# *Acte cryptique*? *Zambrano*, welfare rights, and underclass citizenship in the tale of the missing preliminary reference

## Abstract

*What kind of right to reside did Zambrano create? Are Zambrano families entitled to rely on the fundamental principle of equal treatment to access subsistence benefits? And when is a question of EU law sufficiently unclear to create an objective duty for the national court of last instance to make a preliminary reference? The UK Supreme Court recently concluded that Zambrano families are not entitled to any particular quality of life or to any particular standard of living – so consigning a potentially vulnerable group of EU national children to underclass citizenship. It did so with surprising certainty, without troubling the ECJ with a preliminary reference. But it is hard to imagine a matter less acte clair, or more in need of clarification and consistency at EU level. There is ample reasonable doubt on the matter, strongly suggesting that the Supreme Court breached its duty to refer. Very little of what the ECJ did say in Zambrano was clear – never mind what it did not say.*

## 1. Introduction

The landmark ECJ judgment in *Zambrano*[[1]](#footnote-1) was famously short and enigmatic.[[2]](#footnote-2) It marked a step-change in EU citizenship case law, establishing some degree of protection for some non-mobile EU citizens in their home State.[[3]](#footnote-3) But it did so in a few brief paragraphs, unencumbered with detail as to the full implications and conditions of the new status. The Court asserted that Article 20 TFEU included the right to reside in the Union, and so provided third country national primary carers a right to reside, and to work, in the State of nationality of their child(ren), because finding otherwise would compel the children to leave the territory of the Union, depriving them of “the genuine enjoyment of the substance of the rights attaching to the status of European Union citizen”.[[4]](#footnote-4) But this left open a host of questions; which rights are considered to “attach to the status” of EU citizenship? What counts as, and what is necessary for, the “genuine enjoyment” of the “substance” of those rights? Since *Zambrano*, we have seen a trail of cases in which the Court has refined – not always with crystal clear consistency[[5]](#footnote-5) – the personal scope of *Zambrano* rights.[[6]](#footnote-6) But the material scope of those rights remains unaddressed.

The UK responded with characteristic alacrity – legislating to provide for the new right to reside,[[7]](#footnote-7) and simultaneously excluding the possibility for it to attract any equal treatment rights and disentitling *Zambrano* families to income-related benefits,[[8]](#footnote-8) child benefit and child tax credit,[[9]](#footnote-9) and housing and homelessness assistance.[[10]](#footnote-10) Unlike the right to reside test applied to EU nationals, this exclusion is complete – *Zambrano* carers who work will still not earn entitlement. But is this stripped down right, simply to reside and to work, with no equal treatment rights at all – really all that is needed for the “genuine enjoyment” of the substance of EU citizenship rights?

Unsurprisingly, these rules have been challenged. Rather more unexpectedly, however, the UK courts decided not to trouble the ECJ with a preliminary reference to clarify the scope of the rights at issue; the *Zambrano* ruling was many things – but it was not clear. Yet the UK Supreme Court asserted with unwarranted confidence that the *Zambrano* right is “not a right to any particular quality of life or to any particular standard of living”,[[11]](#footnote-11) and has endorsed a state of tolerated alienhood and potential destitution for the children involved – an underclass EU citizenship which does not, in its view, attract EU fundamental rights protection.

This article explores, in its next section, the central substantive question of whether the material scope of *Zambrano* rights – the substance of rights attaching to EU citizenship – includes a right to equal treatment and access to benefits. It analyses the reasoning by which *Zambrano* families have been excluded from key welfare benefits in the UK – an exclusion upheld by the Court of Appeal of England and Wales in *Sanneh*,[[12]](#footnote-12) and in the UK Supreme Court on the same-but-renamed case, *HC*.[[13]](#footnote-13) The judges concluded that *Zambrano* only requires whatever is sufficient to prevent a *de facto* expulsion, and that the possibility of applying for some basic, last resort, discretionary provision was sufficient for that - notwithstanding evidence showing that this form of support is the lowest in existence in the UK (even lower than that offered to destitute asylum seekers). And that is when it is actually provided; evidence suggests that some local authorities simply do not have the funds to make even more than one award. The failure to meet the basic needs of children in *Zambrano* families creates starkly unequal treatment between those children as compared to other UK national and EU national children, which must lead us to ask whether equal treatment is a right “attaching to EU citizenship”.

In light of questions of discrimination, rights to social security, and implications for private and family life, section 3 argues that the material scope of *Zambrano* rights falls within the scope of the Charter. The UK Supreme Court found that *Dano*[[14]](#footnote-14)handed Member States a carte blanche to disregard to Charter when it comes to special non-contributory benefits (SNCBs), and so ruled that the Charter did not apply to the case. But this is somewhat at odds with the approach of the ECJ, which has used the Charter to define the personal scope of *Zambrano*. In *Chavez-Vilchez* (a case that pre-dates *HC*, and would have been available to the Supreme Court)the ECJ stated that Member States must take account of the fundamental right to private and family life, and the best interests of the child, when deciding whether denying a residence right to a third country national parent would deprive the UK national child of the genuine enjoyment of their EU citizenship rights. If the Charter is pertinent to identifying the *deprivation* of EU rights, then it should also be considered when determining what *those rights* actually are.

Having amassed a range of questions of EU law, section 4 argues that the UK Supreme Court failed in its duty as a court of last instance to make a preliminary reference to the ECJ. Here, it is necessary to analyse developments in the duty to refer questions that are not *acte clair*, in a series of cases since *CILFIT.*[[15]](#footnote-15) Pulling these cases together it is possible to suggest a range of objective criteria that demonstrate that the material scope of *Zambrano* is not *acte clair*. These include: (i) evidence of a divergence of approach or opinion between lower courts, and/or between different Member States;[[16]](#footnote-16) (ii) explicit admissions and implicit suggestions of the national non-referring courts themselves that the issue is not *acte clair*; and (iii) the fact that the matter falls within an evolving area of law, currently undergoing refinement within the ECJ, and generating a great deal of academic commentary specifically on questions that should be put to the ECJ.

Member States should not be entitled to both unilaterally curb developments in EU citizenship and fundamental rights law within their territories, and at the same time prevent their positions from being challenged through inappropriate judicial gatekeeping. A breach of the duty to refer is an additional problem, related to, but separate from the issue of whether the national court arrived at the “correct” interpretation of the matter of EU law at issue. Had it been faced with the relevant questions, the ECJ might have shied away from a politically sensitive conclusion, and so contrived similar conclusions to those of the UK Supreme Court. But that possibility does not – indeed, cannot – eradicate the duty to *ask*. The Supreme Court’s failure not only to make a reference, but even to discuss the request put to it, or mention the *CILFIT* criteria, or make a case that the matter was *acte clair*, unabashedly breached Article 267 TFEU – and potentially also Article 6(1) ECHR. If national courts can put words in the mouths of ECJ judges with impunity, even on core existential questions touching on new developments in EU citizenship, then the duty to refer is a hollow one, and the Court will be deprived of its vital function in refining and defining EU law.

## 2. Do the rights of equal treatment and access to benefits fall within the material scope of *Zambrano*?

In its notoriously laconic ruling, the ECJ found that Article 20 TFEU contained an autonomous right for EU citizens to reside in the Union, based on EU law, but not dependent on having exercised free movement. This right included the right to reside for the third country primary carer of the own State national, in order to prevent the own-national being forced to leave the territory of the Union, and so being deprived of the opportunity to exercise their right to reside within the Union. However, the Court did not explore what other rights might also be necessary to prevent the own State national from having to leave the EU. The Court stated that 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”.[[17]](#footnote-17) This line is *not* limited to precluding “national measures revoking residence rights”. Instead it suggests that the principle can apply more broadly – to *other national measures* that might affect one’s ability to reside within the Union, and/or, measures affecting *other citizenship rights* – such as, potentially, equal treatment. After all, part two of the TFEU is entitled “Non-Discrimination and Citizenship of the Union”; the equal treatment right and the status as EU citizen are inextricably intertwined, as the one is “conferred by” the other.

While the question of who is a *Zambrano* carer has arisen several times before the ECJ, the issue of the material scope of *Zambrano*, and questions as to national measures other than expulsion decisions, or the substance of rights beyond residence rights have not. In particular, no light has been shed on whether the residence right is equivalent to other EU citizenship-based rights to reside, and therefore carrying an entitlement to equal treatment, and permitting access to benefits. But this is the subject of legislation in the UK – which has enacted national measures excluding *Zambrano* families from key subsistence benefits. The lawfulness of this blanket benefit ban has come before the highest courts in the UK. Both the Court of Appeal of England and Wales, and the UK Supreme Court sidestepped the issue of which rights might *follow* from *Zambrano* right to reside, and instead focused on decisions intrinsically linked to the risk of *de facto* expulsion, capable of triggering a *Zambrano* right by activating Article 20 TFEU. Only circumstances of extreme destitution could be equated with refusals of residence permits, and so Member States were only required, according to the UK courts, to offer (very) minimal protection.

This duty could be met, according to Elias LJ in the Court of Appeal, by support under the Children Act 1989, a UK statute designed to protect the best interests of children in the UK. The provision at issue is section 17, which (theoretically) requires local authorities to provide support, in the form of accommodation and/or cash,[[18]](#footnote-18) to migrant families who have no other statutory source of support, in order to safeguard or promote the child(ren)’s welfare. It is discretionary, and administered by local authorities with different approaches and inadequate funds. It supposedly provides “a back-stop provision which is designed to save the carer and child from homelessness and destitution”.[[19]](#footnote-19) In relying on this measure to save the domestic rules, both courts suggest that the *Zambrano* right is a new, unprecedented kind of right to reside in EU law – one that does not carry any equal treatment rights, nor a right to any quality of life,[[20]](#footnote-20) which sets a low bar for “genuinely enjoying” one’s EU citizenship rights. Admittedly, the ECJ has in recent years not seemed too concerned for EU law to guarantee any quality of life for migrant EU nationals who are deemed insufficiently economically active to be considered workers, and so fall foul of the conditions in Directive 2004/38 and within Article 21 TFEU.[[21]](#footnote-21) But for EU nationals in a Member State different from that of their nationality, EU citizenship has remained a gateway to equal treatment *through* work, whereas the UK position is that *Zambrano* carers must remain permanently excluded from equal treatment rights, even when they are working – which is the real novelty of this domestic rule.

The Court of Appeal acknowledged that in *Zambrano*, the ECJ had created an EU citizenship-based right-to-reside, which without domestic intervention, would lead to equal treatment entitlements not even conditioned by Directive 2004/38, but this was treated as an unintended consequence. Arden LJ, in the Court of Appeal stated that “the decision of the CJEU in *Zambrano*… co-incidentally triggered a right to claim benefits under domestic law which they were never intended to have”.[[22]](#footnote-22) But without the ECJ having actually said anything to that effect, this is rather audacious judicial mind-reading. In *Zambrano,* the ECJ created an EU citizenship-based right to reside, and gave no indication that it was dramatically different from other EU citizenship-based rights to reside, or that it was intended to create the first right to reside carrying unconditional *unequal* treatment.

As the case arose around a benefit claim, one might be forgiven for expecting the ECJ to have mentioned any permitted discrimination in this regard. Instead, the courts have interpreted the ECJ’s silence as giving a definitive green light to restrictions on benefits, which is something the UK has claimed before - unsuccessfully. After *Baumbast*[[23]](#footnote-23) established a right to reside for the third country national primary carer of the child of a (former) migrant worker in education in the host State, the UK took the position that this right to reside could not attract entitlement to benefits, arguing that it was dependent on self-sufficiency. In *Ibrahim*,[[24]](#footnote-24) the Court of Appeal of England and Wales agreed with the Secretary of State that there was a “general principle of self-sufficiency” for non-workers in EU law.[[25]](#footnote-25) The judges concluded that they were “sceptical”[[26]](#footnote-26) as to whether *Baumbast* could confer a (benefits-entitling) right to reside. Even so, the court made a preliminary reference because the issues were “not *acte clair*” and raised “a difference of opinion concerning a recent decision of the Court”.[[27]](#footnote-27) The ECJ pointed out that no condition of self-sufficiency could be identified in the legislation or case law in question,[[28]](#footnote-28) and in *Teixeira*, added rather emphatically that “the Court did not base its reasoning even implicitly on such a condition.”[[29]](#footnote-29) The same might be said of *Zambrano*. The UK Supreme Court noted this argument, but countered that the restrictions at issue in the two scenarios were “quite different”; in *Ibrahim/Teixeira* the issue was whether there was a self-sufficiency condition in EU law, but in *HC* the issue was the compatibility of domestic legislation with EU law. This is a contorted way of trying to find two different phrases for the same thing. *Ibrahim* and *Teixeira* both concerned the compatibility of domestic legislation with EU law; the claimants were excluded from Housing Assistance by the Allocation of Housing and Homelessness (Eligibility) Regulations 2006 (because they were not “qualified persons” under the Immigration European Economic Area Regulations 2006). The question was essentially whether these exclusions were compatible with EU law – the same question as in *HC*.

The question remains, therefore, which rights an Article 20 TFEU right to reside confers, and whether those who fall within the scope of *Zambrano* fall within the scope of Member States’ equal treatment duties. What is the substance of the rights attaching to EU citizenship? Three key possible approaches emerge – first, a *Zambrano* right to reside might be a complete right to reside in itself, similar to *Teixeira*,[[30]](#footnote-30) if we regard the protection from poverty as necessary to prevent forced departure from the Union, or the right of equal treatment as another right “attaching to the status of European citizen”. This in effect means drawing on Article 45 TFEU by analogy[[31]](#footnote-31) – a right to reside that presumes rights to equal treatment and safeguards to quality of life in situations that fall outside the scope, and the conditions, of Directive 2004/38. Second, the Article 21 TFEU case law and Directive 2004/38 could be applied by analogy, to withhold equal treatment rights and access to benefits from non-working *Zambrano* carers, but to protect their quality of life when they do work. Or, third, as the UK contends, Article 20 might confer a new, skeletal right allowing for mandatory, permanent unequal treatment, regardless of work or contributions.

In opting for the third, novel option, both the Court of Appeal and the Supreme Court emphasized the "derivative" nature of the right[[32]](#footnote-32) – but that does not tell us much. Family member rights can be described as derivative,[[33]](#footnote-33) but family members still have conditional rights to equal treatment; the rights of *Teixeira* carers are doubly derivative, since they are drawn from the rights of the cared for child(ren), which are themselves derived from the work/former work of their EU national parent(s).[[34]](#footnote-34) But *Teixeira* families have equal treatment rights that are not conditional on (continued) work or sufficient resources.

Arguably, it is not enough simply to find that Article 20 TFEU establishes a new right, not aligned with existing rights to reside, in order to find discriminatory treatment lawful; there are a number of other sources of equal treatment rights within EU law. Once it is established that *Zambrano* families have an EU citizenship-based right to reside, their situation is no longer “wholly internal” but is subject to EU law, so it could be claimed that the EU law general principle of equal treatment,[[35]](#footnote-35) even as between own-State nationals, applies – as it did in *Eman and Sevinger*,[[36]](#footnote-36) where the national competence to define the electorate did not obviate a duty to abide by the general principle of equal treatment as between own nationals when allocating the right to vote in European Parliament elections. Further, Article 21 of the Charter of Fundamental Rights provides for equal treatment in the implementation of EU law. The Charter rights should be read in line with the ECHR (which the UK has incorporated into domestic law through the Human Rights Act 1998). Insofar as the children with *Zambrano* carers can be said to have an identifiable "status" for the purposes of Article 14 ECHR, (and so, presumably, that status forms a "ground" for the purposes of Art. 21 CFR) they are entitled to protection from discrimination in the allocation of the rights in the Convention[[37]](#footnote-37) – including rights to social security protected under Article 1, Protocol 1,[[38]](#footnote-38) and Article 8.[[39]](#footnote-39) Those rights must in turn be interpreted through the prism of the UN Convention on the Rights of the Child, that is, in such a way as to give effect to the best interests of the child.[[40]](#footnote-40) With these equal treatment sources in mind, whichever legal basis is chosen as the template for Article 20 rights, we should ask whether the discrimination entailed compared to other UK national children, and to EU national children, is capable of justification.

The backstop support in section 17 of the Children Act provides significantly different treatment for the UK national children affected. Lady Hale’s concurring judgment in *HC* lists some disadvantages of section 17 support compared to mainstream benefits: it is a discretionary mechanism, not one provided "as of right"; there are no standard rates, leading to inconsistency across the country; it does not passport recipients onto other benefits (such as, for example, free school meals); and a local authority’s decision cannot be appealed, just judicially reviewed.[[41]](#footnote-41) But the disadvantages go deeper than that – there is significant and troubling evidence about the sheer inadequacy of section 17 support to meet basic needs and respect fundamental rights – counsel for the claimants in *HC* described it as providing no more than a “hand-to-mouth existence”.[[42]](#footnote-42) Local authorities are not obliged to meet all the assessed needs of claimants, and can take their own resources into account.[[43]](#footnote-43) In light of increasingly straitened public funds, the latter is an important caveat. A legal research and case work charity in the UK, the Public Law Project (PLP), produced a report on support under the Children Act, and ensuing destitution. The report notes that some authorities “routinely provide very low levels of financial subsistence”,[[44]](#footnote-44) and also identifies some key "problem areas" in making section 17 applications, including threats by local authorities to take the child(ren) into care rather than providing support, or stating that they can only accommodate, or provide financial assistance to, the child, not the carer.[[45]](#footnote-45) Indeed, one case, (involving an EU national, not a *Zambrano* carer), encountered in a project researching EU rights (EU Rights Project), revealed the limits of relying on local authority support. The adviser noted: “We were told immediately that client would not qualify for any LA housing/homelessness assistance, and she was advised that perhaps she should return to [Bulgaria]. A possible source of assistance suggested by Housing Options was Social Services who they said might offer care for her child, but not for her — they might be able to help with her fare back to [Bulgaria].”[[46]](#footnote-46) PLP also described *Zambrano* cases in which local authorities argued that the child should just be handed over to the non-*Zambrano* parent, “even where high levels of domestic violence by the other parent are acknowledged.”[[47]](#footnote-47)

Lady Hale noted that the total cost of the support offered to the claimant in the *HC* case all but exhausted the local authority’s annual section 17 support budget,[[48]](#footnote-48) which would presumably preclude similar support being given to any other claimant in the same year. In a COMPAS report on local authority provision of section 17 support, Price and Spencer found that “subsistence payments for families ranged considerably between the local authorities studied in terms of amount… and in the interpretation of duties to provide subsistence”.[[49]](#footnote-49) One provided payments that for a family with two adults and two children “would amount to little over £1 per person per day”.[[50]](#footnote-50) In “*all cases*” payments were “well below welfare benefit rates, below Home Office s95 support for destitute asylum seekers, and even marginally below Home Office s4 ‘hard case’ support rates”.[[51]](#footnote-51) When it comes to accommodation, Hackney Community Law Centre and Hackney Migrant Centre report that “almost two thirds of the properties provided [under section 17] are unsuitable and fall short of meeting the practical and emotional needs of the children and their principal carers, usually mothers”. Problems included lack of cooking facilities, “severe overcrowding” and “infestations of vermin or insects.”[[52]](#footnote-52)

In short, there should be little doubt that in consigning *Zambrano* families to section 17 support, the UK is mandating drastically unequal treatment for the UK national children affected. Price and Spencer draw attention to “concerns relating to the long-term impact on children, given what is known from past studies on the consequences for child development and life chances of living in poverty”.[[53]](#footnote-53) None of this sounds much like an opportunity to “genuinely enjoy” one’s EU citizenship rights. It is at least plausible that genuine enjoyment of such rights for children should mean accessing education “under the best possible conditions” – the term employed in Regulations 1612/68[[54]](#footnote-54) and 492/2011[[55]](#footnote-55) from which the Court distilled a right to equal treatment for *Teixeira* carers. Or at least it should mean accessing education under basically decent conditions. In *Teixeira* cases, the right vests in a prior period of work linking directly to Article 45 TFEU, but this economic link can be fairly tenuous; a past, short period of work, as long as it was genuine and effective, can be enough to create an unconditional right to reside and to equal treatment for the primary carer – who may themselves never have worked – of the child of the EU national former worker, for the rest of the duration of the child’s studies (which may be fourteen years). If *Zambrano* cases were to be aligned with *Teixeira*, it could be possible to require a similar prior economic activity, either on the part of the carer or on the part of the UK national parent. This would not in itself fall within the ambit of Article 45 TFEU but could be analogized with it, drawing on the Charter of Fundamental Rights. Or, the right could be framed as not subject to any economic connection requirement – given that no such requirement is mentioned in *Zambrano*, and given that the closer comparator is arguably a UK national child whose UK national parent is the primary carer, and given the primacy attached in other areas of EU law to the connection that nationality affords to one’s "home" Member State.[[56]](#footnote-56) In either case, the Charter should play a significant role in the framing of the rights at issue due to the very significant drawbacks of section 17 support *when it is provided*. The next section argues that the exclusion of *Zambrano* families from (even conditional) equal treatment, is not compatible with EU law in light of the Charter of Fundamental Rights.

## 3. *Zambrano* carers and rights to private and family life: When does the Charter bite?

Children are at the heart of a *Zambrano* claim – children with EU citizenship, and who, as members of “a fragile population that cannot rely on [their] own resources”,[[57]](#footnote-57) are disproportionately likely to be vulnerable.[[58]](#footnote-58) The serious and deleterious effects of poverty upon children’s home lives,[[59]](#footnote-59) physical[[60]](#footnote-60) and mental health,[[61]](#footnote-61) personal development, educational attainment[[62]](#footnote-62) and life chances,[[63]](#footnote-63) fall within the ambit of Article 8 ECHR (the right to private and family life)[[64]](#footnote-64) for the purposes of constructing possible discrimination cases using Article 14 ECHR.[[65]](#footnote-65) From the evidence available about the stark inadequacy of section 17 support, and the ensuing poverty experienced by claimants, it would seem inevitable that *Zambrano* families would also fall within the ambit of Article 8 ECHR, leading us to consider Article 7 of the Charter of Fundamental Rights. This is an opportunity to flesh out the socio-economic dimensions of Article 7 CFR, in line with the approach of the ECHR – which might be more politically palatable than attempting to develop Article 34 CFR into more standalone right to social security and social assistance.[[66]](#footnote-66)

Both the Court of Appeal of England and Wales and the UK Supreme Court concluded that the Charter did not apply, because the UK was not implementing Union law when it passed the regulations which exclude *Zambrano* families from key welfare benefits.[[67]](#footnote-67) But this is a problematic conclusion – and another issue on which we need clarification from the ECJ. The exclusions were introduced deliberately in response to *Zambrano*. Without those legislative amendments, the necessary result of *Zambrano* was that those families would be entitled to benefits. The UK Supreme Court adopted rather circular reasoning; Lord Carnwath found that “*once it is determined* that EU law does not require more for the children of a *Zambrano* carer than practical support sufficient to avoid their being obliged to leave the Union”[[68]](#footnote-68) the Charter does not apply. This conclusion revolves around a key evasion – precisely, it has *not* been determined “what EU law requires” in terms of support for *Zambrano* families – and that is a question of EU law.

The Supreme Court has stumbled into, as Van Eijken and Phoa put it, something of a “chicken and egg” question.[[69]](#footnote-69) While there are suggestions that the Charter can only be triggered once it is established that the situation would anyway fall within the scope of application of Union law,[[70]](#footnote-70) in *Chavez-Vilchez*, the Court found that, “*as part of*” ascertaining whether a *Zambrano* right to reside crystallized, account must be taken of the right to respect for family life under Article 7 CFR, read in the light of the obligation to take the best interests of the child into consideration under Article 24 CFR.[[71]](#footnote-71) The requirements of the Charter – and in particular, the duty to consider the best interests of the child – were part and parcel of the assessment for *Zambrano* carer status.

If the Charter must be incorporated into defining the personal scope of *Zambrano*, it should have some bearing on defining the material scope. But the Supreme Court instead pointed to the ECJ’s confusing stance in *Dano*. There, the ECJ had concluded that “when the Member States lay down the conditions for the grant of special non-contributory cash benefits and the extent of such benefits, they are not implementing EU law”.[[72]](#footnote-72) The UK Supreme Court appears to have drawn from this a *carte blanche* for Member States to set their own SNCB conditions with no regard for the Charter.[[73]](#footnote-73) This interpretation is simply not tenable; SNCBs *do* fall within the scope of EU law. Member States may set the basic eligibility conditions – whether to award benefits to persons on grounds of unemployment, low incomes, or other circumstances or conditions. And these choices are clearly national choices. But the payment of these benefits must comply with such EU provisions as are relevant in the allocation and administration of those benefits – including the right to (conditional and limited) equal treatment on the grounds of nationality.[[74]](#footnote-74) Hence *Brey[[75]](#footnote-75)* itself, from which the waiver is supposedly derived, made clear that while Member States may make such benefits subject to having a right to reside under Directive 2004/38, they must consider the proportionality of refusals to EU nationals on grounds of no longer being self-sufficient.[[76]](#footnote-76)

The proclamation in *Dano* only makes sense if we look at the question to which it was an answer. There, the German court asked whether, *if* it was found that the rules excluding Ms Dano from subsistence benefits *complied with EU law*, the Charter could compel a Member State to offer “more extensive payments” than the provision of funds to return to the home State.[[77]](#footnote-77) In essence, it was asking whether, in the event Ms Dano was lawfully excluded from the claimed benefits, the Charter could compel the State to create another benefit to which she would be entitled. As Member States are free to decide which circumstances to cater for in their welfare systems, and the extent of payments, it is not surprising that the ECJ found that this was not the implementation of EU law, and that it did not have jurisdiction to answer that particular question.[[78]](#footnote-78) But *Dano* cannot credibly be authority for the proposition, readily accepted in the UK Supreme Court, that Member States escape the scope of the Charter simply by pointing out that a benefit is a special non-contributory benefit. The UK court’s distinction between personal and material scope of EU law – finding that *Zambrano* carers fell within the former, but their claims for benefits did not fall within the latter[[79]](#footnote-79) – is not terribly convincing. The right to reside provided for by EU law is a material matter of EU law, based on, and creating material rights under Article 20 TFEU. It is at least arguable that the enforced poverty created by the UK rules could compel *Zambrano* families to leave the territory of the Union (as suggested by HHJ McKenna in *Merali*),[[80]](#footnote-80) which would, under the logic of *Zambrano*, be a national measure depriving the EU citizen of the right to reside in the territory of the Union, infringing Article 20, and within the scope of EU law. Or it could be argued that whether or not it would imperil residence rights, it nevertheless prevents the enjoyment of other rights attached to EU citizenship – namely, equal treatment. Again, we must return to the approach in *Chavez-Vilchez* and ask whether it would be logical to require Member States to use the Charter to identify a *deprivation* of the “genuine enjoyment” of the substance of rights attaching to EU citizenship, but not to identify *what the rights attaching to EU citizenship actually are*.

The emphasis in *Chavez-Vilchez* upon the rights of the child is also instructive. The right to respect for private and family life must be interpreted in accordance with the duty to consider the best interests of the child, contained in Article 24 CFR (and drawing upon Art. 3 of the UN CRC). Authorities in the Netherlands had avoided acknowledging *Zambrano* rights by identifying another parent “in the Netherlands, or in the European Union as a whole”,[[81]](#footnote-81) and arguing that the child could go and live with them instead, unless they were not able to “care for the child because he is, for example, in prison, confined to an institution or hospitalized, or even dead”.[[82]](#footnote-82) This readiness to transfer primary carer-ship, other than when absolutely impossible to do so, appeared to pay scant regard to the child’s well-being. Advocate General Szpunar noted that the ECJ had previously held that “the principle of the primacy of the best interests of the child is the prism through which the provisions of EU law must be read.”[[83]](#footnote-83) The Court found that the existence of another parent who was “able and willing” to care for the child was relevant, but not dispositive; rather, the authorities needed to consider whether there was a relationship of dependency between the actual primary carer and the child such that requiring the former to leave the Union would compel the latter to do so too. In assessing dependency, Member States must take into account

“in the best interests of the child concerned, all the specific circumstances, including the age of the child, the child’s physical and emotional development, the extent of his emotional ties both to the Union citizen parent and to the third-country national parent, and the risks which separation from the latter might entail for the child’s equilibrium”.[[84]](#footnote-84)

This begs the question as to whether the ECJ might identify the rights that attach to EU citizenship, and so establish what constitutes a breach of Article 20 TFEU, with reference to Article 7 CFR, viewed through the "prism" of the best interests of the child in Article 24 CFR.[[85]](#footnote-85) There is a potential breach of these provisions on their own terms, as well as a possible breach through discrimination. The different degree of respect given to Article 7 rights of *Zambrano* children, interpreted in light of Article 24 CFR, when compared to other UK national children, or the children of EU national migrant workers/former workers (whether seeking to align them with *Teixeira* Art. 45 TFEU cases or Directive 2004/38 / Art. 21 TFEU cases), could constitute discrimination under Article 21 of the Charter. Many *Zambrano* children will, by definition, fall into the category of “national minority” if their third country national carer is also their parent, while membership of a *Zambrano* family could constitute a status “such as” the listed protected categories.

As there is a *prima facie* difference in treatment, if we consider the Charter and/or the general principles of EU law engaged, we need to examine the purported justifications put forward by the Secretary of State. The majority of the Supreme Court,[[86]](#footnote-86) and the unanimous Court of Appeal, waved through the government’s claimed objectives, declining to examine the question of justification. The aims included: encouraging immigrants unlawfully in the UK to regularize their stay; reducing incentives for benefit tourism; allocating funds to “those with the greatest connection with the UK”;[[87]](#footnote-87) and procreative deterrence – that is encouraging “TCNs wishing to have children here to ensure that they had sufficient resources to support themselves and their child”.[[88]](#footnote-88) Lady Arden (discussing the ECHR, having found the Charter not to apply), referred to these as “deliberate policy reasons”, noted objections had been raised, and dismissed them as “a matter for political judgement.”[[89]](#footnote-89) Lord Carnwath in the Supreme Court addressed the question with equal brevity; having listed the claimed objectives, he noted that counsel for the claimants had “criticisms”, but stated that he found it “impossible to say that these objectives fall outside the wide margin of discretion allowed to national governments in this field”.[[90]](#footnote-90)

In terms of justification of Charter breaches, we do not yet have much guidance from the Court, especially in matters of social security, but as the Charter draws upon the ECHR, it makes sense to look to ECHR case law for a steer. Indeed, Article 52(3) CFR states: “In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention”. Social security decisions that potentially infringe the ECHR are subject to a low standard of judicial review; justifications should not be manifestly without reasonable foundation.[[91]](#footnote-91) But, low though it is, it is a standard that must be met. In addition, potential breaches of the general principle of equal treatment must be justified with a legitimate objective, for which the contested measure is appropriate and logical in light of the overall legal context.[[92]](#footnote-92) Judicial deference that does not subject potentially illogical, unethical, and irrelevant objectives to these most basic tests is tantamount to an abdication of responsibility of judicial review. The claimed objectives are deeply problematic for justifying infringements of the Charter and the general principle of equal treatment. First, the desire to encourage "unlawful” immigrants to regularize their stay is irrelevant. *Zambrano* carers are not unlawful immigrants, and not subject to immigration control. Second, there is no evidence that people become *Zambrano* carers in order to be “benefit tourists” – they are typically, by the UK’s definition, people who have a child with a UK national/someone with settled status in the UK and who have since become single parents – which is rarely anyone’s go-to financial strategy.[[93]](#footnote-93)

Third, the desire to award benefits to those with the greatest connection to the UK is a prime example of the use of “a single condition” that “is too general and exclusive in nature” and which “unduly favours an element which is not necessarily representative of the real and effective degree of connection” between the family and the UK, “to the exclusion of all other representative elements”.[[94]](#footnote-94) It is, contrary to established EU law, unlikely to be a “satisfactory indicator of the degree of connection of applicants to the Member State granting the benefit” if it is liable “to lead to different results for persons… whose degree of integration into the society of the Member State granting the benefit is in all respects comparable”.[[95]](#footnote-95) We must bear in mind that at the heart of a *Zambrano* claim is a child who theoretically has the strongest connection possible with the UK – British nationality.[[96]](#footnote-96) And the *Zambrano* exclusion takes effect no matter how long the family have lived in the UK, regardless of how integrated they are; whether the child was born in the UK and been schooled in the UK, and even if the *Zambrano* carer has been in work and making contributions through tax and national insurance. Whereas a *Teixeira* family has entitlement to social assistance on the basis of a parent’s former work – even though that work may have been brief (as long as it was effective and genuine); even though the former worker may no longer be living with the family; even though the child may have recently arrived and not be significantly integrated; and even though the primary carer has never worked in the UK.[[97]](#footnote-97) Or other EU national families with loose connections to the UK can "earn” equal treatment through work. In short, the blanket exclusion of *Zambrano* families and children from subsistence benefits on the basis of *Zambrano* status alone does nothing to test or reflect the degree of connection to the UK.

Fourth, and finally, the procreative deterrence justification is ethically problematic on a number of counts. It presumes that the choice to have a child is that of the third country national alone, forgetting that a UK national parent was on the scene at some point. It presumes that it is lawful and ethically sound to seek to influence the family planning choices of a national minority – whereas that in itself is an intrusion on intimate Article 8 ECHR / Article 7 CFR rights.[[98]](#footnote-98) It assumes that conception is the result of deliberate choice, and places an onus upon those with unexpected pregnancies to anticipate the risk of being abandoned by their partner, and presumably to mitigate that risk by considering an abortion. And it punishes the children for the actions of their parents, contrary to the UK Supreme Court ruling in *ZH Tanzania*.[[99]](#footnote-99)

In green-lighting the government’s manifestly inappropriate justifications, without any analysis whatsoever, the UK courts have abjectly failed to challenge the discriminatory effects of the exclusion at issue, or to require the government to meet the very low bar of submitting justifications that have a reasonable foundation, as required by the ECHR – and arguably, the Charter – while the miscellany of illogical objectives would fail to meet the simple “is it nonsense?” test for departing from the general principle of equal treatment. This creates more pressing questions for the ECJ – should justifications for possible infringements of Charter rights meet a basic threshold of being logical, appropriate, and of not infringing other Charter rights? We have now amassed such a collection of necessary, unanswered questions of EU law, that it is difficult to avoid the conclusion that the UK Supreme Court defaulted on its duty to make a preliminary reference.

## 4. When does the duty to make a reference kick in?

A host of burning questions, going to the heart of EU citizenship and current developments in EU law radiate from *HC*. Which rights “attach to EU citizenship”? Do those rights include some degree of equal treatment? Is access to subsistence benefits necessary for “genuine enjoyment” of the right to reside? Should the rights attaching to EU citizenship be interpreted in light of Articles 7 and 24 CFR? And should justifications for discriminatory treatment under Article 21 CFR be logical and appropriate? Very little of what the Court *did* say in *Zambrano* was clear – never mind what it did not say. Recognizing this, counsel for the appellants made the request for a preliminary reference to the ECJ a “key objective of the SC appeal”.[[100]](#footnote-100) But you would not know it from reading the judgment, which does not engage with arguments for and against a reference; indeed the possibility is only mentioned in the last line in Lady Hale’s judgment.[[101]](#footnote-101) As such, the Court did not consider the *CILFIT* criteria in deciding whether to make a reference, and neither that nor other relevant cases were mentioned. *CILFIT* established that courts of last instance are under a duty to refer questions of EU law arising before them, unless the question is not relevant to the outcome of the case, or the question has already been addressed by the ECJ, or the answer is so obvious as to leave no room for reasonable doubt. The first two exceptions do not apply here, so we are only concerned with the question as to whether the answer is *acte clair*.

The *CILFIT* doctrine has been the subject of substantial, often critical, commentary;[[102]](#footnote-102) a rigid application of *CILFIT* would make a “coming across a ‘true’ *acte clair* situation” as “likely as encountering a unicorn”,[[103]](#footnote-103) according to Advocate General Wahl. According to the ECJ in *CILFIT*, when declining to make a reference on *acte clair* grounds, the national court “must be convinced that the matter is equally obvious to the courts of the other Member States and to the Court of Justice”;[[104]](#footnote-104) it must bear in mind that interpretation of a provision involves comparing different language versions;[[105]](#footnote-105) it must also bear in mind that even where different versions do agree, “legal concepts do not necessarily have the same meaning in Community law and in the law of the various Member States”,[[106]](#footnote-106) and it must place every provision in the context of “Community law as a whole, regard being had to the objectives thereof and to its state of evolution at the date on which the provision in question is to be applied”.[[107]](#footnote-107) However, the impracticability of these tests means they are not actually used. Limante comments that the Court has “never referred to the more specific *CILFIT* requirements, such as the linguistic comparisons of EU provisions or the assessment of a particular EU terminology or of the EU legal system as a whole”.[[108]](#footnote-108) However, the Court has attempted to refine the *acte clair* test – and on occasion, to find national courts in breach of the duty to refer preliminary questions.

While acknowledging that Article 267 TFEU is an “an instrument for cooperation between the Court of Justice and the national courts”, the Court has repeatedly emphasized the obligation to refer questions of interpretation of EU law.[[109]](#footnote-109) The duty is important, to avoid the “risk of divergences in judicial decisions within the European Union”.[[110]](#footnote-110) In *Ferreira da Silva*, the Court acknowledged that national courts have “sole responsibility for determining whether the correct application of EU law is so obvious as to leave no scope for any reasonable doubt”. But it confirmed that there are limits to that discretion. While contradictory decisions in national courts or tribunals do not mean that a matter cannot be *acte clair*,[[111]](#footnote-111) in *Ferreira da Silva* the ECJ established that the Supreme Court of Justice of Portugal had breached its duty to make a reference. The Court noted that the question at issue – the interpretation of the concept of “transfer of business” - had “given rise to a great deal of uncertainty on the part of many national courts and tribunals which, as a consequence, have found it necessary to make a reference to the Court of Justice”.[[112]](#footnote-112) This uncertainty created a risk of divergence in judicial decisions in the Union. Advocate General Bot, in the same case, pointed out that non-compliance with the duty on the part of national courts would have the effect of “depriving the Court of the fundamental task … to ensure ‘that in the interpretation and application of the Treaties the law is observed’”,[[113]](#footnote-113) and further suggested that the “obligation to make a reference to the Court thus constitutes the rule, while a decision not to make a reference is the exception.”[[114]](#footnote-114) If exercising that exception, there is, according to the Advocate General, a strong onus upon the court of last instance to give reasons for its certainty,[[115]](#footnote-115) and to exercise particular caution in areas where the Court needs to “refine the scope” of a concept, because the “case law in question is constantly evolving”.[[116]](#footnote-116) Failure to make a reference in breach of Article 267 not only impedes the development of EU law, and obstructs the work of the ECJ – it creates direct, concrete disadvantages for the individuals affected by the problematic law. If the ECJ were to be faced with the matter, and was minded to reach a different conclusion to the Supreme Court, then the failure to make a reference has in itself kept *Zambrano* families in poverty. Following *Köbler*, this could trigger State liability; the obligation to “make good damage caused to individuals by infringements of Community law for which they are responsible” also applies where the infringement “stems from a decision of a court adjudicating at last instance”[[117]](#footnote-117) as long as three conditions are met: that the rule of Community law infringed is intended to confer rights on individuals; that the breach is sufficiently serious; and that there is a direct causal link between that breach and the damage suffered. In *Köbler*, the Court found that while the duty to refer does not in itself create rights for individuals, that duty is a key gateway to the realization of individual rights; it exists “to prevent rights conferred on individuals by Community law from being infringed”.[[118]](#footnote-118) So, failure to make a preliminary reference is evidence that the court has manifestly infringed the contested rights which the referral duty is supposed to protect[[119]](#footnote-119) – in this case, Article 20 TFEU, which *is* intended to confer rights on individuals. In light of the poverty into which *Zambrano* families have been pushed, and the fundamental nature of the principle of equal treatment, the breach can be deemed sufficiently serious; and as the Supreme Court’s decision not to refer is directly responsible for the continued breach, there is a clear causal link.

Since *Ferreira da Silva*, the EU Commission has used Article 258 TFEU to bring an infringement procedure against France for a breach of the duty to refer under Article 267. *Commission* v. *France*[[120]](#footnote-120) post-dates *HC*, so could not itself have informed the UK Supreme Court, but it sheds light on how EU institutions should respond to the Supreme Court’s failure to refer. In *Commission* v. *France*,the national court had submitted a preliminary reference questioning whether EU law precluded national rules allowing for differential treatment, for tax purposes, of dividends originating from other Member States. On receiving the answer that these rules infringed EU law, the national court of last instance, the Conseil d’État, then set conditions limiting the circumstances and extent of reimbursement claims. The Commission claimed that the national court should have made a further preliminary reference before establishing procedures for reimbursement – and argued that the “mere fact” that the Commission itself had a different understanding of the first preliminary ruling “shows that the solutions… [reached by the national courts] cannot enjoy a presumption of compatibility with EU law”.[[121]](#footnote-121) The ECJ noted that the initial ruling had been “silent” on the matter at issue. The approach taken at national level appeared to depart from the ECJ’s approach in other cases, on the grounds that the schemes were different, but the national court “could not be certain that its reasoning would be equally obvious to the Court.”[[122]](#footnote-122) Moreover, the fact that the national court had reached a conclusion that was “at variance” with the ECJ’s present judgment, a fact that could not be available to any national court without recourse to time travel, “implies that the existence of reasonable doubt concerning that interpretation could not be ruled out.”[[123]](#footnote-123) The Court upheld the Commission’s substantive and procedural infringement complaints; in failing to make a preliminary reference on a matter that was “not so obvious as to leave no scope for doubt, the French Republic failed to fulfil its obligations” under Article 267 TFEU.

Drawing upon this series of cases, it is possible to identify some persuasive indicators that the nature of the rights afforded to *Zambrano* families is not *acte clair*, and that the UK Supreme Court breached its duty to refer. In terms of the *Ferreira da Silva* criteria, there is evidence of a difference of approaches among the lower courts, at odds with the position taken in the Supreme Court, and also evidence of different approaches – or confusion – in different Member States. We can further point to the UK courts’ own admissions that the matter was not *acte clair*, and the fact that the area of law is in a state of constant evolution and refinement through ECJ references. This state of flux is evident both in the case law and in the wealth of legal commentary following on from *Zambrano*, calling attention to the lack of clarity on the scope of the substance of rights doctrine.

### 4.1 The Ferreira da Silva criteria: Differences among national courts and between Member States

The UK Supreme Court reached a conclusion that was not unanimously backed up by the prior lower court judgments. *HC* was an appeal of *Sanneh*, from the Court of Appeal, which was in turn an appeal of four separate cases – *Sanneh*;[[124]](#footnote-124) *HC*;[[125]](#footnote-125) *Merali and Others*;[[126]](#footnote-126) and *Scott*.[[127]](#footnote-127) *Merali* was itself a combination of four cases. In the Court of Appeal, Lady Justice Arden stated that it was “not necessary to go into the details of the judge's reasoning” in *Merali*, claiming that he only looked at whether the claimants were *Zambrano* carers. This is a somewhat misleading and disingenuous summary, given that the judgment provides evidence of a significant divergence of understanding.

In all four of the cases under the *Merali* heading, the judge, HHJ McKenna, found that refusal of the assistance claimed could compel the claimants to leave the Union – in other words, that a refusal of benefits triggered the protection of Article 20 TFEU, notwithstanding the fact that the facts of the cases all arose after the commencement of the domestic regulations excluding *Zambrano* carers from such assistance. He found that it did not “lie in the mouth of the Respondent in the circumstances of these cases to say that in fact Children Act 1989 support will be available in the future so that the Appellants are not compelled to leave the territory of the EU”.[[128]](#footnote-128) That is, Birmingham City Council could not guarantee section 17 support, and so could not thereby avoid a duty to provide assistance. Noting the lack of evidence about the availability of long-term section 17 support, the judge found that *Zambrano* status and a right to assistance were inextricably linked, as “it cannot arguably be suggested that a mother with no family in the United Kingdom, no support network, no entitlement to public funds, no money and no available charitable support would remain in the United Kingdom on the streets rather than return to their respective countries of origin.”[[129]](#footnote-129)

The case of *Sanneh* also reveals divergence among the lower courts; the conclusions of the first tier tribunal were somewhat at odds with those of the higher courts. The first tier tribunal judge concluded that refusal of Income Support would mean that the primary carer’s presence in the UK was not viable; and that her child could not enjoy her rights as an EU citizen without the “financial, practical and emotional support” of the mother, so that ultimately they would both have to leave the UK.[[130]](#footnote-130) Benefit entitlement was necessary to give effect to Article 20 TFEU rights. The UK rules excluding *Zambrano* carers from benefits came into effect after the facts of the case, so were not then at issue. But those later domestic rules could not in themselves alter this interpretation of EU law. Rather, the judge’s conclusions would suggest that the regulations are not compatible with Article 20 TFEU.

Differences in approach are not confined to courts and tribunals in the UK. A brief foray into instances of *Zambrano* welfare litigation elsewhere is enough to show a lack of clarity and consistency – especially if we include the fact patterns of cases that actually reached the ECJ. In Belgium, the *Zambrano* case itself arose out of a claim for unemployment benefits; if a right to reside was established, entitlement would follow. The case of *X* v. *Office National d’Allocations Familiales pour Travailleurs Salariés*[[131]](#footnote-131)appears to show that *Zambrano* carers in Belgium were entitled to claim professional family benefits, as entitlement follows on from work, regardless of nationality. However, the claimant’s circumstances changed and she claimed residual family benefits and was refused.[[132]](#footnote-132) The Higher Labour Court in Brussels concluded that X was only entitled to such benefits as were necessary to ensure her Belgian child could genuinely enjoy the substance of the rights conferred by EU citizenship, and did not consider that the family benefits were necessary for that.[[133]](#footnote-133) The Belgian Constitutional Court later found that it was legitimate to make special non-contributory benefits conditional upon a sufficient link with Belgium, and that the legislature could choose whether to focus on either the nationality of the child *or* the residence status of the parent.[[134]](#footnote-134) This arguably permitted the legislature to focus on a single factor that was not adequately representative of the real links between the family and the State. However, in contrast to the situation in the UK, the Court added that such carers could claim minimum subsistence benefits,[[135]](#footnote-135) if the claimant did not have sufficient means to provide for the needs of the child, to guarantee its health and development.

Case law in the Netherlands provides further evidence of potential divergence from the UK approach. The Dutch Centrale Raad van Beroep found in 2012 that there was scope to interpret the rights of those relying on Article 20 TFEU consistently with those who did fall within the list of qualifying rights to reside (which include those in Directive 2004/38).[[136]](#footnote-136) In contrast, the Raad van State in 2013 took quite a different approach – asking whether the refusal of the benefit would in itself necessitate departure from the Union.[[137]](#footnote-137) Minderhoud has argued that the reasoning in this case – that there must be direct link between the benefit claimed and a compulsion to leave the Union – was “strange”.[[138]](#footnote-138) However, Minderhoud concludes that the case, and a 2014 case in the Hoge Raad (the Supreme Court of the Netherlands),[[139]](#footnote-139) show that once a TCN parent has a residence right based on *Zambrano*, they are entitled to welfare benefits and child benefits. Eijkhout describes this conclusion as “crystal clear”.[[140]](#footnote-140) The focus has instead been on the difficulty of qualifying for that status in the first place – as evident in in *Chavez-Vilchez*, which consisted of eight separate cases, all of which stemmed from claims for social assistance and child benefit; once *Zambrano* status was established, then entitlement to the claimed benefits would follow.[[141]](#footnote-141)

In some States, it is likely that the issue has not yet been litigated. For example, in Germany, the Bundesverwaltungsgericht (Federal Administrative Court) has held that *Zambrano* created a *sui generis* right to reside in EU law, which is not the same as either the right of residence for foreigners, or the right to reside for EU nationals.[[142]](#footnote-142) However, there is little available information on the consequences of this categorization for accessing benefits. Wollenschläger, national expert on the EU Commission’s network on free movement of workers and social security coordination, notes that if a claimant does not fall under the German law on free movement of EU citizens, according to the wording of § 7 (1)(2) Social Code II/SGB II, they “may not be excluded” from benefit entitlement; however, the Bundessozialgericht (Federal Social Court) “interprets the exclusions contained in § 7 (1)(2) Social Code II/SGB II widely”.[[143]](#footnote-143) So in terms of consistency across the EU, we have evidence of divergence in the fact patterns of the ECJ’s case law as well as in domestic cases, a lack of clarity, and a lack of development in some cases. If we now look beyond the *Ferreira da Silva* criteria for other indicators that the questions in *HC* were not in fact *acte clair*, then striking signals are found in the admissions of the Court of Appeal and the Supreme Court, which are examined next.

### 4.2 The non-referring courts’ own concessions / implications that the matter is not acte clair

Giving the lead Court of Appeal judgment in *Sanneh*, Lady Justice Arden commented that the question as to whether *Zambrano* carers were entitled to protection from nationality discrimination was “not *acte clair,*and could in principle properly be referred by this court for a preliminary ruling by the CJEU under Article 267 TFEU”.[[144]](#footnote-144) But she went on to decline to do so, based on, *inter alia*, speculation as to the likely outcome of any reference, finding it “unlikely” that the ECJ would consider *Zambrano* carers entitled to equal treatment.[[145]](#footnote-145) But where there is reasonable doubt, it is not for the national court to second guess the ECJ’s position just to avoid a reference. To adopt the language of *Commission* v. *France*, the very language of likelihood (and admission that the questions are not *acte clair*) means “that the existence of reasonable doubt concerning [the Court’s] interpretation could not be ruled out”, and the Court of Appeal “could not be certain that its reasoning would be equally obvious” to the ECJ. Lord Justice Elias added that if there were any discrimination, the ECJ would “in all likelihood” consider it justified, but that he “would not personally go as far as to say that the position is *acte clair,* if only because the *Zambrano* resident is a judicially created concept of uncertain scope”.[[146]](#footnote-146)

If we turn to the language of the UK Supreme Court, the judges made no claim that the issue was *acte clair*, nor did they mention it as a requirement. Lord Carnwath emphasized the fact that the issue had *not* been addressed by the ECJ; in *Zambrano* there “was no issue as to the nature of financial support (if any) required, nor as to the extent of any right to benefits otherwise available to nationals”.[[147]](#footnote-147) He considered subsequent cases, and added that he had “been referred to no European court authority”[[148]](#footnote-148) on *Zambrano* rights and non-contributory benefits. Referring to *Rendón Marín*, Lord Carnwath again pointed to the fact that the issue has simply not arisen before the ECJ, stating that there was “nothing in the European court’s treatment of the case itself to suggest that the ‘scope of EU law’ for these purposes extended beyond protection against being obliged to leave”[[149]](#footnote-149) – but nor was there anything to suggest that it did not. Lady Hale also noted that “*Zambrano*and the later cases say nothing about entitlement to benefits”,[[150]](#footnote-150) while finding that “all that *Zambrano* requires”[[151]](#footnote-151) was access to the minimal, deeply unequal, backstop support, theoretically provided by section 17. But if we again quote *Commission* v. *France*, the fact that the ECJ has previously been “silent” on an issue cannot logically rule out the possibility of reasonable doubt. Indeed, if domestic courts were only obliged to refer questions *that the ECJ had already addressed*, that would render the reference mechanism rather pointless. The failure to make a reference to the ECJ, in light of judicial admissions in one of the higher courts that the matter is not *acte clair*, and the failure of the court of last instance even to discuss the preliminary reference duty criteria, while admitting that the matter had not been addressed by the ECJ, points to this being a manifest breach of Article 267 that directly obstructs the realization of rights conferred by EU law, creating direct causal link between the breach and the loss sustained by *Zambrano* families – paving the way for a possible future State liability claim under *Köbler*.

### 4.3 The concept is currently in a dynamic state of evolution

The fact that the area of *Zambrano* rights is in a dynamic state of evolution is evident from the flurry of preliminary references stemming from, and drawing upon, *Zambrano*. As Elias LJ acknowledged, the status is a recent judicial creation “of uncertain scope” and the ECJ is in a current, constant state of revisiting and refining that scope. Initially this was to curb the personal scope; in *McCarthy*,it appeared to confine the status to carers of EU national children/dependents, and in *Dereci* it found that the “mere fact it might appear desirable” for a third country national to remain resident to keep a family together was not enough to trigger the status.[[152]](#footnote-152) The Court has further been asked whether it is lawful to refuse a residence permit to a second third-country-national parent, (it is, unless such refusal amounts to a deprivation of the genuine enjoyment of EU citizenship rights for the EU national child);[[153]](#footnote-153) whether nationals of other States can derive rights from Article 20 TFEU (they cannot,[[154]](#footnote-154) especially if covered by other provisions of secondary law),[[155]](#footnote-155) and whether Member States could refuse residence applications from third country nationals (all adults, bar one who was three weeks from majority) seeking to join an own-national adult on whom they were not dependent and where they were not part of his household, (they can, unless that own national would be deprived of the genuine enjoyment of his EU citizenship rights).[[156]](#footnote-156) It has not all been about setting limits; the Court has on occasion required Member States not to be too restrictive. They cannot automatically expel persons convicted of criminal offences if they fall within the principles of *Zambrano,*[[157]](#footnote-157) nor can they automatically refuse *Zambrano* rights on the grounds of the carer having a criminal record.[[158]](#footnote-158) And, as explored already, *Zambrano* rights should not be refused solely on the ground that there was another person who could assume care of the own State national child, unless the best interests of the child had been considered,[[159]](#footnote-159) or (as established in a case post-dating *HC*) solely on the ground that the third-country national is the subject of an entry ban: the relationship of dependency must still be examined.[[160]](#footnote-160)

This abundance of references means we are in a situation echoing that captured by Advocate General Bot in *Ferreira da Silva*: “The cases which are successively brought before the Court allow it to refine the scope of that concept. *The case-law in question is therefore constantly evolving*. That peculiarity should have led the Supremo Tribunal de Justiça to exercise caution before deciding not to bring the matter before the Court.”[[161]](#footnote-161)

The much-referred issue of when *Zambrano* rights are triggered is still in flux, while the question of exactly what those rights are is at an even more incipient stage of development. That it is open to so many different possible developments and interpretations is further indicated by the quantity of debate and commentary it has generated. Here, I echo Kornezov’s suggestion that legal academic sources be considered when establishing whether a matter is *acte clair*, as they are “external sources of information about the way a given legal rule is construed in the wider legal community”.[[162]](#footnote-162)

It is hard to ignore the wealth of academic commentary on the unclear relationship between *Zambrano* status and access to equal treatment rights, social assistance, and/or protection of fundamental rights. Commentary directly following the *Zambrano* case drew attention to unanswered questions about the material scope of the substance of rights doctrine, and implications for benefit eligibility. Van Eijken and de Vries immediately highlighted questions that are likely to need answering by the ECJ – including whether those reliant on Article 20 TFEU would be entitled to benefits.[[163]](#footnote-163) Others noted that the *Zambrano* ruling did not mention conditions akin to those in Directive 2004/38 – implying that it does entail a right to equal treatment[[164]](#footnote-164) without an expectation that claimants show sufficient resources or sickness insurance, or else noted the lack of clarity on the material rights at issue.[[165]](#footnote-165)

If we fast-forward to the Court of Appeal’s judgment in *Sanneh*, Lady Arden’s judgment actually included an oblique reference to commentary, stating that she drew “attention to the scholarship on *Zambrano* carers in the judgment of Elias LJ in *Harrison*”.[[166]](#footnote-166) However, she said nothing about it, and neglected to mention that only one item of scholarship was mentioned in *Harrison*, which did not actually support the conclusions she drew. Elias LJ had acknowledged that a piece (by Davies)[[167]](#footnote-167) supported the argument that “the position in EU law is at least fluid, that the current state of the law is not entirely coherent, and that the precise scope of the *Zambrano* principle remains uncertain.”[[168]](#footnote-168) Following *Sanneh*, further analyses supported the conclusion that a preliminary reference would be necessary when the case reached the Supreme Court.[[169]](#footnote-169)

Later commentary, since the *HC* hearing, could not have informed the court in that case, but it offers further support to the argument that *Zambrano* was not clear on the question of benefit eligibility,[[170]](#footnote-170) and that the Supreme Court failed to act when “presented with a perfect opportunity to seek clarification from the Court of Justice … on the nature and scope of children’s EU citizenship status in a Zambrano-carer context.”[[171]](#footnote-171) In sum, if one thing is clear from the academic commentary, it is that the scope of *Zambrano* rights is not clear, especially with regard to benefit entitlement and fundamental rights. This could have provided some indication of “reasonable doubt” – had the Supreme Court deigned even to consider the *acte clair* test. However, faced with appellants specifically requesting a preliminary reference as a key objective of their case, the Supreme Court, remarkably, barely even mentions the possibility. Lord Carnwath’s lead judgment, representing the opinion of four out of the five presiding judges, *does not mention it at all*. Lady Hale’s judgment outlines her reasons for reaching broadly the same substantive conclusions as Lord Carnwath about the case, and then adds in the final sentence, in a rather disjointed fashion, “for these reasons, I agree that there is no question to be referred to the Court of Justice of the European Union”. But she had not at any point mentioned or discussed the request or argument for such a reference, and it is not enough for a judge to simply say they have reached their own opinion and have chosen not to make a reference. There should be *some* mention of what should be considered when deciding whether or not to make a reference – and in this case, *some* claim that the matter is *acte clair*. But the judges ignore the question, perhaps because they would struggle to credibly claim there was anything approaching clarity at EU level on the matter.

The failure to engage with appellants’ specific requests for a preliminary reference, or to give explicit reasons for refusing that reference, not only breaches Article 267 TFEU, it also makes the court responsible for the continued breach of Article 20 TFEU, opening up a potential State liability claim under the *Köbler* principles. It could also trigger a claim under Article 6(1) ECHR. In *Dhabhi* v. *Italy*[[172]](#footnote-172) the ECtHR found that the court of last instance when declining to make a preliminary reference made “no reference to the applicant’s request for a preliminary ruling”, and pointed out that the judgment did not engage with any of the *CILFIT* exceptions,[[173]](#footnote-173) so there was a breach of Article 6(1) ECHR. In *Schipani* v. *Italy*,[[174]](#footnote-174) the ECtHR emphasized that national courts of last instance refusing to make a preliminary reference must refer to the specific “exceptionsprovided for by the case-law of the ECJ”, and summarized the three *CILFIT* exceptions.[[175]](#footnote-175) While Limante notes that the ECtHR is setting “only minimal requirements for the duty to state reasons for non-referral”,[[176]](#footnote-176) this is another low bar the UK Supreme Court has failed to meet.

## 5. Conclusion

Just as it was in 2011, the material scope of *Zambrano* rights remains a burning question, going to the heart of autonomous EU citizenship rights, an area of law undergoing rapid and ambiguous development. This is not a question to be properly decided on the basis of the intuitions of national courts – too little is clear from the ECJ’s own case law, and there is too much at stake. There is a risk of significant divergence in approach as to which rights attach to EU citizenship, what their substance is, and what States should do to ensure their genuine enjoyment. Yet when the UK’s restrictive interpretation, denying *Zambrano* carers any access to subsistence benefits, was challenged and reached the national court of last instance, that court failed in its duty to seriously consider a preliminary reference.

The substantive conclusions reached by the UK Supreme Court are problematic, and are far from the straightforward application of established EU legislative and case law principles. There is considerable reasonable doubt as to the material scope of *Zambrano*. The case was a dramatic development – establishing a new right to reside, and asserting some autonomous content to EU citizenship rights, not based on mobility. And it was – probably deliberately – presented to us wrapped in mystery. Is this a right to reside comparable to other EU citizenship-based rights to reside? Does the absence of a mention of limitations and conditions akin to those in Directive 2004/38 mean that the holders have unconditional equal treatment rights – or does it mean they have none at all? Is it a *sui generis*, unprecedented, stripped down right merely to be present and work, severed from the fundamental EU legal principle of equal treatment? Previous patterns of case law should serve as a warning against assuming that the ECJ condones a default of benefit-restriction.

The interpretation of *Zambrano* adopted by the Supreme Court assumes that the status itself carries no entitlements to equal treatment, or any right to any standard of living. Rather, people in such positions are only entitled to claim whatever theoretical provision might prevent them from being forced to leave the EU. Section 17 support – if it is provided – should prevent *complete* destitution, even if it leaves many recipients *mostly* destitute. There is no escaping the conclusion that it represents unequal treatment of the UK national children affected as compared to other UK national children and/or the children of EU nationals. It does not even provide second-class citizenship, but rather creates an underclass (recalling the £1 per day support offered by one local authority). And that is when the support *is* provided; the experience of NGOs, and the budgets involved, make clear that it frequently is not.

The ensuing, State-mandated poverty faced by *Zambrano* families cannot help but have severe consequences for the well-being and personal development of the children involved. This could trigger Article 20 TFEU through creating the risk of forced departure from the Union, or else through imperilling other rights attached to EU citizenship – namely equal treatment rights. In either case, Article 20 TFEU should be interpreted in light of the Charter of Fundamental Rights. The effects of the UK approach, driving *Zambrano* families into poverty, bring the measures within the ambit of Article 8 ECHR, and so by extension, Article 7 CFR. In a series of *Zambrano* cases, the ECJ has recognized the need to refer to Article 7, read in light of the Article 24 CFR duty to consider the best interests of the child, when deciding who should be covered, to prevent a deprivation of the genuine enjoyment of the substance of rights attaching to a child’s EU citizenship. But the UK courts found the Charter did not apply in *HC*, even though there is a strong possibility, that if Articles 7 and 24 CFR are relevant for finding a *deprivation* of genuine enjoyment of citizenship rights, they are equally relevant for identifying what those rights actually are. Those provisions should be read together with Article 21 CFR, precluding discriminatory treatment, to place the onus upon Member States to justify the differential treatment of own-national children compared with *Zambrano* carers. That justification should at least be logical and appropriate. It is not a high threshold, but the UK’s claimed legitimate objectives have failed to reach it.

Of course, given its recent regressive turn in Union citizenship case law,[[177]](#footnote-177) if the ECJ is at some point faced with the question of welfare rights and *Zambrano* families, it might reach similar conclusions to those of the UK Supreme Court – that an Article 20 TFEU right is genuinely different from other rights to reside, that it carries no equal treatment right, and is untouched by the general principles of EU law or by the Charter. It is possible that *Zambrano* rights are seen as lesser rights by EU institutions, as well as by the UK – as possibly indicated by their exclusion from the EU-UK Withdrawal Agreement.[[178]](#footnote-178) But even that would not alter the conclusion that procedurally, there has been a significant dereliction of duty to ask the question. As Kornezov has argued, the procedural matter needs to be dealt with separately from the substantive one[[179]](#footnote-179) – otherwise national courts of last instance could just roll the dice and second-guess the ECJ’s answers to unasked questions.

This article has drawn together a number of objective criteria to demonstrate that in the face of alternative possible interpretations, on any reading, this matter is not *acte clair*. While differences of opinion between lower and higher national courts is not itself determinative of reasonable doubt, it is a factor to take into account. Such differences are evident in the history of the *HC* cases, in particular the four *Merali* cases in the judgment preceding the Court of Appeal, and the First tier Tribunal judgment on *Sanneh*. But these go unmentioned by the Supreme Court. Furthermore, some degree of divergence between Member States is evident in the fact patterns of the cases that have made it to the ECJ; *Zambrano* itself arose out of an unemployment benefit claim, while the four cases under the *Chavez-Vilchez* umbrella were premised on *Zambrano* status creating entitlement to child benefits. Divergent national approaches may reflect different domestic interpretations of what is required by EU law. Other domestic cases also indicate a presumption of at least some benefit entitlement resulting from *Zambrano* status in both Belgium and the Netherlands, while the law in Germany seems relatively ambiguous. This is an area crying out for some clarity and consistency.

Going beyond the *Ferreira da Silva* criteria, the statements of the Court of Appeal and the Supreme Court themselves provide evidence of reasonable doubt, with the Court of Appeal judgments explicitly saying the matter was not *acte clair*. The Supreme Court judgment did not use the term and ignored the test for deciding whether to make a reference. But it repeatedly emphasized that the matter was not one that had been addressed by the ECJ, and used this to infer that it must therefore not be a matter of EU law. But the ECJ’s silence on an issue should not be interpreted as giving a definitive answer to an unasked question. As a matter of logic, the ECJ is supposed to receive questions with which it has not already engaged.

Elias LJ described the *Zambrano* right to reside as a “judicially created concept of uncertain scope”; this dynamic state of evolution should also have weighed in favour of a reference. The status has been, and continues to be, the subject of a host of preliminary references, indicating that it is in flux, as stressed in the Opinion of Advocate General Bot in *Ferreira da Silva*, as grounds for caution when ruling out reasonable doubt. That *Zambrano* is an ECJ work-in-progress is also evident in the wealth of legal commentary analysing and exposing the remaining ambiguities in the substance of rights doctrine – and pointing in particular to outstanding questions about welfare and fundamental rights.

Contrary to the apparent conviction of the UK Supreme Court, it is not open to courts of last instance to guess at what EU law requires in areas under current development, on which the ECJ has not yet had a chance to pronounce. Doubtless, in the post EU-referendum climate, and the controversial *Miller*[[180]](#footnote-180)litigation on Article 50 fresh in its memory, the Supreme Court would feel wary of inviting the ECJ to decide the lawfulness of any UK law, not least in an area as politically fraught as benefits for non-nationals. But squeamishness aside, it was obliged to at least address, methodically, the question of whether the matter was *acte clair*. And a robust, and honest application of the principles of Article 267 TFEU could only have resulted in an admission that the material scope of *Zambrano* is possibly the most obscure aspect of a thoroughly cryptic case. The Supreme Court’s disregard for the duty to refer is in itself a breach of EU law, and potentially of ECHR rights, too. If such a duty crystallizes anywhere, then it surely must do so here, around a case characterized by ambiguity, relating to a status in a state of flux, which has generated controversy, confusion, and speculation in legal systems and legal academic circles around the EU. This is an example of judicial gatekeeping, undermining the reference mechanism, contributing to a potential breach of Article 20 TFEU, and jeopardizing the development and consistency of EU law. If there is one thing that must have a Union meaning, to prevent the State-by-State unilateral modification of rights vested in EU law,[[181]](#footnote-181) it is the substance of rights attaching to EU citizenship.

Charlotte O’Brien[[182]](#footnote-182)\*

1. Case C-34/09, *Gerardo Ruiz Zambrano* v. *Office national de l'emploi (ONEm)*,EU:C:2011:124. [↑](#footnote-ref-1)
2. Nic Shuibhne, “Seven questions for seven paragraphs”, 36 EL Rev. (2011), 161. [↑](#footnote-ref-2)
3. On the “new vision” proposed by *Zambrano*, see Azoulai, “‘Euro-bonds’: The *Ruiz Zambrano* judgment or the real invention of EU citizenship”, 3 *Perspectives on Federalism* (2011), E-31; on the “controversial and historic step in the development of EU citizenship”, see Hinarejos, “Citizenship of the EU: Clarifying ‘genuine enjoyment of the substance’ of citizenship rights”, 71 CLJ (2012), 309, 312. [↑](#footnote-ref-3)
4. Case C-34/09, *Zambrano*, para 45. [↑](#footnote-ref-4)
5. E.g. on the problematic relationship between *Zambrano*, Case C-434/09, *McCarthy,* EU:C:2011:277, and Case C-256/11, *Dereci*, EU:C:2011:734, see Kochenov “The right to have what rights? EU citizenship in need of clarification”, 19 ELJ (2013), 502. [↑](#footnote-ref-5)
6. Case C-434/09, *McCarthy,* andCase C-256/11, *Dereci;* also Joined Cases C-356 & 357/11, *O & S,* EU:C:2012:776; Case C-40/11, *Iida,* EU:C:2012:69; Case C-87/12, *Ymeraga,* EU:C:2013:29; Case C-304/14, *CS,* EU:C:2016:674; Case C-115/15, *NA,* EU:C:2016:487; Case C-165/14, *Rendón Marín*, EU:C:2016:675; Case C-113/15, *Chavez-Vilchez,* EU:C:2017:354; Case C-82/16, *KA*,EU:C:2018:308. [↑](#footnote-ref-6)
7. Schedule 1, para 3 of the Immigration (European Economic Area) (Amendment) (No. 2) Regulations 2012, (SI 2012/2560), inserting sub-section (4)(a) to Regulation 15A into the Immigration (European Economic Area) Regulations 2006, (SI 2006/1003). [↑](#footnote-ref-7)
8. The Social Security (Habitual Residence) (Amendment) Regulations 2012 (SI 2012/2587), amending the Income Support (General) Regulations 1987 (SI 1987/1967). [↑](#footnote-ref-8)
9. The Child Benefit and Child Tax Credit (Miscellaneous Amendments) Regulations 2012 (SI 2012/2612), amending the Child Benefit (General) Regulations 2006 (SI 2006/223) [↑](#footnote-ref-9)
10. The Allocation of Housing and Homelessness (Eligibility) (England) (Amendment) Regulations 2012 (SI 2012/2588), amending the Allocation of Housing and Homelessness (Eligibility) (England) Regulations 2006 (SI 2006/1294). [↑](#footnote-ref-10)
11. From the Court of Appeal case *Harrison (Jamaica)* v. *Secretary of State for the Home Department* [2012] EWCA Civ 1736, 67; cited approvingly by Lord Carnwath in *HC* v. *SSWP* [2017] UKSC 73, 15. [↑](#footnote-ref-11)
12. *Sanneh & Ors* v. *SSWP* [2015] EWCA Civ 49. [↑](#footnote-ref-12)
13. *HC* v. *SSWP* [2017] UKSC 73. [↑](#footnote-ref-13)
14. Case C-333/13, *Dano,* EU:C:2014:2358. [↑](#footnote-ref-14)
15. Case 283/81, *CILFIT*, EU:C:1982:335; Case C-160/14, *Ferreira da Silva e Brito and Others*, EU:C:2015:565; Joined Cases C-72 & 197/14, *X & Van Dijk*, EU:C:2015:564; Case C-416/17, *Commission* v. *France*, EU:C:2018:811. [↑](#footnote-ref-15)
16. Case C-160/14, *Ferreira da Silva*, para 44. [↑](#footnote-ref-16)
17. Case C-34/09, *Zambrano*, para 42. [↑](#footnote-ref-17)
18. Section 17(6). [↑](#footnote-ref-18)
19. *Sanneh & Ors,* cited *supra* note 12, 171. [↑](#footnote-ref-19)
20. *Harrison,* cited *supra* note 11. Repeated in the Court of Appeal in *Sanneh* at 171. [↑](#footnote-ref-20)
21. Case C-333/13, *Dano*; Case C-67/14, *Alimanovic,* EU:C:2015:597; Case C-299/14, *García-Nieto*, EU:C:2016:114; Case C-308/14, *Commission* v. *United Kingdom,* EU:C:2016:436. [↑](#footnote-ref-21)
22. *Sanneh*, cited *supra* note 12, 122. [↑](#footnote-ref-22)
23. Case C-413/99, *Baumbast*,EU:C:2002:493. [↑](#footnote-ref-23)
24. *London Borough of Harrow* v. *Ibrahim & Anor* [2008] EWCA Civ 386. [↑](#footnote-ref-24)
25. Ibid, 54. [↑](#footnote-ref-25)
26. Ibid, 55. [↑](#footnote-ref-26)
27. Ibid, 49. [↑](#footnote-ref-27)
28. Case C-310/08, *Ibrahim*, EU:C:2009:641, paras. 52-3. [↑](#footnote-ref-28)
29. Case C-480/08, *Teixeira*, EU:C:2009:642,para 67. [↑](#footnote-ref-29)
30. Noting, however that *Teixeira* residence does not count towards the five years for permanent residence under Art. 16 of Directive 2004/38 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, O.J. 2004, L 158/77–123: Case C-529/11, *Alarape & Tijani,* EU:C:2013:290. [↑](#footnote-ref-30)
31. While the Court did not mention the primary law basis in *Teixeira*, it applied Regulation 1612/68, the basis of which was the free movement of worker Treaty provisions (Arts. 48 and 49 EEC). [↑](#footnote-ref-31)
32. *Sanneh,* cited *supra* note 12,26, 95; *HC*, cited *supra* note 13, 14, 28. [↑](#footnote-ref-32)
33. As they were in Case C-286/03, *Silvia Hosse*, EU:C:2006:125, para 52; Case C-457/12, *S,* EU:C:2014:136, para 33; Case C-456/12, *O,* EU:C:2014:135, para 36; and Case C-244/13, *Ogieriakhi*, EU:C:2014:2068, para 37. [↑](#footnote-ref-33)
34. And were described as derivative in Case C-529/11, *Alarape & Tijani*, paras. 26, 28, 29, 31, 49. [↑](#footnote-ref-34)
35. Case C-85/96, *Martinez Sala*, EU:C:1998:217, para 4; Case C-456/02, *Trojani,* EU:C:2004:488, paras. 40, 44; and Case C-184/99, *Grzelczyk,* EU:C:2001:458, para 30. [↑](#footnote-ref-35)
36. Case C-212/06, *Government of the French Community and Walloon Government* v. *Flemish Government,* EU:C:2008:178; Case C-300/04, *Eman and Sevinger*, EU:C:2006:545. [↑](#footnote-ref-36)
37. The UK has not signed or ratified Art. 1, Protocol 12 which provides for a free-standing right to non-discrimination, so ECHR non-discrimination claims within the UK must rely on the parasitic Art. 14 provision, thus needing to be coupled with another ECHR right. [↑](#footnote-ref-37)
38. Appl. Nos. 65731/01 & 65900/01, *Stec* v. *United Kingdom* (Admissibility) [2005] ECHR 924. [↑](#footnote-ref-38)
39. Appl. no. 59140/00, *Okpisz* v. *Germany* (2006) 42 EHRR 32. [↑](#footnote-ref-39)
40. UN CRC Art 3. [↑](#footnote-ref-40)
41. *HC*, cited *supra* note 13, 43. [↑](#footnote-ref-41)
42. *Sanneh*, cited *supra* note 12, 121. [↑](#footnote-ref-42)
43. *R (G)* v. *Barnet LBC* [2003] UKHL 57. [↑](#footnote-ref-43)
44. Public Law Project, “Social services support for destitute migrant families a guide to support under s 17 Children Act 1989”, (PLP, 2014) p. 30 available at <publiclawproject.org.uk/wp-content/uploads/data/resources/121/s-17-updated-July-2014-12.9.14.pdf> all websites last accessed 15 Aug. 2019. [↑](#footnote-ref-44)
45. Ibid., Part 5, pp. 25-32. [↑](#footnote-ref-45)
46. O’Brien, *Unity in Adversity: EU Citizenship, Social Justice and the Cautionary Tale of the UK* (Hart, 2017), p. 135. [↑](#footnote-ref-46)
47. Ibid., p. 18. [↑](#footnote-ref-47)
48. *HC,* cited *supra* note 13,44. [↑](#footnote-ref-48)
49. Price and Spencer, “Safeguarding Children From Destitution: Local Authority Responses To Families With ‘No Recourse To Public Funds’”, June 2015, (Oxford: COMPAS), 43, available at <www.compas.ox.ac.uk/wp-content/uploads/PR-2015-No\_Recourse\_Public\_Funds\_LAs.pdf>. [↑](#footnote-ref-49)
50. Ibid., p. 44. [↑](#footnote-ref-50)
51. Ibid., emphasis added. [↑](#footnote-ref-51)
52. Threipland, “A place to call home A report into the standard of housing provided to children in need in London”, Hackney Community Law Centre & Hackney Migrant Centre (2015), p. 6 available at: <www.hclc.org.uk/wp-content/uploads/2015/12/A-Place-To-Call-Home-Electronic-Report1.pdf>. [↑](#footnote-ref-52)
53. Price and Spencer, op. cit. *supra* note 49. [↑](#footnote-ref-53)
54. Regulation (EEC) 1612/68 on freedom of movement for workers within the Community, O.J. 1968, L 257/2, Art. 12. [↑](#footnote-ref-54)
55. Regulation (EU) 492/2011 on freedom of movement for workers within the Union, O.J. 2011, L 141/1 Art. 10. [↑](#footnote-ref-55)
56. Case C-224/98, *Marie-Nathalie D’Hoop* v. *Office national de l’emploi*, EU:C:2002:432. See O’Brien, “Real links, abstract rights and false alarms: The relationship between the ECJ’s ‘real link’ case law and national solidarity”, 33 EL Rev. (2008), 643. [↑](#footnote-ref-56)
57. Azoulai, op. cit. *supra* note 3, E-34. [↑](#footnote-ref-57)
58. Children in migrant families disproportionately live in poverty: Rutter “Migration, migrants and child poverty”, 138 *Poverty* (2011), 6. See also O'Brien, “I trade, therefore I am: legal personhood in the European Union”, 50 CML Rev. (2013), 1643, 1658-9. [↑](#footnote-ref-58)
59. The Children’s Society, *A good childhood for every child? Child Poverty in the UK,* (2013), available at <www.childrenssociety.org.uk/sites/default/files/ tcs/2013\_child\_poverty\_briefing\_1.pdf>. [↑](#footnote-ref-59)
60. Cooper and Stewart, “Does money affect children’s outcomes? An update”, (2017) Case paper 203, LSE. [↑](#footnote-ref-60)
61. Ayre, “Poor mental health: The links between childhood poverty and mental health problems”, (2016, The Children’s Society). Available at: <www.childrenssociety.org.uk/sites/default/files/poor\_mental\_health\_report.pdf>. [↑](#footnote-ref-61)
62. Ferguson, Bovaird and Mueller, “The impact of poverty on educational outcomes for children”, 12 *Paediar Child Health* (2007), 701. [↑](#footnote-ref-62)
63. Griggs and Walker, “The costs of child poverty for individuals and society: a literature review” (2008, Joseph Rowntree Foundation). Available at: **<**www.jrf.org.uk/sites/default/files/jrf/migrated/files/2301-child-poverty -costs.pdf>. [↑](#footnote-ref-63)
64. Which encompasses matters of “outside interference” with the development “of the personality of each individual in his relations with other human beings”, and their “right to establish and develop relationships with other human beings and the outside world”: *Botta* v. *Italy,* [1998] 26 EHRR 241, 32; *S and Marper* v. *UK,* (2009), 48 EHRR 50, 66. [↑](#footnote-ref-64)
65. Examples of welfare benefit cases that fall within the ambit of Art. 8 for the purposes of an Art. 14 claim are: *R (on the application of Carmichael and Rourke)* v. *Secretary of State for Work and Pensions* and *R (on the application of Rutherford and another)* v. *Secretary of State for Work and Pensions*, [2016] UKSC 58. [↑](#footnote-ref-65)
66. On the different ways the Charter might be invoked in a social security context, see Paju, *European Union and Social Security Law* (Hart, 2017), Ch. 7. [↑](#footnote-ref-66)
67. *Sanneh*, cited *supra* note 12, 117; *HC*, cited *supra* note 13, 28. [↑](#footnote-ref-67)
68. *HC*, cited *supra* note 13, 28. [↑](#footnote-ref-68)
69. Van Eijken and Phoa, “The scope of Article 20 TFEU clarified in *Chavez-Vilchez*: Are the fundamental rights of minor EU citizens coming of age?”, 43 EL Rev. (2018), 949, 956. [↑](#footnote-ref-69)
70. See the Opinion of A.G. Wathelet in Case C-115/15, *Secretary of State for the Home Department* v. *NA*, EU:C:2016:259, paras. 125-6. [↑](#footnote-ref-70)
71. Case C-113/15, *Chavez-Vilchez,* para 70. See also para 71. [↑](#footnote-ref-71)
72. Case C-333/13, *Dano*, para 91. [↑](#footnote-ref-72)
73. *HC*, cited *supra* note 13, 28. [↑](#footnote-ref-73)
74. And EU law may require exceptions to territorial conditions: Case C-287/05, *Hendrix,* EU:C:2007:494. [↑](#footnote-ref-74)
75. Case C-140/12, *Brey,* EU:C:2013:565. [↑](#footnote-ref-75)
76. Ibid, paras. 70-72; 77-8. [↑](#footnote-ref-76)
77. Case C-333/13, *Dano*, para 45, (question 4). [↑](#footnote-ref-77)
78. Though note that the ECJ has not always considered the Charter bound to a strict remit of national rules that "implement" EU law. As Dougan explains, “*Kücükdeveci* [Case C-555/07, EU:C:2010:21] has been interpreted as authority for a broader proposition: that the Member State will act within the scope of Union law, and is thus bound by the general principles/Charter, whenever the exercise of its own regulatory competence happens to touch upon a matter which is also subject to some form of legislative intervention by the Union itself.” In “Judicial review of Member State action under the general principles and the Charter: Defining the ‘Scope of Union Law’”, 52 CML Rev, 1201, 1224. Had the Court followed its own logic in *Dano*, Dougan points out, it would have had to find the Charter applicable. [↑](#footnote-ref-78)
79. *HC*, cited *supra* note 13, 28. [↑](#footnote-ref-79)
80. *Merali & Ors* v. *Birmingham City Council*, BM30027A, BM30054A, BM30079A, BM30078A,

    BM30053A, BM30046A, Birmingham Civil Justice Centre, 19 Sept. 2013. [↑](#footnote-ref-80)
81. Case C-133/15, *Chavez-Vilchez*, para 34. [↑](#footnote-ref-81)
82. Ibid., para 36. [↑](#footnote-ref-82)
83. Opinion of A.G. Szpunar in Case C-133/15, *Chavez-Vilchez*, EU:C:2016:659, para 45. [↑](#footnote-ref-83)
84. Case C-133/15, *Chavez-Vilchez*, para 72. [↑](#footnote-ref-84)
85. On the relationship between Art. 8 ECHR and the best interests duty, see O’Brien, “‘Done Because We Are Too Menny’: The two-child rule promotes poverty, invokes a narrative of welfare decadence, and abandons children’s rights”, 26 *International Journal of Children’s Rights*, (2018), 700; and O’Brien, “What is the point of social security? Discriminatory and damaging effects of the two-child limit justified by the ‘lottery of birth’”, (2019) *Journal of Social Welfare and Family Law*, published online 31 July 2019. [↑](#footnote-ref-85)
86. Lady Hale however declared herself “unimpressed” with the justifications put forward. [↑](#footnote-ref-86)
87. *Sanneh*, cited *supra* note 12, 96; *HC*, cited *supra* note 13, 32. [↑](#footnote-ref-87)
88. Ibid. [↑](#footnote-ref-88)
89. *Sanneh*, cited *supra* note 12, 116. [↑](#footnote-ref-89)
90. *HC*, cited *supra* note 13, 32 [↑](#footnote-ref-90)
91. Applications Nos. 65731/01 & 65900/01, *Stec and Others* v. *the United Kingdom,* [2006] ECHR 393, 52. [↑](#footnote-ref-91)
92. The difference in treatment between own nationals in Case C-300/04, *Eman & Sevinger*, for instance, made no sense in contrast with the measures granting the right at issue to others *–* see para 59. [↑](#footnote-ref-92)
93. Single parents “face a disproportionate risk of poverty”, and are “more likely than the average employee to be trapped in low-paid work”: Rabindrakumar, “One in four A profile of single parents in the UK”, Gingerbread Report (February 2018), available at: < www.gingerbread.org.uk/wp-content/uploads/2018/02/One-in-four-a-profile-of-single-parents-in-the-UK.compressed.pdf>, pp. 10, 7. [↑](#footnote-ref-93)
94. Case C-224/98, *D’Hoop,* EU:C:2002:432, para 39. [↑](#footnote-ref-94)
95. Case C-192/05, *Tas-Hagen and Tas,* EU:C:2006:676,para 38. [↑](#footnote-ref-95)
96. In *Rottman*, the ECJ referred to “the special relationship of solidarity and good faith between [a Member State] and its nationals and also the reciprocity of rights and duties, which form the which form the bedrock of the bond of nationality”: Case C-135/08, *Rottman,* EU:C:2010:104. [↑](#footnote-ref-96)
97. See O’Brien, annotation of Case C-310/08 *Ibrahim*, Case C-480/08 *Teixeira,* 48 CML Rev. (2011), 203. [↑](#footnote-ref-97)
98. See O’Brien (2019), op. cit. *supra* note 85. [↑](#footnote-ref-98)
99. *ZH Tanzania* v. *Secretary of State for the Home Department* [2011] UKSC 4, 44. [↑](#footnote-ref-99)
100. Email correspondence with Ranjiv Khubber, acting for the appellant in *HC*. [↑](#footnote-ref-100)
101. *HC,* cited *supra* note 13,53. [↑](#footnote-ref-101)
102. Fenger and Broberg, “Finding light in the darkness: On the actual application of the *acte clair* doctrine”, 30 YEL (2011), 180, Sarmiento, “*Cilfit* and *Foto-frost*: Constructing and Deconstructing Judicial Authority in Europe”, in Maduro and Azoulai (Eds.), *The Past and Future of EU Law: The Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty* (Hart, 2010); Paunio, *Legal Certainty in Multilingual EU Law: Language, Discourse and Reasoning at the European Court of Justice* (Routledge, 2013). [↑](#footnote-ref-102)
103. Opinion of A.G. Wahl in Joined Cases C-72 & 197/14, *X & van Dijk,* EU:C:2015:319, para 62. [↑](#footnote-ref-103)
104. Case 283/81, *CILFIT*, para 16. [↑](#footnote-ref-104)
105. Ibid, para 18. [↑](#footnote-ref-105)
106. Ibid, para 19. [↑](#footnote-ref-106)
107. Ibid, para 20. [↑](#footnote-ref-107)
108. Limante, “Recent developments in the *acte clair* case law of the EU Court of Justice: Towards a more flexible approach”, 54 JCMS (2016), 1384, 1387. [↑](#footnote-ref-108)
109. Case C-160/14, *Ferreira da Silva*, para 37; Case C-322/16, *Global Starnet Ltd*, EU:C:2017:985, para 24; Case C-381/16, *Salvador Benjumea Bravo de Laguna* v. *Esteban Torras Ferrazzuolo*, EU:C:2017:889, para 29; Case C-234/17, *XC and Others* v. *Generalprokuratur*, EU:C:2018:853, para 43. [↑](#footnote-ref-109)
110. Case C-587/17 P, *Belgium* v. *Commission,* EU:C:2019:75, para 77. [↑](#footnote-ref-110)
111. Joined Cases C-72 & 197/14, *X & van Dijk.* [↑](#footnote-ref-111)
112. Case C-160/14, *Ferreira da Silva*, para 43. [↑](#footnote-ref-112)
113. A.G. Opinion in Case C-160/14, *Ferreira da Silva*, EU:C:2015:390, para 102. [↑](#footnote-ref-113)
114. Ibid, para 89. [↑](#footnote-ref-114)
115. Ibid, para 94. [↑](#footnote-ref-115)
116. Ibid, para 97. [↑](#footnote-ref-116)
117. Case C-224/01, *Köbler*,EU:C:2003:513, para 59. [↑](#footnote-ref-117)
118. Ibid, para 35. [↑](#footnote-ref-118)
119. Ibid, para 55. [↑](#footnote-ref-119)
120. Case C-416/17, *Commission* v. *French Republic.* [↑](#footnote-ref-120)
121. Ibid, para 102. [↑](#footnote-ref-121)
122. Ibid, para 111. [↑](#footnote-ref-122)
123. Ibid, para 112. [↑](#footnote-ref-123)
124. *SoSWP* v. *JS* [2013] UKUT 490 (AAC).  [↑](#footnote-ref-124)
125. *HC, R (On the Application Of)* v. *Secretary of State for Work and Pensions & Or*s [2013] EWHC 3874 (Admin). [↑](#footnote-ref-125)
126. *Merali & Ors* v. *Birmingham City Council*, BM30027A, BM30054A, BM30079A, BM30078A,

     BM30053A, BM30046A, Birmingham Civil Justice Centre, 19 Sept. 2013. [↑](#footnote-ref-126)
127. *Scott* v. *London Borough Council*, 3CR02096, Croydon County Court, 17 Jan. 2014. [↑](#footnote-ref-127)
128. *Merali*, cited *supra* note 126, 46. [↑](#footnote-ref-128)
129. Ibid, 47. [↑](#footnote-ref-129)
130. Quoted in *SoSWP* v. *JS*, 7. [↑](#footnote-ref-130)
131. Cour du travail de Bruxelles (Higher Labour Court Brussels), Number: RG n° 2010/AB/333, 22 Dec. 2011. [↑](#footnote-ref-131)
132. Ibid, 2. [↑](#footnote-ref-132)
133. Ibid, 10. [↑](#footnote-ref-133)
134. Cour constitutionnelle (Belgium), Number: 12/2013, 21 Feb. 2013, B.12.2-3. [↑](#footnote-ref-134)
135. Under Art. 57 Law of 8/7/1976; Ibid, B.13.1. [↑](#footnote-ref-135)
136. ECLI:NL:CRVB:2012:BY5173, Centrale Raad van Beroep, Number: 10-4069 AKW, 17 Dec. 2012. [↑](#footnote-ref-136)
137. ECLI:NL:RVS:2013:1846, Raad van State, Number: 201303327/1/A2, 6 Nov. 2013, 3.3. [↑](#footnote-ref-137)
138. Minderhoud, JV 2014/113, Hoge Raad (Supreme Court of the Netherlands), Number: 13/00409, 14 Feb. 2014, 13/00409 (annotation). [↑](#footnote-ref-138)
139. ECLI:NL:HR:2014:277, Hoge Raad, Number: 13/00409, 14 Feb. 2014. [↑](#footnote-ref-139)
140. Eijkhout, USZ 2014/156, Hoge Raad, Number: 13/00409, 14 Feb. 2014 (annotation). [↑](#footnote-ref-140)
141. Klaassen, “*Chavez-Vilchez*, Court of Justice of the European Union 10 May 2017, C-133/15”, in Brouwer, Kok and Zwaan (Eds.), *Rechtspraak Vreemdelingenrecht* *1950-2019*: *Landmark Cases on Asylum and Immigration Law* (Ars Aequi Libri, 2019). [↑](#footnote-ref-141)
142. Judgment of 12 July 2018; DE: BVerwG: 2018: 120718U1C16.17.0; 34. [↑](#footnote-ref-142)
143. Email correspondence with Wollenschläger. [↑](#footnote-ref-143)
144. *Sanneh*, cited *supra* note 12, 125. [↑](#footnote-ref-144)
145. Ibid, 128. [↑](#footnote-ref-145)
146. Ibid, 172. [↑](#footnote-ref-146)
147. *HC*, cited *supra* note 13, 9. [↑](#footnote-ref-147)
148. Ibid, 11. [↑](#footnote-ref-148)
149. Ibid, 13. [↑](#footnote-ref-149)
150. Ibid, 47. [↑](#footnote-ref-150)
151. Ibid. [↑](#footnote-ref-151)
152. Case C-256/11, *Dereci,* para 68. [↑](#footnote-ref-152)
153. Joined Cases C-356 & 357/11, *O & S.* [↑](#footnote-ref-153)
154. Case C-40/11, *Iida.* [↑](#footnote-ref-154)
155. Case C-115/15, *NA.* [↑](#footnote-ref-155)
156. Case C-87/12, *Ymeraga.* [↑](#footnote-ref-156)
157. Case C-304/14, *CS.* [↑](#footnote-ref-157)
158. Case C-165/14, *Rendón Marín.* [↑](#footnote-ref-158)
159. Case C-113/15, *Chavez-Vilchez.* [↑](#footnote-ref-159)
160. Case C-82/16, *KA.* [↑](#footnote-ref-160)
161. A.G. Opinion in Case C-160/14, *Ferreira da Silva*, para 97. [↑](#footnote-ref-161)
162. Kornezov, “The new format of the *acte clair* doctrine and its consequences”, 53 CML Rev. (2016), 1317, 1337. [↑](#footnote-ref-162)
163. Van Eijken and de Vries, “A new route into the promised land? Being a European citizen after *Ruiz Zambrano*”, 36 EL Rev. (2011), 704, 713. [↑](#footnote-ref-163)
164. Van Elsuwege and Kochenov, “On the limits of judicial intervention”, 13 *European Journal of Migration and Law* (2011), 443, 454; Hailbronner and Thym noted that the judgment gives rise to a “seemingly unconditional residence status”, but suggested that the Court had avoided the issue to “leave room for later refinement, which will also allow the Court to take on board political and academic criticism”: annotation of Case C-34/09, *Zambrano*, 48 CML Rev. (2011), 1253, 1257, 1260. Lansbergen and Miller, also highlight the question of whether the right of residence is conditional upon sufficient resources, noting that the “issue throughout the case is ambiguous”: “European citizenship rights in internal situations: An ambiguous revolution?”, 7 EuConst (2011), 287, 298. [↑](#footnote-ref-164)
165. Guild, “The Court of Justice of the European Union and Citizens of the Union: A Revolution

     Underway? The *Zambrano* judgment of 8 March 2011”, *Global Governance Programme Blog,* 17 March 2011, <globalcit.eu/the-court-of-justice-of-the-european-union-and-citizens-of-the-union-a-revolution-underway-the-zambrano-judgment-of-8-march-2011/>; Morris, “European Citizenship and the right to move freely: internal situations, reverse discrimination and fundamental rights”, 18 MJ (2011), 186-7. Also Hailbronner and Thym, op. cit. previous note. [↑](#footnote-ref-165)
166. *Sanneh*, cited *supra* note 12, 32. [↑](#footnote-ref-166)
167. Davies, “The family rights of European children: expulsion of non-European parents”, *EUI Working Papers*, RSCAS 2012/04, Robert Schuman Centre for Advanced Studies, EUDO Citizenship Observatory, available at: < cadmus.eui.eu/bitstream/handle/1814/20375/RSCAS\_2012\_04.pdf?sequence=1&isAllowed=y>. [↑](#footnote-ref-167)
168. *Harrison*, cited *supra* note 11, 62. [↑](#footnote-ref-168)
169. Moffatt, “Sanneh and others v. Secretary of State for Work and Pensions and others”, 29 *Journal of Immigration, Asylum and Nationality Law* (2015), 232, 233; O’Brien, “‘Hand-to-mouth’ citizenship: Decision time for the UK Supreme Court on the substance of *Zambrano* rights, EU citizenship and equal treatment”, 38 *Journal of Social Welfare and Family Law* (2016), 228. [↑](#footnote-ref-169)
170. The “question of the relation between Art. 20 TFEU, social benefits and the requirement not to become a burden on State finances… is still left unanswered”, van Eijken and Phoa, op. cit. *supra* note 69, 970. “[I]t must be conceded that the CJEU’s jurisprudence has often been less than clear” on the scope of *Zambrano* rights, Cousins, “The social security right of Zambrano carers under EU and UK law: R. (HC) v. Secretary of State for Work and Pensions”, 25 *Journal of Social Security Law* (2018), 120, 125. The “protection of a child’s unconditional right to reside in the territory of the State of his nationality would be nullified”: Kroeze, “The substance of rights: new pieces of the Ruiz Zambrano puzzle”, 44 EL Rev. (2019), 238, 247-8. [↑](#footnote-ref-170)
171. Stalford, “Benefits, babies and the insignificance of being British”, 40 *Journal of Social Welfare and Family Law* (2018), 370, 374. [↑](#footnote-ref-171)
172. *Dhahbi* v. *Italy* (Appl. No. 17120/09), 8 April 2014. [↑](#footnote-ref-172)
173. Ibid., 33. [↑](#footnote-ref-173)
174. *Schipani* v. *Italy* (App. No. 38369/09), 21 July 2015. [↑](#footnote-ref-174)
175. Ibid., 69. [↑](#footnote-ref-175)
176. Limante, op. cit. *supra* note 108, 1395. [↑](#footnote-ref-176)
177. Spaventa, “Earned citizenship: Understanding Union citizenship through its scope”, in Kochenov (Ed.), *EU Citizenship and Federalism: The Role of Rights* (Cambridge University Press, 2017), p. 206. [↑](#footnote-ref-177)
178. Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, and the Political declaration setting out the framework for the future relationship between the European Union and the United Kingdom, O.J. 2019, C 66/I. See O’Brien, “A failed duty of care? the draft EU-UK Withdrawal Agreement denies unpaid carers key rights”, UK in a Changing Europe, 27 Nov. 2018, <ukandeu.ac.uk/a-failed-duty-of-care-the-draft-eu-uk-withdrawal-agreement-denies-unpaid-carers-key-rights/>. [↑](#footnote-ref-178)
179. Kornezov, op. cit. *supra* note 162, 1335. [↑](#footnote-ref-179)
180. *Miller & Anor, R (on the application of)* v. *Secretary of State for Exiting the European Union (Rev 3)* [2017] UKSC 5. [↑](#footnote-ref-180)
181. The Court’s reasoning as to why the concept of migrant worker needed a Community meaning; Case 75/63, *Hoekstra,* EU:C:1964:19, para 1. [↑](#footnote-ref-181)
182. \* York Law School, University of York. I owe considerable thanks to a host of excellent and generous colleagues – Nicolas Rennuy at York Law School has provided incredible help in accessing and interpreting Belgian and Dutch case law and legislation, as well as huge support throughout the production of this work. Thanks to Paul Minderhoud (Radboud University), for sharing materials, and his analysis of key Dutch cases, and to Ferdinand Wollenschlager (Augsburg University) for his research into the German position on *Zambrano* carers. Thanks to Ranjiv Khubber for discussing the objectives of the appellants in the *HC* litigation, and to His Honour Justice McKenna for sharing the text of the *Merali* judgment. Thanks to the anonymous reviewers for their constructive feedback. And finally, thanks to the attendees of the Common Market Law Review on Tour conference in Warsaw, October 2018, for their feedback and encouragement on the first iteration of several of the ideas here presented. [↑](#footnote-ref-182)