

Zambrano, Lounes and Citizenship Rights: Where Are We Now?

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Introduction

- *Zambrano* and *Lounes* are the two key EU citizenship routes to residence
- Exist at the periphery of EU law
- Fundamentals of EU free movement law well-established, but still much development here
- 3 parts to the talk:
 - Locate *Zambrano* and *Lounes* in context of EU free movement law
 - Consider basis of each
 - Examine current state of law and hot topics

PART 1

ZAMBRANO AND LOUNES **IN CONTEXT**

EU Routes to Residence in the UK

- 3 key EU routes to residence in the UK
 - Core rights in Directive 2004/38, Citizens Directive (implemented in Immigration (EEA) Regs 2016)
 - Court-developed derivative rights
 - EU citizenship
- The Treaties still provide the underlying basis for the law here
- But the Court has moved a long way past the core rights

Background: The Treaties

- Treaty on the Functioning of the European Union (TFEU)
- Key provisions in this context:
 - Art 20: citizenship (and free movement)
 - Art 21: right to move and reside freely
 - Art 45: free movement of workers
 - Art 49: freedom of establishment
 - Art 56: free movement of services
- Rights of residence dealt with in Directive 2004/38/EC – the Citizens Directive

Route 1: The Citizens Directive

- The key piece of EU legislation in this field
- Codifies and expands previous “piecemeal” approach: recital (4)
- 3 key residence rights:
 - Right of residence up to 3 months: Art 6
 - No conditions, just passport or ID card
 - Right of residence for more than 3 months: Art 7
 - Worker, self-employed, self-sufficient, education
 - Right of permanent residence: Art 16 (new)
 - 5 years’ continuous lawful residence

Route 2: Derivative Rights

- Not found in the Treaties or Citizens Directive
- Developed from core Treaty rights in Arts 20 and 21
- Often designed to ensure effectiveness of EU family member free movement rights
- Key examples:
 - *Surinder Singh / Eind*
 - *Baumbast*
 - *Chen*
 - *Ibrahim / Teixeira*
 - *Zambrano*

Route 3: EU Citizenship

- Introduced by Maastricht Treaty from 1993
- Art 20 – establishes EU citizenship
- Art 21 – associated rights of free movement
- Significant, especially post-Brexit:
 - *Grzelczyck* – fundamental status of MS nationals
 - *Baumbast* – start of process of deriving rights from citizenship status
 - *Zambrano / McCarthy No 1* – limits / no limits
 - *Lounes* – even applies in dual national situation
 - *Ziebell* – current stage of development of EU law

PART 2

THE BASIS OF THE RIGHTS

The Basis of the Rights: Early Cases

- *Zambrano* and *Lounes* have their origins in early cases on the status of Union citizenship:
 - *Grzelczyck* – fundamental status of MS nationals
 - *Baumbast* – start of process of deriving rights from citizenship status
 - *Chen* – rights of residence to non-EU citizens to give effect to EU citizenship rights
- Key features:
 - Identifies citizenship as fundamental status
 - No link between citizenship and economic activity – and therefore residence

Zambrano 1: Background

- Facts: 3rd country nationals, with EU citizen children who had never left their MS of residence
- No right to reside under domestic law
- No criminality

Zambrano 2: Outcome

- 39 – Citizens Directive does not apply because the children are still in home MS and so not “beneficiaries”
- 40, 41 – restatement of case-law on EU citizenship
- 42-44 – key passages:
 - Art 20 TFEU precludes national measures that deprive EU citizens of the genuine enjoyment of the substance of their rights as EU citizens (42)
 - Refusal to grant right of residence and work permit has that effect (43)
 - Such a refusal “must be assumed” to lead the EU citizen children to leave the territory of the EU = unable to exercise the substance of their rights as EU citizens (44)

Zambrano 3: Response

- Hugely controversial
- In UK, *Zambrano* carers excluded from mainstream means-tested benefits – upheld in *HC & Sanneh*
- Significance of choice – *FZ (China)*
- Judgment in very broad terms, even by CJEU standards
- Later CJEU cases emphasise exceptional nature of the right – rowing back?
 - *McCarthy No 1*
 - *Dereci*
 - *Iida*
 - *O and B*
 - *Alokpa*
 - *Chavez Vilchez*

Zambrano 4: Unresolved Issues

- *Zambrano* left many questions unanswered, e.g.:
 - Effect of criminality: *CS (Morocco)* (CJEU), *Rendon Marin* (CJEU) and *Robinson (Jamaica)* (CoA):
 - Can derogate on grounds of public policy / security
 - Analogous tests to Citizens Directive Arts 27 and 28
 - Must show genuine, present and sufficiently serious threat – but can exceptionally rely on *Bouchereau* exception, see *Robinson*
 - Application to adults: *Dereci* and *Patel and Shah* (and *KA*):
 - Adult carers can benefit from *Zambrano* rights
 - Out of country applications: *MA and SM*:
 - *Zambrano* applies to entry clearance applications

Lounes 1: The Problem of Dual Citizenship

- Traditional UK position was that dual UK citizens resided under national law, not EU law, and so could not rely on EU family member rights
- *McCarthy No 1* – dual Irish / British citizen, never left UK, could not rely on EU law to obtain right of residence for 3rd country national spouse
- Problem for M was fact that had never exercised free movement rights

Lounes 2: McCarthy Revisited

- Mrs Ormazabal had exercised free movement rights to move to UK from Spain as a student
- Stayed lawfully and was granted citizenship
- Then met husband, Mr Lounes, who was in UK as 3rd country national, unlawful overstayer
- Question: could Mr Lounes rely on wife's status as an EU citizen to obtain right of residence in UK?
- UK said national law applies; Mr Lounes said EU law applies

Lounes 3: Outcome

- The Grand Chamber agreed with Mr Lounes
- Key was prior exercise of free movement rights
- Mrs Ormazabal had clearly exercised her free movement rights in moving to UK in first place
- She could not be a beneficiary of the Citizens Directive because she was in a MS of nationality
- But Mr Lounes could rely on Art 21 TFEU to obtain a derivative right based on wife's prior exercise of free movement rights
 - Could not be treated like person who had never left
 - Art 21 promotes integration, and naturalisation was highest degree of integration
 - Wrong for rights to reduce with more nationalities

Lounes 4: Unresolved Issues

- Does date of move matter?
- *Kovacevic* – case about 3rd country national spouse of Croatian national
- Croatian national moved to UK in 2007 before accession of Croatia to EU
- Croatia became MS in 2013
- They married in 2014
- Upper Tribunal: no prior exercise of free movement rights = no right under Art 21
- Limits *Lounes* to cases where free movement rights exercised prior to move
- See also *Ziebell* in the Grand Chamber

Some Conclusions

- *Zambrano* and *Lounes* are interesting and difficult because they exist at the centre of EU constitutional law but the periphery of EU immigration law
- *Zambrano* – many of key residual issues have been resolved to an extent – criminality, adult carers, application to entry
- But may be reviewed / revised in Supreme Court in *Patel and Shah*
- *Lounes* – *Kovacevic* has confirmed centrality of prior exercise of free movement
- Does date of marriage matter (pre- or post-citizenship)?
- Role of *Lounes* arguments post-Brexit?