that non-Belgian EU nationals enjoyed in Belgium.[40] This is another provision that was destined to take a restrictive turn shortly after the *Zambrano* case. However, once again, Zambrano's situation was timely enough.[41]

Several Belgian immigration lawyers had already tried, in the aftermath of *Chen*, to rely on a combination of the *Chen* rule and the provisions of the Law on Foreigners to win regularization of status in Belgium for their third country national clients who had Belgian children. The strategy yielded mixed results. Some municipalities initially accepted the argument, while several others increasingly rejected relevant applications on 'legal engineering grounds'.[42] Relevant cases began to flock to the *Conseil du Contentieux des Étrangeres*, together with gentle lawyerly nudges towards referring a question to the CJEU.[43] Among these cases was Mr. Ruiz Zambrano's action for annulment lodged in 2005 after his application to take up residence as the

[38] Chen, *supra* n. 37 ¶ 45-46.
[39] *Id.*
[40] *Loi du 15 décembre 1980 sur l'accès au territoire, le séjour, l'établissement et l'éloignement des étrangers en ce qui concerne les conditions dont est assorti le regroupement familial*, Moniteur Belge of 31 December 1980 ('Law on Foreigners'), former art. 40(6), current art. 40 *bis*.
[41] See *infra* n. 112.
[42] Interview with Mr. Pierre Robert, *supra* n. 6.
[43] *Id.*

ascendant of a Belgian national was rejected.[44] None of these cases would go very far as the *Conseil du Contentieux des Étrangeres* made it clear that it would not refer questions to the CJEU.[45] This would be the end of the story for several migrants, including some 15 other Colombians Mr. Robert was assisting at the time, who, like Mr. Zambrano, had been denied asylum, granted a *non-refoulement* clause, and in some cases, had had Belgian-born, Belgian-national children.[46] But not for Mr. Zambrano who, thanks to his social security litigation, would find at the *Tribunal du Travail* another opportunity to push through the combination of international, national and EU law, which could support his case.

1.3 The Road not Taken (by other Cases): the *Tribunal du Travail*

What made the *Zambrano* case was that it landed on the table of the *Tribunal du Travail*.

Ironically, had the Belgian authorities simply paid Mr. Zambrano his well-deserved unemployment benefits, rather than fretting to change nationality and immigration laws, the *Zambrano* case would have never happened. Similarly, the Belgian authorities missed the point in their attempts to mute the Zambrano litigation. In April 2009, they extended to Mr. Zambrano a provisional residence permit.[47] Later that same year, they granted him definitive regularization in the context of a collective procedure addressed to parents of Belgian nationals.[48] However, grant of a residence permit, or even a work permit, could not solve the problem as, in order to

[44] Zambrano, *supra* n. 2, ¶ 22-23 and 30-31.
[45] The CCE has indeed decided that it is not a court of last instance as an appeal on points of law is possible before the Conseil d'Etat, and on that ground routinely refuses to refer to the ECJ; conversation with Tim Corthaut supra n 6. Also see in this respect Conseil du Contentieux des Étrangeres, 24 June 2010, nr. 45 395, point 2.2.2.2; see also T. Corthaut, 'Help! Een prejudiciële vraag? – Een eerstehulpdoos bij prejudiciële vragen aan het Hof van Justitie', in N. Cariat and J. Nowak (eds.), Le droit de l'Union européenne et le juge belge / Het recht van de Europese Unie en de Belgische rechter, Bruylant, 2015, p. 114.
[46] Interview with Mr. Pierre Robert, *supra* n. 6.
[47] Id. Also see Zambrano, *supra* n. 2, ¶ 32-33
[48] Interview with Mr. Pierre Robert, *supra* n. 6.

obtain his unemployment benefits, Mr. Zambrano needed retroactive recognition of the regularity of his workdays between 2001 and 2006.[49] Such retroactive recognition would have to depend on the fact that as ascendant of a Belgian and EU national, at least since his second child was born in 2003, Zambrano had not needed a residence or work permit in Belgium. This involved a question on the reach of European citizenship: does the latter imply, for the third country national parent caretaker of a minor citizen, a right to work and reside in the Member State of residence and nationality of the citizen child? On 30 January 2008 the *Tribunal du Travail* dared to ask the CJEU precisely that question, one that the *Conseil du Contentieux des Étrangeres* would not.

In its analysis, the *Tribunal du Travail* weaved the factual and legal elements of the case to render a vivid image of Mr. Zambrano as the 'model' migrant. He was a vulnerable asylum seeker who both had to flee violence in his country of origin and was covered by a *non-refoulement* clause in his host country.[50] He was also a responsible father, who had suffered severe post-traumatic syndrome when his first child had been abducted in Colombia.[51] He had no choice as to where to conduct and further expand his family life,[52] but had always made sure to provide sufficiently for his children.[53] Finally, he was a diligent worker, who had managed to obtain an open-ended contract with a Belgian company,[54] had regularly paid social security, and had never presented a burden for Belgian public finances.[55]

[49] *Id.*.
[50] *Tribunal du Travail*, *supra* n. 22, ¶ III.2.3.
[51] *Id.* ¶ III.2.3.
[52] *Id.* ¶ IV 4.1.1-4.1.3.
[53] *Id.* ¶ III.8.
[54] *Id.* ¶ III.7.
[55] *Id.* ¶ III.15-16.

At the same time, the *Tribunal du Travail* de-emphasized the importance of the internal nature of Zambrano's situation both in terms of the appropriateness of a preliminary reference and in terms of the applicability of EU law. With regard to the former, it relied on CJEU precedents to conclude that a preliminary reference may be needed even in an internal situation, if a Member State has chosen to extend the same rights that EU nationals enjoy on its territory to its own nationals, as was the case in Belgium under article 40 of the Law on Foreigners.[56] With regard to the latter, it hinted that the internal nature of the situation did not matter as much if one considered the point of view of European citizenship rather than the point of view of free movement.[57]

The way the European citizenship question ripened in Zambrano's complex situation and the way it was presented by the *Tribunal du Travail* made for a perfect factual and legal storm looming on the CJEU's horizon. In the eye of that storm one would see a migrant who was both in need and deserving, two vulnerable minor European citizens who had been rescued from statelessness, and a credible European citizenship argument grounded in a smooth combination of national, international and EU law. One could even forget that this was, after all, a purely internal situation.

2 Transformation at the CJEU

In the end, the internal situation doctrine was not forgotten. Advocate General Sharpston, in her opinion, closely examined the scope and meaning of European citizenship, concluding that the situation of the Zambrano children was by its nature not purely internal, and that article 21 TFEU

[56] *Id.* ¶ IV 4.2.2-4.2.3. (referring to Government of Communauté française and Gouvernement wallon v Gouvernement flamand C-212/06; reference is also made to Dzodzi C-197/89 and MRAX C-459/99, see ¶ IV 3.2.1.1).
[57] *Id.* ¶ IV 3.2.1.1.

encompasses a free standing right of residence, regardless of the exercise of movement.[58] The purely internal nature of the situation was also a central element at the CJEU hearing, where the Member State governments and the European Commission opposed the extension of EU law to cover a situation like Mr. Zambrano's, while some of the judges seemed skeptical as to the relevance of the latter's internal character.[59]

This did not lead to a bold denunciation of the internal situation but rather to a dismissive treatment in the judgment. The court reformulated the referred questions in a way that absorbed the purely internal issue into the broader context,[60] and proceeded instead on citizenship as a fundamental status. If sidestepping the internal situations doctrine was acclaimed to be the revolution in this case,[61] this was a quiet revolution. What is possibly more telling is the way the Court performs two fundamental transformations in its seven-paragraph reasoning on the case:[62]

A first transformation is in the characters of the story. At the CJEU, the main characters are the two who had been left in a penumbra at the national level – the Zambrano children. This may seem obvious as the question for the CJEU is one of European citizenship and the European citizens of the story are the children. However, the *Tribunal du Travail* was very explicit in that the question of the citizenship and non-discrimination rights of the children was entirely functional to the determination of whether their father could collect his unemployment benefits.[63] Regularization of the father's social security situation would in turn reflect onto the rights of the

[58] *Zambrano, supra* n. 2, Opinion of Advocate General Sharpston ¶¶ 89-101.
[59] *Zambrano, supra* at 2, hearing notes, ¶ 44-54. Mr. Robert recalls that one of the judges asked the Belgian government representative whether it would have made a difference if the Zambranos had brought their children every year to Eurodisney in France or once to see the tulips in the Netherlands. Interview with Mr. Pierre Robert, *supra* at n. 12.
[60] Zambrano, *supra* n. 2 ¶ 36,
[61] This is considered one of the most innovative aspects of the judgment. See e.g., Kochenov, 'A Real European Citizenship', *supra* n. 9; Lenaerts, *supra* n. 9.
[62] See Niamh Nic Shuibne, 'Seven Questions for Seven Paragraphs, [2011] 36 ELR 161.
[63] *Tribunal du Travail, supra* n. 22, ¶ IV.4.2.3.

children in terms of their access to medical insurance and other family benefits.[64] The central dilemma that European citizenship had been called to solve was Mr. Zambrano's social security problem. At the CJEU level, the central concern is rather the Zambrano children's ability to remain in the EU. This ability would be impaired if their father were not entitled to reside with them and to work in order to provide for their maintenance.[65]

The second transformation relates to the triggering of a European citizenship question. The focus of the preliminary reference was Mr Zambrano and whether his children's European citizenship entitled him to access the Belgian labor market.[66] In the CJEU judgment, the focus rather falls on the origin of the Zambrano children's European citizenship. The Court recalls the rule in article 10 of the Belgian Code on Nationality and emphasizes that Colombia would not, *per se*, have recognized the children as its nationals.[67] The threat of statelessness surfaces in the CJEU's survey of the background facts and implicitly reinforces the Court's conclusion that the Zambrano children 'undeniably enjoy' the status of European citizenship. In an extended syllogism, the Court suggests that the Zambrano children enjoy such status because all EU nationals are EU citizens, the Zambrano children are Belgian nationals and it is up to Belgium to determine who their nationals are.[68] In between the lines, through the implied reference to statelessness, the court also adds that the Zambrano children are Belgian nationals for good reason.

[64] *Id*. ¶ IV.4.3.5.
[65] Zambrano, *supra* n. 2, ¶ 44.
[66] *Tribunal du Travail*, *supra* n. 22, ¶ IV, 4.3.5. The Tribunal also refers to the legal engineering argument but only to dismiss it.
[67] Zambrano, *supra* n. 2, ¶ 19.
[68] Zambrano, *supra* n. 2, ¶ 40.

The Court's approach resonates to some extent with that adopted years before in another seminal EU citizenship case. In *Trojani*,[69] the Court eschewed the question of whether Mr. Trojani had a right under EU law to reside in Belgium, despite insufficient resources. Instead, it relied on the fact that he was lawfully resident in Belgium on the basis of Belgian national law.[70] The Court was therefore free to unleash its reasoning on non-discrimination of lawfully resident European citizens.[71] In *Zambrano*, the Court similarly downplays the question of whether the Zambrano children have EU law rights in their state of nationality by focusing on the fact that, as a direct consequence of a determination of Belgian law, they undeniably enjoy the status of European citizens.[72] In addition, Belgian law, as we learned in *Rottmann*, cannot have the effect of depriving the children of EU citizenship rights that the same Belgian law has conferred upon them through nationality.[73] The European citizenship question becomes a *Rottmann*-inspired one on what amounts to deprivation of the substance of European citizenship.[74]

Eventually these two transformations result into the disjoining of two layers that coexisted in the background story of the case: a first layer concerns a needy and deserving migrant deprived of social security; a second layer focuses on two vulnerable minor citizens threatened with deprivation of any citizenship at first (due to the risk of statelessness), and with deprivation of the enjoyment of the substance of European citizenship then (should their parents be expelled from Belgium). Rejoining these two layers yields some considerations on the role of the Court

[69] Case C-456/02 Michel Trojani v Centre public d'aide sociale de Bruxelles (CPAS) EU:C:2004:488.
[70] *Id.*, ¶ 37.
[71] *Id.*, ¶ 40-44.
[72] Sadl and Hink's network analysis of EU citizenship case law finds that chains of references to non-discrimination and fundamental status result in circumventing the limits of EU competence in EU citizenship cases. Urska Sadl and Sigrid Hink, 'Precedent in the Sui Generis Legal Order: a Mine Run Approach' [2014] 20 European Law Journal 544, 557 and 560.
[73] See Niamh Nic Shuibne, '(Some of) the Kids are all Right', [2012] 49 CMLR 349, at 364-66.
[74] Zambrano, *supra* n. 2, ¶ 42. Also see Nic Shuibne, '(Some of) the Kids' *supra* n. 73, at 352.

and the legacy and political implications of the Zambrano case for European citizenship doctrine. It also signals an under-acknowledged rationale of the judgment: European citizenship is engaged to avoid deprivation for a class of migrants who are both deserving and particularly deprived. The letter of the judgment suggests that European citizens cannot be deprived of the substance of their rights. The background story suggests that the substance of European citizenship becomes relevant in situation involving vulnerable and yet deserving citizens who have already been deprived at so many levels: of the protection of their country of origin, of security of status, of hard-earned social security for themselves and their families. Exceptional deprivation in other words activates the (exceptional) doctrine of European citizenship's substance. This may shed novel light on the legal and political relevance of the case.

3 Considerations on the Role of the Court

The mixed migration and citizenship stories in the background of the *Zambrano* case make for a hard constitutional case disguised as an easy immigration one. This leads to a judgment that mixes different levels of reasoning. While the transformations that occur at the CJEU bring the constitutional questions in the case to the forefront (how far does the European citizenship of the children reach) and leave the immigration ones behind the veil (what does a vulnerable and hard-working migrant as Mr. Zambrano deserve), the judgment ultimately offers a sound response to the latter (Mr. Zambrano deserves to stay and work) while treating the former evasively (as far as its 'substance' goes). .

Sensitivity to the facts seems to drive, in other words, the Court's interpretation of EU law in the case. This confuses the Court's role. The Court has reiterated several times in the case law that

cooperation with national courts is the thrust of the preliminary reference procedure.[75] Yet, in *Zambrano*, it seems tempted to adjudicate on the facts, thereby stepping to some extent into the shoes of the national court.[76] Additionally, it acts in this case as a fundamental rights adjudicator, not only because in substance it protects individual rights threatened by state action,[77] but also because it acts as a judge of almost last resort for an individual claim which had been already denied relief in several *fora*.[78]

Adjudication on the facts and protection of fundamental rights come at the expense of constitutional interpretation, in whose respect the Court's approach in the case seems incomplete.[79] The Court implicitly transcends some of its key doctrines, without reconciling the new approach with the old one, and ultimately leaving a number of questions pending:[80] the relationship between European citizenship and nationality, the destiny of internal situations, the

[75] See e.g. case C-140/12, *Pensionsversicherungsanstalt v Peter Brey*, judgment of 19 September 2013, EU:C:2013:565, ¶ 31.
[76] For this it has been criticized in the literature. See Nic Shuibne, '(Some of) the Kids' *supra* n. 73, at 367-371 and 377.
[77] See Lenaertz, *supra* at n. 9, at 14-15 (the case lends itself to a reformulation of the famous observation by AG Jacobs in case Konstantinidis according to which each European citizen should be entitled to say 'Civis Europaeus Sum'); also see Gareth Davies 'The Family Rights of European Children: Expulsion of non-European Parents' [2012] EUI Working Papers RSCAS 2012/04, at 1 (the backdrop to these recent cases is a period of increased EU attention to fundamental rights and particularly children rights).
[78] Mr. Robert emphasized how resort to EU law had become a necessity when the case came to the *Tribunal du Travail*. He was prepared to bring a claim to the European Court of Human Rights for violation of the right to property had the EU law route not worked. Interview with Mr. Pierre Robert, *supra* n. 6. Zambrano's claims for regularization of his residence situation had been rejected by the *Conseil d'État*, by the *Office des Étrangeres* and were pending in front of the *Conseil du Contentieux des Étrangers*. Zambrano, *supra* n. 2, ¶ 17, 23 and 29.
[79] See Nic Shuibne, '(Some of) the Kids' *supra* n. 73, at 371.
[80] In Sadl and Hink's categorization of claim and legal principle in a number of EU citizenship central cases, Zambrano is interestingly one of a handful in which no explicit legal principle can be detected. Sadl and Hink, *supra* note 72, at 558.

definition of the substance of European citizenship.[81] This threatens both the identity of the Court and the legacy of the case.[82]

In terms of the former, reflecting on the link between underlying stories and ultimate ruling in *Zambrano* leads to question whether there is a reverse correspondence in the Court's adjudication approach between the ease of the factual frame it is presented with and the intensity of its engagement with constitutional questions.[83] In terms of the legacy of the case, understanding the mixed stories of desert and deprivation that merged in *Zambrano* sheds light on its legal relevance.

4 Legacy

4.1 Legal Relevance

Subsequent cases seem to have marginalised the ruling in *Zambrano*. Several claims of third country nationals relying on the substance of a family member's European citizenship have followed.[84] None has found clear relief, as the Court's effort has qualified and restricted the

[81] *Rottmann* (Case C-135/08, Janko Rottmann v Freistaat Bayern, EU:C:2010:104) already raised the question of the relationship between European citizenship and nationality. On purely internal situations, the Court reversed gear in the subsequent cases of McCarthy and Dereci. The question of the substance of EU citizenship remains open.

[82] While sensitivity to the factual background results in a judgment inspired by the same rights-driven approach that has been highlighted in the literature on European citizenship, failure to ground rights-protection in a sound theory of the substance of supranational citizenship risks consolidating the sense of a random approach to individual rights. See Eleanor Spaventa, 'Seeing the Wood despite the Trees? On the Scope of Union Citizenship and its Constitutional Effects' [2008] 45 CMLR 13, at 39.

[83] While addressing this question is beyond the scope of this chapter, the same offers a possible hint to the literature on paths of adjudication at the Court. See e.g. Sadl and Hink, *supra* note 72; Nic Shuibne, '(Some of) the Kids' *supra* n. 73, at 372 (on the court's use of formulas); Loïc Azoulai, 'The "Retained Powers" Formula in the Case Law of the European Court of Justice: EU Law as Total Law?' [2011] 4 European Journal of Legal Studies 192; Mark Dawson, 'How Does the European Court of Justice Reason? A Review Essay on the Legal Reasoning of the European Court of Justice', [2014] 20 European Law Journal 423 (interpreting Zambrano as an example of the Court's reacting to the surrounding legal and political environment); Elise Muir, Mark Dawson, Bruno de Witte eds., 'Judicial Activism at the European Court of Justice' [2013].

[84] Case 434/09 Shirley McCarthy v Secretary of State for the Home Department EU:C:2011:277 EU:C:2011:277; case C-256/11 Murat Dereci and Others v Bundesministerium für Inneres EU:C:2011:734; case C-87/12 Kreshnik Ymeraga v Ministre du Travail, de l'Emploi et de l'Immigration EU:C:2013:291; joint cases 356/11 and 357/11 O, S v. Maahanmuuttovirasto and Maahanmuuttovirasto v L, EU:C:2012:776; case C-86/12 Adzo Domenyo Alokpa and

scope of the substance doctrine, particularly in the McCarthy and Dereci rulings.[85] Ultimately, as things stand, the substance of European citizenship is only "interfered with" when a dependent child citizen faces a real threat of having to leave the European Union.[86]

Rejoining the different narratives in the background story and the different levels of reasoning concurring in the *Zambrano* judgment suggests that the ruling may have specific relevance in situations coupling desert and extreme vulnerability: European citizenship was deployed in *Zambrano* to protect from deprivation two citizens amongst the most vulnerable and a migrant amongst the most deserving. The flow of asylum seekers escaping to Europe, at the time of writing, in the context of an ongoing humanitarian emergency promises several comparable stories of vulnerability and deprivation.[87] While profound divisions among the Member States in the face of such emergency cast shadows on the political foundations of European integration,[88] the *Zambrano* rationale illustrates a way in which European legal categories may be relevant, albeit in a piecemeal fashion, in the context of the refugee crisis.[89] It is in this context that the *Zambrano* ruling may experience a second life in both legal and political terms.

Others v Ministre du Travail, de l'Emploi et de l'Immigration, EU:C:2013:645; for an analysis of this line of case law see Francesca Strumia, 'Looking for Substance at the Boundaries: European Citizenship and Mutual Recognition of Belonging' [2013] 32 Yb Eur L 432.

[85] See Nic Shuibne, '(Some of) the Kids' *supra* n. 73, at 366-67 (the Court has added confusion in subsequent case law, in part by bringing back the purely internal rule). Also see Eleanor Spaventa, 'Earned Citizenship – understanding Union Citizenship through its Scope' in D Kochenov ed., 'Citizenship and Federalism in Europe: the Role of Rights' (CUP, forthcoming 2016), at 7-8.

[86] Zambrano, *supra* note 2, at ¶ 44. Also see G Davies 'The Family Rights of European Children' *supra* n. 77 (for an analysis of national measures compelling departure from the EU).

[87] The European Council at a meeting in June 2015 agreed a plan on resettlement and relocation for up to 60,000 migrants. See European Council, 25-26 June 2015, Conclusions, http://www.consilium.europa.eu/en/press/press-releases/2015/06/26-euco-conclusions/ (accessed 5 July 2015).

[88] See e.g. Patrick Kingsley, 'This isn't Human: Migrants in Limbo on Italian-French Border' The Guardian, 17 June 2015, http://www.theguardian.com/world/2015/jun/17/this-isnt-human-migrants-in-limbo-on-italian-french-border (accessed 7 July, 2015).

[89] Subsequent cases involved asylum seekers however their situations never quite matched the Zambrano one. See *Ymeraga*, *supra* n. **Error! Bookmark not defined.** (no minor European citizen children involved); *Alokpa supra* n. **Error! Bookmark not defined.** (there were minor European citizen children, but also a European citizen father); also see *O, S v. Maahanmuuttovirasto supra* n. **Error! Bookmark not defined.**.

From a legal perspective, the question is whether children of recently arrived refugees and asylum seekers who are born on the territory of an EU Member State can acquire, as the Zambrano children did, nationality of the State of birth under rules protecting children from statelessness.[90] In other words, how easily could a 'Zambrano situation' happen again in Europe? The answer depends on a combination of factors in international and national law.

The 1961 Convention for the Reduction of Cases of Statelessness and the 1997 European Convention on Nationality both provide for the contracting parties' obligation to grant their nationality to children born on their territory who would otherwise be stateless.[91] The 1961 Convention allows for contracting parties to subject the grant of nationality to a number of conditions, such as, among others, a requirement of habitual residence, and the absence of a criminal record.[92] The UNHCR has emphasized that these conditions must be interpreted in light of the right of every child to acquire a nationality and the principle of the best interest of the child under the Convention on the Rights of the Child.[93] Any rules that contracting parties apply should allow children born on their territory to acquire nationality either at birth or shortly thereafter.[94]

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[90] After Ireland changed its nationality law in 2005, no EU Member State applied a pure *ius soli* rule whereby nationality is granted for the sole fact of being born on the territory. See Dimitry Kochenov and Justin Lindeboom's chapter in this book. For an overview of EU Member States nationality laws see EUDO database on National Citizenship Laws, http://eudo-citizenship.eu/databases/national-citizenship-laws (accessed 5 July 2015).

[91] Either at birth or within a certain period thereafter. Convention on the Reduction of Cases of Statelessness, *supra* n. 30, art. 1. European Convention on Nationality, *supra* n. 30, art. 6(2).

[92] Convention on the Reduction of Cases of Statelessness, *supra* n. 30, art. 1(2). According to the UNHCR habitual residence is a factual criterion unrelated to lawfulness of residence (which is specifically allowed as a requirement by the European Convention on Nationality). UNHCR Guidelines on Statelessness No. 4: Ensuring Every Child's Right to Acquire a Nationality through Articles 1-4 of the 1961 Convention on the Reduction of Statelessness, 21 December 2012, ¶ 41. Also see Olivier Willem Vonk, Maarten Peter Vink, Gerard-René de Groot, 'Protection against Statelessness-Trends and Regulations in Europe' [2013] 1 EUDO Country Report, at 41.

[93] See UNHCR Guidelines on Statelessness *supra* at 92, ¶ 9-11. Also see Convention on the Rights of the Child, Nov. 20, 1989, available at http://www.ohchr.org/en/professionalinterest/pages/crc.aspx (accessed 8 July 2015), art. 3 and art. 7(2).

[94] UNHCR Guidelines on Statelessness, *supra* n. 92, ¶ 9-11.

A particular case is the one of children who –like the Zambranos - could acquire nationality of the state of origin of their parents, provided they are registered with relevant authorities. The UNHCR indicates that in these cases contracting parties are not under an obligation to grant their nationality, if the authorities of the state of origin have no discretion on whether to grant or deny nationality, and provided the parents can be reasonably expected to make contact with the authorities of the state of origin.[95]

Three situations can therefore be distinguished under international law rules. A first situation is the one of children of recognized refugees who do not automatically acquire nationality of the state of origin at birth. In this case, the authorities of the state of birth are under an obligation to grant their nationality to the child. This is regardless of whether or not the child could acquire nationality of the state of origin through registration, as clearly refugee parents are not in a position to make contact with the authorities of the state of origin.[96] A second situation is the one of children of recognized refugees who automatically acquire the nationality of the state of origin at birth. These are '*de facto*' stateless children, as they are not in a position to avail themselves of the protection of the state of origin.[97] According to the UNHCR, contracting parties should give these children the possibility to acquire their nationality, but preferably through a procedure that allows for voluntary choice.[98] Finally, the third situation is the one of children of asylum seekers who, like the Zambranos, are not formally granted refugee status. If these children do not automatically acquire the nationality of the state of origin at birth, they are certainly covered by article 1 of the 1961 Convention. If they could acquire nationality of the state of origin through registration with relevant authorities, as in the Zambrano case, applicability of the art. 1

[95] *Id.* ¶ 24-26.
[96] *Id.* ¶ 27.
[97] *Id.* ¶ 28.
[98] *Id.*

obligation depends on whether the parents are in a position to contact relevant authorities, and on whether the latter authorities would have any discretion in the matter.[99]

International law thus makes for a number of cases that could become 'Zambrano situations' in the context of the reception of significant numbers of asylum seekers in Member States. Whether these cases can concretely turn into 'Zambrano situations' depends on the extent to which international law is effective at the domestic level. Several Member States are parties to either one or both of the 1961 and 1997 Convention.[100] However, their domestic rules on acquisition of nationality for children at risk of statelessness often include additional conditions, such as lawful residence or conditions pertaining to the status and nationality of the parents that are in breach of the Conventions' rules, and that restrict the number of asylum seekers' cases that could yield Zambrano situations.[101] Based on a recent survey of relevant rules in Member States, it appears that 11 of 28 Member States would allow a Zambrano situation to arise.[102]

As for Belgium, while the relevant provision of the Code on Nationality was amended in a restrictive sense in 2006,[103] several factors suggest that *Zambrano* could happen again. First, the Belgian Constitutional Court in 2008 interpreted the amended provision in line with international principles, indicating that the exception to the rule of acquisition of nationality must be interpreted narrowly.[104] Furthermore, Belgium, which was not a party to the 1961 Convention at

[99] *Id.* ¶ 24-26. Also see Vonk, Vink and de Groot 'Protection against Statelessness', *supra* n. 92, at 46.
[100] 19 of the 28 EU Member States are parties to the 1961 Convention. The same number are parties to the 1997 Convention.
[101] See Vonk, Vink and de Groot 'Protection against Statelessness', *supra* n. 92, at 42-45.
[102] *Id.* at 43-45. The 11 Member States are Belgium, Bulgaria, Greece, Finland, France, Ireland, Italy, Poland, Portugal, Slovakia, Spain.
[103] See *supra* n. 32.
[104] *Cour Constitutionnelle* (Belgian Constitutional Court), Judgment of 24 April 2008, n. 73 http://www.const-court.be/public/f/2008/2008-073f.pdf (accessed 8 July 2015) (the exception cannot apply to children of refugees and of other people who are in the impossibility of contacting the authorities of the state of origin ¶ B.8.5). This is in line with preparatory works to the amending law, according to which the exception is not meant to apply to children of persons granted refugee status or subsidiary protection. See *Chambre des Représentants* document 2760/01,

the time of the *Zambrano*, has since acceded to the same Convention in 2014, which suggests at least a willingness to abide by relevant international rules.[105] In addition, in some recent cases, Belgian nationality has been granted to the stateless children of migrant parents who had not been formally recognized as refugees in Belgium without an inquiry into whether they would have been able to obtain the nationality of another state.[106]

A further set of questions regarding the relevance of the *Zambrano* ruling for the condition of refugee and asylum seeker families in EU Member States pertains to the kind of rights parents can claim on the basis of the substance of the European citizenship of children. Rejected asylum seekers, like the Zambranos, can probably rely on the ruling to obtain a right to stay and work. Nevertheless, are there rights beyond this? In particular, can the substance of European citizenship offer something in terms of protection to parents recognized as refugees, who will have a right to stay and work, regardless of the citizenship of their children?[107]

supra n. 35. The Zambranos would have qualified for subsidiary protection after the implementation of the Qualifications Directive in Belgium. See *supra*, n. 16.

[105] It seems that the decision to accede to the Convention was the result of lobbying activities on the part of the UNHCR and of the Interfederal Centre for Equal Opportunities and the Federal Centre of Migration, http://diversitybelgium.be. Conversation with Sarah Lambrecht, supra n. 34.

[106] *Tribunal de Premiere Instance seant a Liege*, n. 14/1629/B, judgment of 19 December 2014 (the case concerned the Belgian born children of two Roma parents. The parents appeared to not be recognized as nationals by another State. The *Tribunal* not only did not apply par. 2 of article 10, but gave a generous interpretation of par 1, - acquisition of Belgian nationality is automatic and the judgment as to whether the child would otherwise be stateless requires only a mental exercise rather than a concrete proof).

[107] In the UK for instance where a formal right to reside for 'Zambrano carers' has been recognized, amendments to social security regulations have been passed to ensure that Zambrano carers have no access to a range of social security benefits. And the courts have gone along. See Social Security (Habitual Residence) (Amendment) Regulations 2012/2587 of 11 October 2012 (effective 8 November 2012) http://www.legislation.gov.uk/uksi/2012/2587/pdfs/uksi_20122587_en.pdf. Also see 'Zambrano Right to Reside-Amendment to Regulations', Memo of the Department of Social Development of 8 November 2012, vol 2/37. For an example of the UK Courts' position, The Queen on the Application of Sanneh v Secretary of State for Work and Pensions [2013] EWHC 793 (Admin).

Answers to these questions ultimately hinge not only on the legal significance of the ruling, but also on the way, its underlying rationale penetrates a surrounding public debate on migration and the condition of migrants.[108]

IV.2 Political Relevance

The *Zambrano* ruling suggests that when it comes to the situation of the most vulnerable migrants, European citizenship endeavors to speak rights to power.[109] It brings a discourse of rights to bear on the power of the Member States to exercise unbridled discretion in managing their borders, and in including and excluding. In this sense, the ruling adds a voice to an ongoing debate on immigration, in which this power is constantly reaffirmed.[110]

While the effectiveness of this discourse may be debatable, the very case of Belgium offers an example of how hints from the *Zambrano* judgment had a mitigating effect on some of the harshest outcomes of a hostile political climate towards immigration. The *Zambrano* case took advantage of a window of legal opportunity in Belgium: the provision on acquisition of nationality by stateless children was about to be amended.[111] Likewise, the provisions of the Law on Foreigners extending the same family reunification rights to Belgian nationals as to migrant EU nationals were to change in 2011.[112]

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[108] Debate that, according to Dimitry Kochenov and Justin Lindeboom, raises windmills to fight against immigration policy. See their chapter in this book.
[109] But see Daniele Gallo, 'La Corte di Giustizia rompe il vaso di Pandora della cittadinanza europea', [2012] Giorn. di Dir. Ammin. 39 at 49 (there is a risk that the case may induce Member States to alter their immigration and nationality laws in a restrictive direction as happened in *Chen*).
[110] See e.g. David Cameron, Immigration Speech, 28 November 2014, http://www.bbc.co.uk/news/uk-politics-30250299 (accessed 8 July 2015).
[111] See *supra* note 32.
[112] *Loi modifiant la loi du 15 décembre 1980 sur l'accès au territoire, le séjour, l'établissement et l'éloignement des étrangers en ce qui concerne les conditions dont est assorti le regroupement familial*, 8 July 2011, Moniteur Belge, 12 September 2011. The family reunification regime applying to Belgian nationals was brought closer to the one applying to TCNs, through the enactment of resources, adequate housing and other preliminary requirements.

The change to article 10 of the Code on Nationality, in particular, fits within the context of generalized discontent with a nationality law that, ever since a reform in 2000, was one of the most permissive in Europe and was seen as an element of attraction for migrants.[113] In the same spirit, a comprehensive reform in 2012 would radically change Belgian nationality law,[114] with the stated intent of making it 'neutral in respect of immigration pressures.'[115]

The *Zambrano* ruling did not have any resonance in the context of the reform of the nationality law.[116] However, it did play a role in the discourse surrounding, and eventually in the substance of, the amendment to the Law on Foreigners. Just a few days after the *Zambrano* judgment, the *Conseil d'État* issued an opinion on the proposed amending law,[117] highlighting how the very objective of the proposed law, to make family reunification more difficult for Belgian nationals, was in contrast with the *Zambrano* ruling and with the substance of Belgian citizenship.[118] The revival of the internal situation in *McCarthy* and *Dereci* weakened the argument of the *Conseil d'État* and eventually the reform was passed regardless of *Zambrano*.[119] In any case, the only

[113] Marie-Claire Foblets, Zeynep Yanasmayan, Patrick Wautelet, 'Country Report: Belgium', RSCAS/EUDO-CIT-CR 2013/27, at 23-26.
[114] *Id.* Also see *Loi modifiant le Code de la nationalité belge afin de rendre l'acquisition de la nationalité belge neutre du point de vue de l'immigration*, 4 December 2012, Moniteur Belge 393 of 14 December 2012. In the reformed law, three paths to naturalization replace a multitude of pre-existing rules: a short declaration procedure requiring five years of residence, a long declaration procedure requiring ten years of residence and a naturalization procedure for persons of exceptional merit.
[115] This is suggested by the very title of the law as well as by the preparatory works. See *Chambre des Représentants de Belgique, Compte Rendu Integral, Séance Plénière*, CRIV 53 PLEN 108, 24 October 2012, http://www.lachambre.be/doc/PCRI/PDF/53/ip108.pdf (accessed 8 July 2015), ¶ 05.01.
[116] However, another EU citizenship-centered judgment, *Rottmann* (supra n. 81) did. It inspired an advisory opinion of the *Conseil d'État* (Council of State) on the provisions of the new nationality law on loss and forfeiture of Belgian nationality. Relevant provisions were amended in the final version of the reform law to make loss of nationality more difficult, in line with the *Rottmann* ruling, in cases in which this would result into statelessness. See Opinion of the *Conseil d'État* 49.941/AG/2/V of 16 and 23 August 2011 http://www.dekamer.be/FLWB/PDF/53/0476/53K0476011.pdf (accessed 8 July 2015), ¶ 14.1.1-14.4. Also see articles 23 and 23*bis* of the *Code de la nationalité belge* of 28 June 1984 as amended, Justice 1984900065 of 12 July 1984, p 10100.
[117] Opinion of the *Conseil d'État*, n 49 356/4 of 4 April 2011 http://www.lachambre.be/FLWB/PDF/53/0443/53K0443015.pdf (accessed 8 July, 2015).
[118] *Id.*, ¶ 45.
[119] Interview with Mr. Pierre Robert, *supra* n. 6.

right-enhancing amendment that the reform brought about in the Law on Foreigners was an implementation of the *Zambrano* rule: family reunification rights were extended to ascendants of Belgian nationals, regardless of whether any relationship of dependency existed or not.[120]

The *Zambrano* ruling also triggered claims against the reformed Law on Foreigners, which resulted in three judgments of the Belgian Constitutional Court.[121] In all three cases, relevant parties had questioned whether the provisions of the reformed law took into appropriate account the rights of Belgian nationals as EU citizens in light of the *Zambrano* judgment.[122] The Constitutional Court was reluctant to find in the *Zambrano* ruling any limits to the power of the Belgian legislator and upheld the reformed law in all three instances.[123] It did clarify, however, that Zambrano rights would have to be taken into account on a case-by-case basis, possibly dis-applying relevant provisions of the Law on Foreigners when the situation called for it.[124]

The experience of Belgium in this respect shows how European citizenship infiltrates rights-concerns into immigration debates otherwise dominated by the unquestioned discretion of the Member States, informing the views of private parties as well as institutional actors. In particular, European citizenship infiltrates rights-concerns for the most vulnerable among the migrants.

Conclusion

[120] *Id.* Also see *Loi modifiant la loi du 15 décembre 1980*, *supra* n. 56, art. 40 ter.
[121] See, respectively, *Cour Constitutionnelle*, judgment of 26 September 2013, n. 121 http://www.const-court.be/public/f/2013/2013-121f.pdf; judgment of 26 September 2013, n. 123 http://www.const-court.be/public/f/2013/2013-123f.pdf ; and judgment of 19 December 2013, n. 167 http://www.const-court.be/public/f/2013/2013-167f.pdf (all accessed 8 July 2015).
[122] *Id.* Relevant questions focused in particular on art. 40 *ter* of the Law on Foreigners, as amended.
[123] *Id.*
[124] See *Cour Constitutionnelle*, judgment of 26 September 2013, supra n. 121, ¶ B.59.5-7.

Zambrano's quiet revolution in the doctrine of European citizenship has been overshadowed by retreating steps in subsequent judgments and by frustrated comments in the literature. Unravelling the layers in the case's background to distinguish the role of vulnerable citizens, deserving migrants and deprived workers recuperates in part the legacy of that revolution. The Court, which seemed to have mixed its own role of constitutional guardian with the national courts' one of adjudication on the facts, turned out to demonstrate a measure of sensitivity to the combined instances of desert, vulnerability and need. This in turn illuminates the substance of European citizenship: a legal status that trails along nationality and fades in purely internal situations, but that will come to life to mark an alternative inclusion path in cases involving fragile nationals and vulnerable migrants. Knowing this would perhaps be of comfort to Mr. Zambrano, a serious, polite and introverted man, according to his lawyer, who cared that his story may lay the grounds for others.