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| Case Comment  ***Benefits, Babies and the Insignificance of Being British:***  ***R (on the application of HC) (Appellant) v Secretary of State for Work and Pensions and others (Respondents)* [2017] UKSC 73**  Helen Stalford  *European Children's Rights Unit, School of Law and Social Justice, University of Liverpool, UK*  **Background to *HC* and the special status of ‘*Zambrano* Carers’**  The Supreme Court ruling in *HC* concerned an Algerian woman who had been living in the UK since 2008, having arrived with leave but then over-stayed. In 2010 she married a British national on whom she was financially dependent. They had their first child together in August 2011, but the relationship ended in late 2012 as a result of domestic violence, shortly before the birth of HC’s second child in March 2013. After an initial refusal, the local council agreed to provide temporary housing and financial support for HC and her children to the tune of just over £80 per week. This was in fulfilment of its obligation under section 17 of the Children Act 1989 to “safeguard and promote the welfare of children within their area who are in need”. Notwithstanding her own precarious immigration status, it was accepted that HC was entitled to remain in the UK as the primary carer of the two children. This special status has been available to the third country national carers of British national children since the seminal ruling of the Court of Justice of the European Union (CJEU) in *Ruiz Zambrano v Office national de l’emploi* (Case C-34/09 (*ONEm)* [2011] ECR I-01177 8 March 2011).  In *Zambrano* it was decided that EU citizenship, insofar as it is a ‘fundamental status’, confers on all EU nationals a right to reside in their state of nationality even if the national in question has not exercised free movement between the Member States (hitherto regarded as the primary ‘trigger’ of EU citizenship entitlement). Importantly, *Zambrano* extended the benefits of EU citizenship to *children* in a very practical and direct way by precluding any domestic measures that would have the effect of depriving them of genuinely enjoying the rights connected to that status. The CJEU thus concluded that refusing their third country national parents the right to remain, work and claim benefits in the host EU Member State would have such an effect since it would probably “…lead to a situation where those children, citizens of the European Union, would have to leave the territory of the European Union in order to accompany their parents.” (para 44).  In the light of this ruling, the UK Immigration Regulations were amended to allow all those in a ‘*Zambrano* carer’ relationship to live and work in the UK (Immigration (European Economic Area) Regulations 2006 (SI 2006/100). This, in turn, offered a welcome new route for third country nationals wishing to secure residence and work-related rights in an otherwise hostile immigration regime (O’Brien, 2016; Stalford and Woodhouse, 2016). Their enthusiasm was soon dampened, however, by a succession of CJEU cases that limited the scope of the *Zambrano*-carer status,[[1]](#footnote-1) and by the introduction of legislation in the UK which limited the *Zambrano* ruling to a basic right to reside and work as the child’s carer parent. Concurrent regulations were introduced precluding such carers from accessing non-contributory social security assistance otherwise available to nationals, notably income-related benefits, child benefit and child tax credit, and housing and homelessness assistance.[[2]](#footnote-2) Such measures sought to hammer home that a *Zambrano*-based right to reside does not bring with it a right to any particular quality of life or, indeed, to any particular standard of living, even when the parent is unable to work (due to caring commitments, for instance), and even when the family have no other family support on which to draw (due, in Mrs HC’s case, to her estrangement from her abusive husband and to the fact that her wider family network are in another country).  Mrs HC challenged the UK Regulations as discriminatory on the basis that, in being granted a right of residence as a *Zambrano* carer, she and her children are automatically entitled to the same social security assistance as nationals of the host state in accordance with the equality principle contained in Article 21 of the EU Charter of Fundamental Rights. This, she argued, is also supported by Article 14 of the European Convention of Human Rights (ECHR) read in conjunction with Article 8 ECHR (right to respect for private and family life) and Article 1 of the first protocol (right to peaceful enjoyment of property).  **The Supreme Court Judgment in *HC***  The Supreme Court unanimously dismissed HC’s appeal on the following grounds. First, it responded that the entitlement of *Zambrano* carers to the same social security assistance as nationals of the host state only applies to EU Member States when they are implementing EU law and that EU law requires no more for the children of a *Zambrano* carer than the practical support necessary for them to remain in the EU*.* Insofar as the regulations at issue are deemed to fall outside the scope of EU law (they are derived from national welfare legislation rather than EU law), they cannot be subject to the EU equality obligation contained in the Charter. Moreover, the court concluded, *Zambrano* carers and their children can fall back on the last resort provision for children in need provided by s. 17 Children Act 1989, which should be sufficient to prevent the family from having to leave the UK due to a lack of basic resources. Although it is open to the state to provide more generous support, the Supreme Court noted that this is at the discretion of national law, not EU law (per Lord Carnwath, para 28). As a result, the equality provision contained in Article 21 of the Charter could not be used to extend Mrs HC’s entitlement to further financial assistance beyond the limited support required by the *Zambrano* principle and already available under UK law.  Responding to the contention that the regulations breached Article 14 of the ECHR, the Supreme Court cited ECHR jurisprudence that the allocation of public funds in a social security context is primarily a matter for national authorities, provided that such allocations are not “manifestly without reasonable foundation” (confirmed also in *R (MA) v Secretary of State for Work and Pensions (Equality and Human Rights Commission intervening*) [2016] 1 WLR 4550, para 32 per Lord Toulson).  In reaching this conclusion, the ruling in *HC* reinforces the highly exceptional and restrictive nature of the *Zambrano* carer status, and the courts’ resistance to obliging the authorities to provide anything more than ‘back-stop’ crisis provision ‘designed to save the carer and child from homelessness and destitution’ (Elias, LJ, *Sanneh & Ors v Secretary of State for Work and Pensions [2015] EWCA Civ 49, para 171*, cited by O’Brien, 2016, p. 231).  This outcome is troubling for a number of reasons. First, it allows those who are simultaneously EU citizens and British nationals to fall into a welfare hole by virtue of their peculiar legal status as *Zambrano* cared-for children. In doing so, they are treated less favourably than other British children who are not subject to EU law and less favourably than their EU citizen counterparts who reside in the UK with their EU migrant parents under the normal operation of the free movement provisions (O’Brien, 2016). In short, the British nationality of these children holds virtually no welfare currency, but rather, is diminished by the fact that they are reliant on their parents who are of third country nationality.  Second, whilst the ruling accepts the rights of children to be cared for by their parents, it sets a strict limit on the nature and scope of the resources on which parents can draw to provide that support, even for those cases in which paid employment is not a viable option. The potential of this restriction to plunge families into destitution is justified by the fact that children whose situation becomes desperate enough can always fall back on s.17 of the Children Act 1989.In other words, adistinction is drawn between non-contributory welfare provision on the one hand (from which *Zambrano* carers are explicitly excluded), and wider s.17 CA 1989 emergency provision, on the other, (which can be made available to all children in need, regardless of their nationality).  The public policy logic of this distinction is hard to fathom. In economic terms alone, there appears to be no saving to be made insofar as the public costs of supporting Mrs HC’s family are simply shifted from one arm of the state (the Department of Work and Pensions) to the potentially weaker arm of local authorities’ children’s services. Perhaps more worrying is the latter’s capacity to absorb *Zambrano* children in the face of unprecedented and continuing cuts in resources. In England alone, funds available to local authorities for early intervention work of this nature has been cut by 55% (approximately £1.8 billion) since 2011 (National Children’s Bureau and The Children’s Society, 2015; NSPCC, 2017).  Aside from this economic conundrum, there are strong moral and ethical, if not legal, arguments against a policy that allows for the inevitable deterioration in its own national children’s living conditions (and, consequently, in their well-being) before sanctioning intervention. The position is particularly insensitive to cases involving domestic violence, where there is no possibility either of accessing child benefits via the perpetrator by virtue of his status as a UK national parent. Certainly, in Mrs HC’s case, the s.17 remedy triggers a much more detailed social services assessment of the family’s circumstances, including potentially intrusive questioning and evidence gathering from individuals who have already suffered significant trauma. There is also the option for social services to remove the child/ren from the primary carer rather than offer support to the entire family. Indeed, the Public Law Project have noted that:  *In respect of “Zambrano carers”, we are aware of cases in which local authorities have argued that, where the whereabouts of the other parent are known, s/he could care for the child, even where high levels of domestic violence by the other parent are acknowledged.* (Public Law Project, 2014, p. 18).  Furthermore, as Lady Hale points out in her concurring judgment, the nature and scope of support offered under s.17 remains discretionary and not as of right to those who qualify (para 43). There is no basic minimum standard for s.17 subsistence payments in law which can be as low as the rates of subsistence paid to asylum seekers, perhaps even lower. Such assistance also excludes provision otherwise available automatically for children in receipt of welfare benefits to support their development and integration. This includes, for example, access to free school meals, financial support for school trips, or discretionary rates on transport or leisure activities. Their exclusion from welfare benefits may even preclude women like *HC* and her children from accessing domestic violence refuge support (which rely so heavily on income from housing benefits) should the father pose any further threat to their safety.  It is worth noting that proposals are afoot to move *Zambrano* carer support onto a mandated Home Office support regime by virtue of the (yet to be enforced) Immigration Act 2016 (schedule 12, paragraph 6, new section 3A). This will replace any support currently available under the s.17 Children Act route (paragraph 10A). The support that will be included under this scheme will be, to all intents and purposes, the same as that provided under s.17: accommodation, subsistence in kind, cash or vouchers. However, the virtues of taking British born, *Zambrano*-cared for children outside the scope of Children Act support and placing them in the same category as failed asylum seekers and families who do not have leave to remain, is highly questionable and will, no doubt, be subject to further scrutiny when and if it ever comes into play (NRFP, 2017a and 2017b).[[3]](#footnote-3)  Perhaps the one positive message that one might draw from the *HC* ruling is Lady Hale’s explicitly children’s rights-based approach to her concurring judgment. Consistent with her visionary approach to past judgments, she takes care to showcase the key elements of what scholars have recently exposed as a children’s rights-based approach to judgment-writing (Stalford, Hollingsworth and Gilmore, 2017). In doing so, she reminds us of the individual interests of the very real children that are at stake in this case and of the authorities’ need not only to discharge their obligations by reference to the welfare regulations, but to ‘actively promote’ children’s rights and welfare in accordance with section 11 of the Children Act 2004 and under section 175 of the Education Act 2002.  The Supreme Court’s hands are ultimately tied by the fact that the original *Zambrano* ruling did not explicitly include access to social security and other welfare benefits within the range of entitlement that should be connected to residence and work-related rights for EU citizens. But Lady Hale sends a clear message to the respondents that had the issues been considered from the perspective of the children, as British rights-bearers, there may perhaps never have been the impulse to challenge HC’s claim in the first instance.  **Conclusion**  The *HC* ruling is a prime example simultaneously of the invisibility of children’s rights and interests in social welfare litigation (Stalford and O’Brien, 2017) and of what difference a more children’s rights-based approach could have made. The Supreme Court even concedes that there is something of a gap in the evidence as to how the children of workless *Zambrano* carers are to survive if they are precluded from claiming welfare benefits (paras 4 and 41). This partly reflects the EU Court of Justice’s failure, in the original *Zambrano* decision, to foreground the rights and interests of the child in determining what other entitlement should accompany carers’ residence rights. At domestic level, the fact that children cannot claim social welfare benefits in their own right means that such cases continue to be contested, and exclusions justified, almost entirely on the basis of their parent’s status as third country nationals. This has the effect of obscuring the very distinct and acute impact of benefits exclusions on the most vulnerable, and of rendering children’s British nationality largely inconsequential. |

The Supreme Court was presented with a perfect opportunity to seek clarification from the Court of Justice, through a preliminary reference, on the nature and scope of children’s EU citizenship status in a *Zambrano* carer context. Instead, it consigns suchchildren to the crisis management, highly unpredictable route of s.17 as a justifiable response to its obligations under EU law. In reality, the extent to which children’s living conditions must deteriorate to warrant intervention under s.17, the anxiety and uncertainty associated with the assessment process, and the diminishing resources available to local authorities to exercise their discretion in a full and positive way, create disturbingly perilous conditions that are likely to significantly compound *Zambrano* children’s vulnerability.

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**References**

O’Brien, C. (2016) ‘Hand-to-mouth’ citizenship: decision time for the UK Supreme Court on the substance of Zambrano rights, EU citizenship and equal treatment”, 38(2) *JSWFL*, 228-245.

National Children’s Bureau and The Children’s Society (2015) *Cuts that cost: trends in funding for early intervention services*, London: National Children’s Bureau.

No Resource to Public Funds Network (Factsheet) (2017a): Immigration Bill 2015-16: local authority support for families (England), available at: <http://www.nrpfnetwork.org.uk/Documents/immigration-bill-families.pdf>

No Resource to Public Funds Network (NRPF Factsheet) (2017b): ‘Zambrano carers: local authority duties and access to public funds’, available at: <http://www.nrpfnetwork.org.uk/Documents/Zambrano-Factsheet.pdf>

NSPCC, 2017 *How safe are our children? The most comprehensive overview of child protection in the UK*

Public Law Project (2014) *Social Services Support for Destitute Migrant Families A guide to support under s 17 Children Act 1989*

Stalford, H. and Woodhouse, S. (2016) Rights realised or Rights defeated?: Responses to Family Migration in the UK. In: Eekelaar, J. and George, R. *Family Law in Britain and America in the New Century Essays in Honor of Sanford N. Katz.* Netherlands: BRILL, pp. 265-286.

Stalford, H. and O’Brien, C.: ‘Case C-34/09 Zambrano v Ofﬁce national de l’emploi Zambrano’ (Commentary and Judgment) in Stalford, H., Hollingsworth, K. and Gilmore, S. (2017) (eds) *Rewriting* *Children’s Rights Judgments: From Academic Vision to New Practice,* pp.529-544.

1. See notably Case C-434/09, *McCarthy*, [2011] ECR I-3375; Case C-256/11, *Dereci* EU:C:2011:734; Case C-40/11, *Iida* EU:C:2012:691; Case C-115/15 *Secretary of State for the Home Department v NA* EU:C:2016:487, summarised in O’Brien, 2017. [↑](#footnote-ref-1)
2. The Social Security (Habitual Residence) (Amendment) Regulations 2012 (SI 2012/2587), amending the Income Support (General) Regulations 1987 (SI 1987/1967). ii) The Child Benefit and Child Tax Credit (Miscellaneous Amendments) Regulations 2012 (SI 2012/2612), amending the Child Benefit (General) Regulations 2006 (SI 2006/223). iii) 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-2)
3. I am very grateful for Frances Trevena of Coram Children’s Legal Centre for her advice on this point. [↑](#footnote-ref-3)