“Hand-to-mouth” citizenship: decision time for the UK Supreme Court on the substance of *Zambrano* rights, EU citizenship and equal treatment

Introduction

We are on the brink of tapping into the core of EU citizenship. Case C-34/09 *Ruiz Zambrano* [2011] ECR I-01177 established an enigmatic formula, (or an ‘ambiguous’ one – Lansbergen & Miller, 2011) creating a right for EU national children to reside in their own *home* state extending to third country national primary carer, to ensure ‘the genuine enjoyment of the substance’ of EU citizenship rights. But is it enough to have a stripped down right to simply be present and work, with no guarantee as to standard of living and no entitlement to equal treatment? In particular, we have to ask whether there is any right to access welfare benefits. Until now, an EU citizenship-based right to reside has necessarily entailed a right to equal treatment, subject to limitations and conditions (e.g. a requirement of economic activity). The UK position however, is that the *Zambrano* right is a completely different right to reside, not entailing any entitlement to equal treatment in the first place. The Court of Appeal in *Sanneh & Ors v Secretary of State for Work and Pensions* [2015] EWCA Civ 49 found that entitlement to ‘last resort’ protection provided (at least in theory) by section 17 of the Children Act discharged any duty to not effectively force the family out of the country; the court noted claims that section 17 support was inadequate in practice, but added that it was not open to the court to determine how well the provision operated on the ground (94).

*Sanneh* (now renamed *HC* – *R (on the application of HC) v Secretary of State for Work and Pensions and others* UKSC 2015/0215) had a preliminary hearing before the Supreme Court (on 7 March 2016) and permission to appeal was granted. The Supreme Court, most likely with the help of a preliminary reference to the CJEU, will now have to discern the essential substance of citizenship rights, and identify what is necessary for such rights to be ‘genuinely enjoyed’. This article begins by summarizing the key issue in *Sanneh/HC*. It then analyses the *Zambrano* right and related EU case law to argue that the Court has not created a unique, rights-free right to reside in which the family are not entitled to any equal treatment, no matter how much they work, but has instead created another right to reside of a kind with any other EU citizenship-based right to reside, that entails some degree of a right to equal treatment. Equal treatment has been a right attaching to – even interlocking with - Union citizenship, since its inception. The state of nationality is the state with which one has the strongest claim to public resources, and the only state in which there is a legitimate expectation of being treated like a national.

If anything, this piece argues, a *Zambrano* right to reside is *more* fundamental than the right to reside in any *other* Member State. It is the right to reside in the State of nationality – a foundation stone in the edifice of international law and human rights – and is a right to reside in the Union, since being removed means exclusion from the Union. There is therefore nothing weak, or derivative, about the *child’s* right, and so the right that child can confer on a primary carer should be no weaker than that derived from non-national children in Case C-310/08 *Ibrahim* [2010] ECR I-01065 or Case C-480/08 *Teixeira* [2010] ECR I-1107. The failure to acknowledge that children, and children’s rights, are at the heart of the case, (Stalford & O’Brien *forthcoming*) is explored next, in particular focusing on the discriminatory treatment of *Zambrano* children as compared to other UK national children, and as compared to other children relying on an EU citizenship-based right to reside. The suggestion endorsed by the Court of Appeal that the children cannot be said to the subject of discrimination because it is their carers who claim benefits (*Sanneh*, 113) is misleading. Children are rarely (if ever) themselves the direct receivers of welfare benefits, but are intended recipients, and *Teixeira* and *Ibrahim* show that the benefits received by the family, are viewed as supporting a child’s right to reside, and the child’s right to equal treatment, and the conditions in which the right to reside is exercised.

An equal treatment line of argument triggers the reverse discrimination question – should allegations of discrimination be dismissed because Member States retain the right to treat their own nationals detrimentally compared to other EU nationals? I suggest that reverse discrimination is a red herring. Member States are entitled to treat own nationals *not subject to EU law* less well than it treats EU nationals (O’Leary, 2012; Tryfonidou, 2009). However, *Zambrano* children are within the scope of EU law. They are therefore covered by the general principles of EU law including the general principle of equal treatment. They have a right to be treated the same as other UK nationals in a comparable situation. This right is especially pronounced in the context of the genuine enjoyment of rights attaching to Union citizenship (*Eman & Sevinger*). They are also in a comparable situation to *Teixeira/Ibrahim* children, since they are exercising an EU citizenship-based right to reside, and so have a claim to full equal treatment. At the least, they could be said to be in a comparable situation to other EU nationals exercising an EU citizenship-based right to reside, and so be entitled to equal treatment that was conditional on meeting the requirements analogous to those in Articles 7 or 16 of Directive 2004/38.

Infringements of the general principle of equal treatment must be objectively justified (Case C-579/13 *P&S* 4 June 2015, 41; Case T-190/12 *Tomana,* 22 April 2015, 247; Case C-356/12 *Glatzel*, 22 May 2014, 43). This piece examines the arguments put before the Court of Appeal of England and Wales, and that court’s reasoning, to identify the claimed ‘legitimate aims’ of excluding *Zambrano* children from equal treatment – primarily restricting benefits to those with the greatest connection with the UK. It argues that the exclusion is neither a logical nor proportionate means to the posited objectives, in particular highlighting that it excludes tax-payers. The last of DWP’s submissions is that third country nationals should be encouraged to assess their resources before having children. This Malthusian (Malthus, 2008) argument is logically, practically, ethically and legally flawed.

If there is *any* substance to the rights attaching to Union citizenship, those rights must include equal treatment, and the UK should not be allowed to unilaterally modify an EU citizenship-based right to reside (see the Opinion of AG Szpunar in Case C-165/14 *Marin* 4 February 2016, 95, and Kochenov (2013) 504)by embroidering into it an unprecedented mandatory inequality. If *Zambrano* is not an obsolete, empty right, inferior to other possible, statuses pre-existing in national immigration law, it cannot be a license to discriminate against own nationals because they are exercising an EU citizenship-based right to reside. And if Union citizenship carries any meaning for children (who cannot easily become mobile EU nationals), then ‘genuine enjoyment’ of an EU citizenship-based right to reside must mean more than a right to a ‘hand-to-mouth’ existence, (term used by counsel for the claimant in *Sanneh*, 121) or ‘minimal and back-stop’ support (phrase used by Elias LJ in *Sanneh*, 171) in your home state, and it must mean more than a one-sided right to be treated as a tolerated alien by your state of nationality.

The *Sanneh*/*HC* case

*Sanneh and others* is a group of cases in which third country nationals, who are the primary carers of British citizens (who are also EU nationals), seek access to social assistance. Claimants have argued that access to welfare benefits is necessary for the ‘genuine enjoyment’ of the substance of an EU citizenship-based right to reside in the EU, since if driven into destitution, claimants may effectively be forced from the territory back to the third country in question. This has been partly accepted by the Court of Appeal, finding that:

‘*where the carer does not have the resources to remain in the country and so will in practice, absent State support, be compelled to leave with the child for economic reasons, there will be an obligation on the State to take steps to ensure that they are able to remain. EU law focuses on the substance of the right and not merely the form and will require the State to take steps to ensure that the essence of the right is respected*’.

However, such economic protection is minimal and last-resort; counsel for the claimants submitted that section 17 support provided for a ‘hand to mouth existence’ at best, (para 121) and Elias LJ confirmed that ‘section 17 of the Children Act provides a back-stop provision which is designed to save the carer and child from homelessness and destitution’ (171). If there is no equal entitlement to normal welfare benefits, or any guarantee of any ‘particular quality of life’ (see also *Harrison* and *AB v Secretary of State for the Home Department*[2013] CMLR 580), this seems a rather narrow view of ‘genuinely enjoying’ one’s EU citizenship-based right to reside in one’s state of nationality.

In order to claim the benefits in question, it is necessary to be ‘habitually resident’. Legislative instruments[[1]](#endnote-1) make clear that those reliant upon regulation 15A of the Immigration (European Economic Area) Regulations 2006, i.e. reliant upon a *Zambrano* based right to reside, are to be treated as not habitually resident and so excluded from the relevant benefits. The Court of Appeal was asked to decide when *Zambrano* status arose – whether it was at the point of becoming the primary carer of a British child, or whether it was not until the carer was about to be removed. It was then asked whether the status could confer any entitlement to social assistance benefits. The date issue was important, because the claimants suggested that if the status arose at the point of becoming a primary carer, then they had an EU law based right to reside and equivalent entitlements to equal treatment as EU nationals. The Court of Appeal agreed that the conferring of the status happens on the ‘First Date’, since to find otherwise would suggest that they were, until subject to removal measures, residing unlawfully, whereas their right to reside arises to support the British child (*Sanneh,* para 74). The court further agreed that the right to reside could be unacceptably hollowed out were the claimants to be reduced to destitution; ‘[d]estitution can be as undermining of the benefits of EU citizenship as being forced out of the EU’. The child and carer ‘must not be left without the resources which are essential for them to live in this jurisdiction’ (90).

It was found however, that this did not entail a right to equal treatment with other British nationals, or EU migrants, but a right to the ‘back-stop provision designed to save the carer and child from homelessness and destitution’ (Elias LJ, 171) provided for by section 17 of the Children Act. The practical reality of section 17 support is rather in contention – and Arden LJ noted that ‘there have been substantial cuts in public funding… [and] there have been a number of first instance decisions on the operation of section 17 in practice’ (94). But the court was unable to enter into that question, and found that ‘if section 17 assistance is available, it would… [ensure] that the basic needs of the child and the *Zambrano* carer are both properly looked after’ (94). Leaving aside the problem of finding that *real* issues of poverty can be discharged through *theoretical* support, (see the local authority decisions originally made in *Birmingham City Council v Clue* [2010] EWCA Civ 460, and *R (VC) v Newcastle City Council* [2011] EWHC 2673), and accepting the premise, we are still faced with the question of unequal treatment. Even if section 17 support avoids homelessness and destitution, an EU citizenship-based right to reside should surely mean more than that. We are still talking about acute poverty, and in particular acute child poverty. And more particularly still, acute poverty of British children, who may have no other state in which to claim equal treatment as compared to other children. And it is the right not to be disowned by their state of nationality which arguably makes the *Zambrano* right stronger than appears from the *Sanneh* judgment.

What is a *Zambrano* right?

The famously laconic *Zambrano* judgment (Nic Shuibhne, 2011) was not overly embroidered with detail on the constitutional shift pushed through. The two decisive sentences are:

*‘Article 20 TFEU precludes national measures which have the effect of depriving citizens of the Union of the genuine enjoyment of the substance of the rights conferred by virtue of their status as citizens of the Union*

*A refusal to grant a right of residence to a third country national with dependent minor children in the Member State where those children are nationals and reside, and also a refusal to grant such a person a work permit, has such an effect.’*

With these statements, the Court established that EU citizenship is not parasitic upon exercising free movement between Member States, but has some autonomous content – bestowing upon EU national children, who have never travelled between Member States, a right to reside in their own home state, which extends to their third country national primary carer. Otherwise, the carer would be subject to national immigration laws, and at risk of removal, which would *de facto* lead to the child having to leave the country – and the Union. Up until this point, Union citizenship required free movement to be exercised in order to be triggered, and had been critiqued as a status for mobile citizens (Currie, 2009). This development was rightly recognized as a dramatic one, though early academic expectations were deflated with subsequent CJEU case law. Case C-434/09 *McCarthy* [2011] ECR I-3375 curbed the *Zambrano* right to find that it did not extend to third country national family members of adult Union citizens who had not exercised free movement – even where they had dual nationality, (Reynolds, 2013). Case C-256/11 *Dereci* judgment of 15 Nov. 2011emphasized that ‘the mere fact that it might appear desirable to a national of a Member State’ for their third country national family member to reside in the territory ‘for economic reasons or in order to keep his family together in the territory of the Union… is not sufficient in itself to support the view that the Union citizen will be forced to leave Union territory if such a right is not granted’ (68). *Zambrano* has been found to not help a third country national parent seeking to reside in a State different to that of the child’s residence, albeit within the Union, (Case C-40/11 *Iida* judgment 8 Nov. 2012) nor to help step fathers of EU citizen children without legal, financial or emotional dependence having been established (Joined Cases C-356 & 357/11 *O&S and L* judgment of 6 Dec. 2012). It all comes back to assumptions about whether the child would otherwise be forced to leave the EU. The UK courts have adopted restrictive interpretations of this. In *Harrison & AB*, joined cases dealing with recommendations for deportation following criminal convictions, the Court of Appeal found that *Zambrano* did not bite where another parent was lawfully present. The child would be able to stay, even if that meant the break up of the family unit – but such break up would not engage EU law. In *AB*, Elias LJ noted that if the family wished to stay together, they could all move to Morocco, which would be ‘hard’ but there were ‘no insurmountable obstacles to them doing so’ (36).

It is not just the courts in the UK that have so restricted the right; the Home Office guidance is explicit that a *Zambrano* right cannot be granted where there is another person lawfully resident in the UK who cares for the child. In spite of changes to the Immigration Rules (28.07.2014 HC 532) removing the requirement that there be no other available carer, the guidance still precludes a *Zambrano* right where there is someone lawfully resident who *could* care for the child: ‘‘You must refuse an application for a derivative residence card if there is another person in the UK who can care for the relevant person’ (Home Office, 2015). This creates significant problems – and suggests the State is too ready to transfer primary carer-ship, without regard to the factual caring relationship. To be deemed a suitable carer, the other parent must merely have had some contact in the last 12 months, and demonstrated some (undefined) financial commitment to them at some point. There is scant regard for child welfare; the guidance acknowledges that it would be unsuitable to place the child with someone on the sex offender’s register, but offers little beyond that. It suggests that a parent who simply does not want to look after the child, or cannot afford to do so will not for those reasons be deemed unsuitable. And there is no regard at all paid to the child’s wishes (Home Office, 2015, 71).

So with primary carer-ship being readily transferred to deny a *Zambrano* right, it is something of a feat triggering a *Zambrano* right to reside in the first place. But once it is triggered, the question remains open as to what rights attach to that status. The position in UK law, and in *Sanneh*, is that it creates a completely new kind of residence right. Hence UK legislation that was enacted to recognize a *Zambrano* right[[2]](#endnote-2) was immediately accompanied with legislation then excluding that right from any welfare entitlements[[3]](#endnote-3) (other than contributory benefits) that are awarded as a result of having an EU citizenship-based ‘right to reside’. The government refers to a composite ‘right to reside and work’, (DWP, 2012) possibly by way of attempting to distinguish it from a ‘right to reside,’ the stepping-stone to benefit entitlement. But the phrase ‘right to reside and work’ is not used in *Zambrano*. No phrase is used suggesting that the right of residence created is different, and carries different consequences to, the EU citizenship-based concept of a ‘right of residence’. Here, it is worth noting that the Court of Appeal found that *Zambrano* carers should be equated with third country nationals without an EU citizenship-based right to reside (*Sanneh*, 98), and pointed out that the Long-Term Residence directive (2003/109) permits limiting TCN access to social assistance to core benefits. But this sidesteps the key point – that the *Zambrano* right is an EU citizenship-based right, and so they, and their EU national children, are more appropriately dealt with by reference to the citizenship residence directive – 2004/38.

And once a right of residence is recognized for an EU citizen, it is well-established case law – thanks to Case C-85/96 *Martinez Sala* [1998] ECR I-02691(4), Case C-456/02 *Trojani* [2004] ECR I-7573 (40, 44) and Case C-184/99 *Grzelczyk* [2001] ECR I-6193 (30) - that an equal treatment obligation is engaged. Usually a benefit claimant’s reliance upon equal treatment will be subject to limitations and conditions – see Case C-140/12 *Brey* judgment 19 September 2013 (46); Case C-333/13 *Dano* judgment 11 November 2014 (60)*,* Case C-67/14 *Alimanovic* judgment 15 September 2015 (57) and Case C-299/14 *Garcia Nieto* judgment 25 February 2016 (38)*.* At which point it might be considered justified to restrict benefits to those who are, or have been economically active, for instance. But the approach taken to *Zambrano* allows for no such assessment, and no equal treatment under any circumstances, no matter how much work a person has done and is doing. This departs significantly from any established CJEU treatment of those with an EU law based residence right.

Much has been made in *Sanneh/HC* of the ‘derivative’ nature of the right serving to single it out and strip it of equal treatment entitlements (26, 95). The phrase used by the CJEU is ‘derived right of residence’. This alone is not sufficient explanation. The *Teixeira/Ibrahim* right to reside for a primary carer is doubly derivative – the right to reside for the child of a former migrant worker is itself a derivative right, derived from the former right of the former migrant worker; the primary carer’s right is then derived from the child’s derivative right. The *Teixeira/Ibrahim* right is specifically and repeatedly (seven times) referred to as a ‘derived right of residence’ in Case C-529/11 *Alarape & Tijani* judgment 8 May 2013 (22, 23, 26, 28, 29, 31, 49). And yet it entails rather more favourable entitlement to equal treatment with home state nationals than does a standard EU right to reside, since it is not conditional upon current economic activity or sufficient resources. Moreover, the Court has used the term ‘derived right of residence’ when referring to the rights of family members of migrant workers: Case C-244/13 *Ogieriakhi* judgment 10 July 2014 (37); Case C-457/12 *S* judgment 12 March 2014 (33); Case C-456/12 *O* judgment 12 March 2014 (36); Case C-456/12; and Case C-286/03 *Silvia Hosse* [2006] ECR I-01771, (52). Such a derived right still entails entitlement to equal treatment with limitations and conditions.

In short, there is no indication given by the Court in *Zambrano*, or in any of its case law, that what is being created is a skeletal right to be present and to work and for the own state national child and his/her carer to be treated as tolerated aliens. In *Sanneh*, Arden LJ characterized the rules excluding *Zambrano* families from equal treatment as ‘dealing with a situation of *no change* in legislative policy’ (122, emphasis added). In other words, the detriment should not be exaggerated, and the effect of the public sector equality duty should be limited, because they had not had a right to equal treatment before. But this reasoning does not escape the conclusion that *Zambrano* does represent a change in EU legal policy, and Member States are bound to respect that. Arden LJ instead finds that the UK is only bound to respect the findings that it wishes the CJEU had made: ‘the decision of the CJEU in *Zambrano* had given these TCNs a right to reside under EU law which co-incidentally triggered a right to claim benefits under domestic law which they were never intended to have.’ But this is quite an audacious act of mind-reading that goes against the evidence and the case law. The CJEU created an EU citizenship-based right to reside, which necessarily triggers a right to equal treatment *under EU law*. Nowhere did the CJEU suggest that those exercising that right were not intended to really have that kind of right. Given that the *Zambrano* case was a benefits case, it seems only fair to suppose that had the CJEU wished to invent a new, equal treatment-free right to reside, that is something they might have mentioned.

We have been here before, and should learn from past experience. Following *Baumbast*, UK authorities were adamant that *Baumbast* only applied to the self sufficient (ie the well-off), even though the CJEU had not said so, and in spite of the incongruity with the case law. According to the UK, the right to reside did not entail equal treatment. The Court of Appeal, while making the reference in *Ibrahim*, *London Borough of Harrow v Ibrahim & Anor* [2008] EWCA Civ 386, was inclined to agree, expressing scepticism about the idea that they shouldn’t read a self-sufficiency condition into *Baumbast* (55). However, the CJEU in *Ibrahim* (and in *Teixeira*) made clear thatthere was no basis for a condition of self-sufficiency in the legislation in question (52), or in the case law (53), and specifically, pointed out that the ruling in *Baumbast* had not been based on a finding of self-sufficiency (55). In *Teixeira*, the CJEU stated that Member States could not interpret the relevant provisions restrictively (as had the UK authorities, importing their own conditions), adding pointedly that ‘the Court did not base its reasoning even implicitly on such a condition’ (67). *Teixeira* and *Ibrahim* are to *Baumbast* as *Sanneh* is to *Zambrano.*

A citizenship-based right to reside triggers protection from the Charter of Fundamental Rights, a point accepted in *Sanneh* (59; 117); it is reasonable to suppose that such fundamental rights are included in the substance of rights attached to EU citizenship, since citizenship ‘triggers the protection afforded by the fundamental rights not the other way round’, according to Advocate General Wathelet in Case C-115/15 *Secretary of State for the Home Department v NA* 14 April 2016 (see also Kochenov, 2013). Fundamental rights at issue are not only protection of family life (Article 7), but also the right to social security and social assistance under Article 34(2): ‘Everyone residing and moving legally within the European Union is entitled to social security benefits and social advantages in accordance with Community law and national laws and practices.’ Non-discrimination under Article 21(1) is potentially at issue as well, since UK nationals with a third country national primary carer may well be a member of a ‘national minority’.

But it is not just the Charter that confers fundamental rights protection. If anything, there are strong grounds for supposing that the *Zambrano* right is vested in more compelling international principles and human rights law than many other EU citizenship-based rights to reside. For the child it is the right to reside in the state of nationality. This is, put simply, the same thing as a right to a nationality – the right to live in your home state being ‘the essence of nationality’ (Kesby, 2012, 16), for what use is a nationality if one is effectively disowned by the nation? Even more extremely, if the child in question has no other nationality, the *Zambrano* right is a right protecting against practical statelessness. The right to a nationality is, as Arendt famously argued, the right to have rights (Arendt, 1973). The International Covenant on Civil and Political Rights, Article 12(4) states ‘No one shall be arbitrarily deprived of the right to enter his own country.’ The duty of states to admit own nationals, and permit their residence on the territory is well recognised in international law (Boll, 2007, 123). Thus the *Zambrano* right is founded on something elemental in international human rights law. And given that it is framed around the right not to be removed from the territory of *the Union*, it is submitted that just as the right of abode is the essence of nationality, so the right to reside in the Union is the nucleus of Union citizenship. As such, the child’s claim is not weak or derivative. It is the right to have EU rights.

Treating some UK children (a lot) worse than others

The heart of a *Zambrano* claim is a UK national child. Supperstone J in the High Court rejected arguments made about the effects on, or interests of, the children because there were no guarantees as to benefits received by their *parents*. As Arden LJ summarised ‘it is the carers, not the children who are entitled to benefits’. Arden LJ focused the discussion on EU rights to social assistance upon the *carers*, equating them with third country nationals with no EU citizenship-based right to reside, and arguing ‘their status is not founded on any personal right of residence, or right to be paid social assistance’ (26) and ‘EU law has no competence in the level of social assistance to be paid to the *Zambrano* carer’ (27).

But it is the *child’s* right to reside that is at issue, and the primary carer right exists to support that right. The cognate scenario is the *Teixeira/Ibrahim* one; there, primary carers (including third country national primary carers) were found to have a right to reside in the usual, full meaning, bestowing full equal treatment entitlement for the duration of the *Ibrahim* status, in order to support the right to reside of the child. The carer’s right was explicitly (even doubly) derivative. The child’s right to reside was determinative, as was the child’s right to equal treatment: Article 10 of Regulation 1612/68 (now replaced by Article 10 of Regulation 492/2001) required that the *children* of a migrant worker or former migrant worker be admitted to educational courses ‘under the *same conditions* as the nationals of that State’, and States should enable ‘*such children* to attend these courses under the *best possible conditions*’ (emphases added). *Teixeira*  and Ibrahim make clear that family access to benefits (whoever is the technical recipient of a benefit), supports the *child’s* right to reside and the child’s right to equal treatment. This is self-explanatory when dealing with family benefits such as child benefit and child tax credit, but holds good for other benefits such as Housing Benefit which can make the difference between the family maintaining their home or not. The minimal backstop provision under section 17 of the Children Act may well not involve maintaining their home, may require relocation, may involve temporary accommodation for significant periods of time, and could involve substantial disruption to education (Shelter, 2015).

Whether or not the carers are the recipients of the benefits in question is irrelevant; what matters is the effects of benefit exclusion upon the children, and the unequal treatment they suffer as a consequence – that is why the derivative right to reside in *Ibrahim* not only provides for equal treatment with other EU nationals, but is a right to reside in itself that commands equal treatment with own state nationals, not conditional upon current work or sufficient resources. It should not therefore be material that benefits are paid to a *Zambrano* carer rather than directly to the child – indeed, to find otherwise would eviscerate any child’s entitlement to equal treatment, since we might be hard pressed to find systems that disburse monies intended to support the cost of raising a child directly to the children themselves. We would effectively be saying that children can never be entitled to equal treatment. What is crucial is supporting the child’s unequivocal right to reside – which is the right not merely to reside in the UK, but the right to stay in the Union at all. And the state has an obligation to ensure the ‘genuine enjoyment’ of that right, and the rights attached to citizenship, which include equal treatment (‘Non discrimination and citizenship of the Union’ are bound together in the title of ‘Part Two’ of the Treaty on the Functioning of the European Union). ‘Genuine enjoyment’ of equal treatment rights may well be akin to, or even demand, access to education ‘under the best possible conditions’, conferring a *Ibrahim* style right. Or it may mean a conditional entitlement to equal treatment, suggesting that the right to reside need be supplemented by the activities provided in Article 7 of Directive 2004/38. But the child is the centre of the claim; it is the child’s citizenship rights and equal treatment rights at issue, and which are infringed by rules which impose automatic, and unconditional, unequal treatment.

In *Sanneh*, the Court of Appeal found rather swiftly that an argument about the equal treatment rights of the children did not avail the claimants, because what was contended was different treatment to EU national children, and that therefore this was reverse discrimination, which was not prohibited under EU law. The only other potential source of equal treatment, reasoned Arden LJ, was therefore the European Convention of Human Rights, for which any different treatment had to be shown to be ‘manifestly without foundation’. But this dismissal of the possibility of EU based protection from discrimination, and recourse to the ECHR was too hasty. The key feature here is not reverse discrimination, which is discrimination against own nationals *whose situation does not fall within EU law*. The key feature is a two-pronged infringement of the general principle of equal treatment. *Zambrano* children are firstly discriminated against when compared to other UK national children. Secondly, unlike many other UK national children, they are not in a wholly internal situation; they have an EU citizenship-based right to reside, and as such are discriminated against when compared to other children with an EU citizenship-based right to reside.

Falling within the scope of EU law, they are entitled to be covered by the general principles of EU law, including equal treatment - the principle that ‘comparable situations must not be treated differently and that different situations must not be treated in the same way unless such treatment is objectively justified’. The CJEU found in Case C-300/04 *Eman and Sevinger* [200] ECR I-08055*,* a case in which the Netherlands withheld European Parliament voting rights from its own nationals who were in its overseas territories, that a Member State must not differentiate between its own citizens, especially with in the context of the exercise of rights attached to Union citizenship. This includes areas which otherwise fall under the discretion of the legislature; in *Eman and Sevinger*, the Court acknowledged that reserving the vote for those maintaining links with the Netherlands was a potentially legitimate aim, and a residence criterion a potentially appropriate means (55). Moreover, deciding how to confer the right to vote and the holding of elections fell with the legislature’s discretion (60). However, the argument was shown to lack logic, since Aruba residents who moved to a non-member State would acquire the vote, but could not acquire it while resident in Aruba. The rules did not bear out the aims, and did not prioritise those with the greatest links to the Netherlands, so the Court found that the Netherlands government had ‘not sufficiently demonstrated’ that the difference in treatment between its own nationals was objectively justified (60). In the same vein, it might be shown that the UK’s determination of its welfare system falls within its margin of discretion, though we must remember that the children are exercising an EU citizenship-based right to reside, and so their rights are a matter of EU law. The exclusion applies to UK nationals resident in the UK, whose family may also have significant economic connections with the UK, and treats them unfavourably compared to UK national children in a comparable situation – i.e. UK national children, likely born in the UK, and resident in the UK. They may indeed have been resident longer than other UK national children, they may have more family connections, they may be more socially integrated and have attended school, and their parent(s) may have clocked up more contributions. The one thing that makes them different is that they are entitled to the EU protections afforded to safeguard their Union citizenship as well.

In Case C-135/08 *Rottman* [2010] ECR I-01449, the CJEU stated that ‘it is legitimate for a Member State to wish to protect the special relationship of solidarity and good faith between it and its nationals and also the reciprocity of rights and duties, which form the which form the bedrock of the bond of nationality’ (51). *Zambrano* children share that bedrock of nationality. They are in a comparable situation with other UK nationals because they are entitled to benefit from that ‘special relationship of solidarity and good faith’, and to ‘reciprocal rights and duties’, and may not be entitled to benefit from that special relationship anywhere else.

They are also in a comparable situation to EU national children with *Teixeira*  and *Ibrahim* carers, having an EU citizenship-based right to reside – though of course *Zambrano* children have their own direct EU citizenship-based right to reside, whereas *Teixeira/Ibrahim*  children have a right that derives from another EU citizen’s right to reside (and themselves may be third country nationals). If anything, *Zambrano* children’s connections to the UK – and the Union - may be stronger than those of *Teixeira*/*Ibrahim* children, not only due to nationality, but other circumstances – age, duration of residence, integration, language, absence of links with another state, economic activity of parents etc (see Starup and Elsmore, 2010). The UK must show that treating this group of children with an EU citizenship-based right to reside differently from other children with an EU citizenship-based right to reside is justified, demonstrating that the aim is legitimate, but also that the means are appropriate and proportionate. This has not yet been shown.

The mismatch between the aims and means is also pertinent to possible discrimination under the ECHR. This avenue was closed off by the Court of Appeal, which found the rules not to be manifestly without reasonable foundation, because of (i) the existence of s 17 support under the Children Act, (ii) the possibility of relying on national immigration law to gain another status, and (iii) the government’s policy reasons for restricting benefits. While ‘manifestly without reasonable foundation’ is a high hurdle, these particular foundations lack reason. The possibility of other, minimal, back-stop support *is* the differential treatment in question, it is not the justification for it. The option of claiming ‘long-term leave to remain under Appendix FM to the Immigration Rules’ does not really address the claim in question – since it involves a substantial period in which the carer would still have no recourse to public funds. This is tantamount to saying there is not a problem because they have another avenue through which *not* to receive support. So we are left with the government’s ‘deliberate policy reasons’, analysed next, which were apparently accepted without question by the court. This approach is not supported by the ECtHR’s jurisprudence; in the cited case on the ‘manifestly without reaonsable foundation’ yardstick, *Bah v UK* (2012) 54 EHRR 21,the ECtHR also states that in discrimination cases, there must not only be a legitimate aim, but also a ‘reasonable relationship of proportionality between the means employed and the aim sought to be realised’ (36). So a good deal more evidence on the effect of the *Zambrano* exclusion, linking the benefit ban to restricting public finances to those with ‘connections’ with the UK would be required, and a proportionality assessment to ascertain whether the aim could be achieved through a less dramatic, and less discriminatory, means.

A high evidential burden should be expected where a Member State wishes to unilaterally carve up and hollow out the rights attaching to EU citizenship, as well as limiting ECHR rights. The judgment summarises the government’s policy aims, on which the whole issue of justification pivots, in one paragraph (96), before accepting them. The next section questions the legitimacy, logic and proportionality of these objectives.

Legitimate objectives? The lack of logic and absence of proportionality in *Sanneh*

The DWP argued that depriving *Zambrano* families of access to benefits, regardless of how much they have worked or are working, serves economic and political ends. In particular ‘denying access to income-related benefits by those who are subject to immigration control reduces the incentive for people to come to the UK to claim benefits and encourages immigrants here unlawfully to regularise their stay’. This point is both unsubstantiated, and irrelevant. There is no evidence that third country nationals are coming to the UK specifically to become *Zambrano* carers. And *Zambrano* carers are not subject to immigration control.[[4]](#endnote-4) Nor are they ‘unlawfully here’ or in need of regularising their stay. And there is no basis in EU law for finding that a group with a right to reside can be arbitrarily excluded from any equal treatment in order to meet economic or political objectives. However, the Court of Appeal accepted without comment the ‘legitimate aim’ to ‘safeguard public finances by strengthening immigration control and putting *Zambrano*carers on a par with other TCNs seeking social assistance’ (98).

The DWP estimated the costs of providing income-related benefits to *Zambrano* carers; the court referred to the headline estimate of somewhere between £3.8m and £9.4m each year, and added that the ‘UK government considered that, with the limits on public spending, public funds should be allocated to those with the greatest connection with the UK’. The judgment does not give any more detail on the basis of, or persuasiveness of these figures. It should however be noted that the government’s equality assessment stated that 619 families had applied for a *Zambrano* based right to reside between March 2011 (when the judgment was released) and October 2012 – a period of one and a half years (DWP, 2012, 2). Without knowing more about the demographics of these families – or indeed what proportion of applications resulted in rights of residence – it is difficult to guess much about their benefit eligibility. The equality assessment was quick to imply that most *Zambrano* carers would be workers - pointing out that the ‘the majority of non-EU nationals in the UK are employed’ (DWP, 2012, 5) and ‘non EU nationals are only slightly less likely to be in work than the UK population as a whole’ (ibid). But this was in the context of arguing that they would not be significantly disadvantaged by exclusion from social assistance benefits, due to accessing wages and, where relevant, contributory benefits. It is not obvious if and how this reconciles with the economic argument in favour of withholding benefits. Thanks to the UK’s narrow interpretation of *Zambrano*, it is only single parent families who will acquire a *Zambrano* right, and they may well face more difficulties working than the average non-EU national (Citizens Advice, 2008) and as single parents, are more likely to be concentrated in low paid work (Maplethorpe et al, 2010). What we can say is we would be wholly mistaken to assume that *Zambrano* carers do not work, and that is why they wish to apply for benefits. In-work poverty is on the rise (Belfield et al, 2015), especially for lone parents, and it is low-income *workers* who were the subject of Birmingham Law Centre’s complaint that tenancies were out of reach for *Zambrano* clients. Such families were ‘hamstrung by the prospect of not being able to earn the kind of salary that will cover… rent and living expenses [without]… the kind of support available to other low income families’ (Birmingham Law Centre, 2013).

We do not know what assumptions (about working hours, pay, numbers and ages of children, etc) were made when the figures were presented. Nor do we know whether they assume complete ‘equal’ entitlement to benefits, putting the British national children on an equal footing with other British children (and echoing the *Teixeira* right) or conditional entitlement similar to that experienced by other EU nationals. Any projection should also take into account reducing benefit reliance, and increased net contributions as children age, both when they enter school, and when they no longer require childcare at either end of the day.

Regardless of the calculations, it is not clear from the court’s summary whether *any* figure would be considered acceptable. And the question of relevance again rears its head. If the CJEU has determined that a group of people have an EU citizenship-based right to reside, it is generally not open to Member States to unilaterally modify what such a right of residence means, just because they would rather not pay benefits to that category of people. As Advocate General Szpunar said in *Marin*, ‘it is settled case-law that any limitation of the right of free movement *and residence* constitutes a derogation from the fundamental principle of freedom of movement for persons, *which must be interpreted strictly* and the scope of which *may not be determined unilaterally by the Member States*’ (95). Economic arguments have been used when invoking a derogation; states have attempted to limit equal treatment by imposing conditions that make benefit eligibility proportionate in light of, e.g. pressures on the public purse (e.g. Case C-158/07 *Förster* [2008] ECR I-08507*; Brey; Ibrahim*). The outcomes of these cases often hinges upon the perceived proportionality of the measure. But this case does not deal with a *limitation* on equal treatment; the rules are a complete negation of equal treatment. Proportionality does not get a look in, as there are no conditions that *Zambrano* families can meet to become eligible.

If we accept the concerns about the public purse, we must then turn to the statement that ‘public funds should be allocated to those with the greatest connection with the UK’. But *Zambrano* claims are based on UK national children. The whole scheme of international law, and indeed EU free movement law (which permits indirect discrimination against non-national EU citizens – O’Brien, 2008), is predicated on the tenet that *nationality* provides the greatest connection with a state. The Upper Tribunal in *Secretary of State for the Home Department v MK* [2011] UKUT 00475 (IAC)noted that ‘the fact that [the claimant] and the children are Indian citizens demonstrates that they have another country to go to and one in which, absent special circumstances, they can legitimately expect to enjoy the benefits of that country's citizenship’ (25). The flip side of this is that British citizens *can* legitimately expect to enjoy the benefits of *British* citizenship. Certainly, where the children do not have dual nationality, have been born in the UK and lived in the UK their whole lives, there is no other state in the world with whom those children could be said to have a stronger legal connection (and no other state in the world that would recognise them as having a stronger connection). Which suggests a startling absence of reciprocity on the part of the UK state.

A *Zambrano* carer herself may have some claim to a strong connection with the UK, not only through having a UK national child, as she may have been resident for a substantial period of time, and may have been significantly economically active for a substantial period (and may still be at the time of claim). A statement that a group of UK national children, and their primary carers, can never be deemed to have as great a connection with the UK as any other UK national, or any EU national, or any third country national with another EU citizenship-based right to reside, regardless of their length of residence in the UK, regardless of whether the UK national child has any connections with any other country, and regardless of any amount of economic contribution the family has made or is making, is irrational. But Arden LJ accepted that the measures were ‘suitable to promote that objective’ and stated that there was ‘a rational connection between the measures and their legitimate aim’ (98), without explaining what that connection is.

This logic-blind spot is a bit of a theme on the subject of *Zambrano* carers. The government’s 2012 equality assessment claimed that excluding them from all social assistance benefits would encourage migrants ‘who can make a valuable contribution to our economy, whilst deliver fairness for the taxpayer by maintaining the current level of support the benefit system is able to provide to the general population’ (DWP, 2012, formulation used three times, on pages 3, 4 and 5). But the regulations exclude people regardless of their past or present contributions to the economy, and exclude them *even though they are taxpayers* too. Collecting taxes and national insurance, and not permitting them any degree of solidarity in return, is a peculiar form of fairness.

Having stated that UK funds should be directed to those with the greatest connections to the UK (carrying with it the assumption that this automatically always excludes all *Zambrano* families), it is curious that the DWP submission goes on to acknowledge that ‘a number of *Zambrano*carers had been in the UK for some years before the decision in *Zambrano*’ (*Sanneh*, 96). But rather than acknowledge the contradiction on the issue of ‘UK connections’, the submission uses this *against* the *Zambrano* families because such families ‘had been able to support themselves and their families’ – i.e. that further support, just because they now have an EU citizenship-based right to reside is simply not necessary. Establishing that people can survive without support is meaningless – the same reasoning could be used to argue the welfare system is not needed at all. It does not tell us whether rules that treat some people differently despite similar circumstances, and so *discriminate* between them, are lawful.

The final policy reason put forward by the DWP before the Court of Appeal was the procreative deterrent argument – the wish to ‘encourage TCNs *wishing to have children here* to ensure that they had sufficient resources to support themselves and their child, and to reduce "benefits tourism”’ (*Sanneh*, 96, emphasis added). This argument is acutely problematic, and counsel for the claimants argued that a deterrence argument was ‘nonsensical’, since the problem only arose *after* the carer had the child. That is not the only reason it is devoid of sense. The exclusion affects *Zambrano* carers regardless of whether they dutifully completed their resource calculations before having a child, and then their circumstances changed. For example, many people do not set out to become lone parents, and people’s financial circumstances and career positions shift. A *Zambrano* carer has a right based on their child’s *British* nationality. British nationality is not awarded simply on the basis of being born in the UK (jus soli), but requires a degree of jus sanguinis – ie a British parent or a parent with settled status. These children are not born as result of parthenogenesis on the part of an economically reckless TCN with a shaky immigration status acting alone, but as the result of the actions of a couple, one half of which in many cases will have been British or had settled status.

There is, of course, also an ethical problem with deterring people from having children, on the basis of socio-economic means, since such exclusion speaks to socio-eugenic arguments. There is, further, a logic problem with arguing that *Zambrano* families should be *denied sufficient means* (to which they should otherwise have an EU equal treatment claim) *because they do not have sufficient means*. And there is an effect problem. There is no evidence to suggest that the benefit exclusion could or would deter people from having children. What it does is deepen child poverty and punish children for the perceived ‘sins’ of the mother – if we accept that not being deterred from having a baby is a sin. And it is an established case law principle that parental shortcomings should not be visited upon the children (*ZH Tanzania v Secretary of State for the Home Department* [2011] UKSC 4, [2011] 2 WLR 148, 33, 44).

Conclusion

It seems likely that this case will be the subject of a preliminary reference to the CJEU. The arguments pursued by the DWP that the *Zambrano* ruling should be read as adorned with new, unprecedented restrictions, creating an EU citizenship-based right to reside empty of any entitlement to equal treatment, no matter how much a *Zambrano* carer is working, and no matter how strong the family’s connections to the UK, and in spite of the CJEU’s conspicuous failure to say that this is what it was doing, cannot credibly be said to be acte clair. And it would be surprising to see the Supreme Court follow the Court of Appeal in claiming to know the mind of the CJEU better than the CJEU itself. However, with the CJEU recently appearing to go to great lengths to assuage the Member States’ political grumblings (*Alimanovic*, *Garcia Nieto,* and Advocate General Cruz Villalón’s Opinion in Case C-308/14 *Commission v UK* 6 October 2015), it is impossible to predict the results of any such reference. But both courts must not be bullied when determining the essence of EU citizenship.

The exclusion of *Zambrano* families from equal treatment has a significant, detrimental effect upon the children concerned, and it does so in a discriminatory way. They are treated less well than other UK national children, and less well than other children exercising an EU citizenship-based right to reside in the UK. Once it is established that UK national children have an EU citizenship-based right to be in the UK, (as well as a fundamental right in international law), and a right to be joined by their primary carer in the UK, they acquire a right to equal treatment as compared to other UK national children, and as compared to other EU national children in similar circumstances exercising a *Teixeira* right. At the very least, the family could be analogized to other EU national families with a conditional and limited right to equal treatment. To find otherwise condemns the UK national child to be disentitled from complete equal treatment anywhere, and from the advantages that supposedly attach to nationality and citizenship. A *Zambrano* right is not a weak, last resort right to reside that should be grudgingly and parsimoniously eked out to children. Just as the right to reside in your own state is the essence of nationality, so the right to reside in the EU is the essence of EU citizenship – it is the right to have EU rights.

An EU citizenship-based right to reside entails a (limited and conditional) right to equal treatment, and it also brings the family within the scope of EU law, meaning they are covered by the general principle of EU law that those in comparable situations should not be treated differently. This has been found to apply to different treatment meted out by a Member State to its own nationals, especially where the genuine enjoyment of the rights attaching to citizenship is at stake. ‘Comparable’ does not mean identical; as *Zambrano* families feature a third country national primary carer, so did *Eman and Sevinger* feature nationals living abroad. We are concerned with the equal treatment rights of the comparable children. Suggestions that the children are not the centre of the claim because benefits are paid to carers are misleading – and would suggest that children are never entitled to equal treatment since most systems do not pay anything directly to them. *Teixeira* and *Ibrahim* confirm that the *child’s* right to reside and to equal treatment determines the family’s benefit entitlement, since such entitlement directly impacts upon the ‘circumstances’ of the child’s exercise of EU citizenship-based residence rights.

UK national children in *Zambrano* families are in a comparable situation to other UK national children – the only difference (the *Zambrano* carer) being that which brings them within the scope of EU law, which should in itself not be grounds for detrimental treatment. They are UK nationals, resident in the UK; they may have been born in the UK, they may never have lived anywhere else. They may be well integrated and attend school. Their parents may have made regular and long term economic contributions. And, if not dual nationals, they have nowhere else to go where they can expect ‘to enjoy the benefits of that country’s citizenship’. They may also be in a comparable situation to *Teixeira* children, if they are of school age, and if their parent(s) have worked in the UK (on the triggers for a *Teixeira* right, see O’Brien, 2011). The main difference being that the *Zambrano* child’s right is not itself a derivative one, but a *direct* one. They may have stronger claims to real links with the UK than a *Teixeira* child, if age, duration of residence, and duration of parents’ work etc are taken into account – and may also have stronger links with the Union as a whole since neither *Teixeira* child nor *Teixeira* carer need be an EU national.

Having established a right to equal treatment, it is necessary to consider whether the complete equal treatment ban represents an appropriate and proportionate means of achieving a legitimate aim. We are presented with a few aims, including a few rather irrelevant ones about migrants subject to immigration control, or in need of regularizing their stay, which do not apply to *Zambrano* families. The main aim is the desire to restrict limited public resources to those with the greatest connection with the UK. The suggested costs of including *Zambrano* families from benefits are not well explained or reconciled with the equality assessment suggesting that few families would be significantly affected by the changes. But most importantly, the *relevance* of the costs argument is under-explained; if the CJEU deems a group of people have a right to reside, and that right to reside entails equal treatment, it is not open to Member States to simply decide they would rather not meet the costs of that at all; economic considerations do not justify an infringement of EU law. And the means are not a logical or appropriate way of securing the purported aim; simply finding that a family have a *Zambrano* right does not automatically mean they have less of a connection with the UK than other UK nationals or other EU citizens who have greater equal treatment rights. This fact is rather borne out in the DWP’s admission that a number of *Zambrano*  families had been in the UK a number of years.

The final policy reason put forward was the procreative deterrent argument – that the exclusion would make third country nationals think carefully before having children. It is far from clear that it would have this effect – the circumstances of families can change dramatically from the point at which a child is conceived. It is far from clear that this is a *legitimate* aim– should people be dissuaded from creating EU citizen children, or more specifically, should poor people be dissuaded from creating EU citizen children? And it is far from clear that the rules are a legitimate, appropriate or proportionate means of pursuing that possibly illegitimate aim, since what they do is punish the children for the act of their parents, which conflicts with a well established principle in UK case law.

If *Zambrano* families are not entitled to equal treatment, or even a degree of equal treatment subject to limitations and conditions, then the right it confers is a hollow one and the rights attaching to EU citizenship must be insubstantial (O’Brien 2016, forthcoming) and readily vaporized by Member States. *Zambrano* children fall within the scope of EU law, and are entitled to claim equality as a general principle of EU law. This principle is not rhetorical, or vague, but a strong, guiding fundamental doctrine, threaded throughout all areas of EU action. The current infringement of that principle denudes EU citizenship of any entitlement to any standard of living or basic equal treatment beyond a ‘hand-to-mouth’ existence, and is not an appropriate or proportionate means of attaining the given objectives. It punishes children, it does not take account of connections with the UK, it denies fairnesss to *Zambrano* taxpayers, and denies *Zambrano* children the ‘reciprocity of rights and duties which form the bedrock of the bond of nationality’, consigning them to tolerated alienhood in their own country.

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**Notes**

1. The Social Security (Habitual Residence)(Amendment) Regulations 2012 S.I. 2587 and the child benefit and child tax credit (miscellaneous amendments) regulations 2012 S.I. 2612. [↑](#endnote-ref-1)
2. The Immigration (European Economic Area) (Amendment)

Regulations 2012 SI No 1547 [↑](#endnote-ref-2)
3. The Social Security (Habitual Residence)(Amendment) Regulations 2012 S.I. 2587 and the child benefit and child tax credit (miscellaneous amendments) regulations 2012 S.I. 2612 [↑](#endnote-ref-3)
4. Regulation 6 of the Allocation of Housing and Homelessness (Eligibility) (England) Regulations 2006, as amended, states:

‘(1) A person who is not subject to immigration control is to be treated as a person from abroad who is ineligible for housing assistance under [Part 7](http://login.westlaw.co.uk.ezproxy.york.ac.uk/maf/wluk/app/document?src=doc&linktype=ref&context=6&crumb-action=replace&docguid=I296C8CA1E44F11DA8D70A0E70A78ED65) of the 1996 Act if—

…

(b) his only right to reside in the United Kingdom—

…

(iv) is derived from Article 20 of the Treaty on the Functioning of the European Union in a case where the right to reside arises because a British citizen would otherwise be deprived of the genuine enjoyment of the substance of the rights attaching to the status of European Union citizen’. [↑](#endnote-ref-4)