

JUDGMENT OF THE COURT (Grand Chamber)

8 March 2011*

In Case C-34/09,

REFERENCE for a preliminary ruling under Article 234 EC from the Tribunal du travail de Bruxelles (Belgium), made by decision of 19 December 2008, received at the Court on 26 January 2009, in the proceedings

Gerardo Ruiz Zambrano,

v

Office national de l'emploi (ONEm),

THE COURT (Grand Chamber),

composed of V. Skouris, President, A. Tizzano, J.N. Cunha Rodrigues (Rapporteur), K. Lenaerts, J.-C. Bonichot, Presidents of Chamber, A. Rosas, M. Ilešič, J. Malenovský, U. Lõhmus, E. Levits, A. Ó Caoimh, L. Bay Larsen and M. Berger, Judges,

* Language of the case: French.

Advocate General: E. Sharpston,
Registrar: A. Calot Escobar,

having regard to the written procedure and further to the hearing on 26 January 2010,

after considering the observations submitted on behalf of:

- Mr Ruiz Zambrano, by P. Robert, avocat,

- the Belgian Government, by C. Pochet, acting as Agent, assisted by F. Motulsky and K. de Haes, avocats,

- the Danish Government, by B. Weis Fogh, acting as Agent,

- the German Government, by M. Lumma and N. Graf Vitzthum, acting as Agents,

- Ireland, by D. O'Hagan, acting as Agent, assisted by D. Conlan Smyth, Barrister,

- the Greek Government, by S. Vodina, T. Papadopoulou and M. Michelogiannaki, acting as Agents,

- the Netherlands Government, by C. Wissels, M. de Grave and J. Langer, acting as Agents,

- the Austrian Government, by E. Riedl, acting as Agent,

- the Polish Government, by M. Dowgielewicz, and subsequently by M. Szpunar, acting as Agents,

- the European Commission, by D. Maidani and M. Wilderspin, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 30 September 2010,

gives the following

Judgment

- ¹ The reference for a preliminary ruling concerns the interpretation of Articles 12 EC, 17 EC and 18 EC, and also Articles 21, 24 and 34 of the Charter of Fundamental Rights of the European Union ('the Charter of Fundamental Rights').

- 2 That reference was made in the context of proceedings between Mr Ruiz Zambrano, a Columbian national, and the Office national de l'emploi (National Employment Office) ('ONEm') concerning the refusal by the latter to grant him unemployment benefits under Belgian legislation.

Legal context

European Union law

- 3 Article 3(1) of Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC (OJ 2004 L 158, p. 77, and corrigenda OJ 2004 L 229, p. 35, and OJ 2005 L 197, p. 34), provides:

'This Directive shall apply to all Union citizens who move to or reside in a Member State other than that of which they are a national, and to their family members as defined in point 2 of Article 2 who accompany or join them.'

National law

The Belgian Nationality Code

- 4 Under Article 10(1) of the Belgian Nationality Code (*Moniteur belge*, 12 July 1984, p. 10095), in the version applicable at the time of the facts in the main proceedings ('the Belgian Nationality Code'):

'Any child born in Belgium who, at any time before reaching the age of 18 or being declared of full age, would be stateless if he or she did not have Belgian nationality, shall be Belgian.'

The Royal Decree of 25 November 1991

- 5 Article 30 of the Royal Decree of 25 November 1991 (*Moniteur belge* of 31 December 1991, p. 29888) concerning rules on unemployment provides as follows:

'In order to be eligible for unemployment benefit, a full-time worker must have completed a qualifying period comprising the following number of working days:

...

2. 468 during the 27 months preceding the claim [for unemployment benefit], if the worker is more than 36 and less than 50 years of age,

...'

- 6 Article 43(1) of the Royal Decree states:

'Without prejudice to the previous provisions, a foreign or stateless worker is entitled to unemployment benefit if he or she complies with the legislation relating to aliens and to the employment of foreign workers.

Work undertaken in Belgium is not taken into account unless it complies with the legislation relating to the employment of foreign workers.

...'

- 7 Under Article 69(1) of the Royal Decree:

'In order to receive benefits, foreign and stateless unemployed persons must satisfy the legislation concerning aliens and that relating to the employment of foreign labour.'

The Decree-Law of 28 December 1944

- 8 Article 7(14) of the Decree-Law of 28 December 1944 on social security for workers (*Moniteur belge* of 30 December 1944), inserted by the Framework Law of 2 August 2002 (*Moniteur belge* of 29 August 2002, p. 38408), is worded as follows:

‘Foreign and stateless workers shall be eligible to receive benefits only if, at the time of applying for benefits, they satisfy the legislation concerning residency and that relating to the employment of foreign labour.

Work done in Belgium by a foreign or stateless worker shall be taken into account for the purpose of the qualifying period only if it was carried out in accordance with the legislation on the employment of foreign labour.

...’

The Law of 30 April 1999

- 9 Article 4(1) of the Law of 30 April 1999 on the employment of foreign workers (*Moniteur belge* of 21 May 1999, p. 17800) provides:

‘An employer wishing to employ a foreign worker must obtain prior employment authorisation from the competent authority.

The employer may use the services of that worker only as provided for in that authorisation.

The King may provide for exceptions to the first paragraph herein, as He deems appropriate.’

10 Under Article 7 of that law:

‘The King may, by a decree debated in the Council of Ministers, exempt such categories of foreign workers as He shall determine from the requirement to obtain a work permit.

Employers of foreign workers referred to in the preceding paragraph shall be exempted from the obligation to obtain a work permit.’

The Royal Decree of 9 June 1999

11 Article 2(2) of the Royal Decree of 9 June 1999 implementing the Law of 30 April 1999 on the employment of foreign workers (*Moniteur belge* of 26 June 1999, p. 24162) provides:

‘The following shall not be required to obtain a work permit:

...

2. the spouse of a Belgian national, provided that s/he comes in order to settle, or does settle, with that national;
 - (a) descendants under 21 years of age or dependants of the Belgian national or his spouse;
 - (b) dependent ascendants of the Belgian national or his/her spouse;
 - (c) the spouse of the persons referred to in (a) or (b);

...'

The Law of 15 December 1980

- ¹² Article 9 of the Law of 15 December 1980 on access to Belgian territory, residence, establishment and expulsion of foreign nationals (*Moniteur belge* du 31 December 1980, p. 14584), in the version thereof applicable to the main proceedings ('the Law of 15 December 1980'), provides:

'In order to be able to reside in the Kingdom beyond the term fixed in Article 6, a foreigner who is not covered by one of the cases provided for in Article 10 must be authorised by the Minister or his representative.

Save for exceptions provided for by international treaty, a law or royal decree, the foreigner must request that authorisation from the competent diplomatic mission or Belgian consul in his place of residence or stay abroad.

In exceptional circumstances, the foreigner may request that authorisation from the mayor of the municipality where he is residing, who will forward to the Minister or his representative. It will, in that case, be issued in Belgium.'

13 Article 40 of the same law provides:

'1. Without prejudice to the provisions in the regulations of the Council [of the European Union] and the Commission of the European Communities and more favourable ones on which an EC foreign national might rely, the following provisions shall apply to him.

2. For the purposes of this Law, "EC foreign national" shall mean any national of a Member State of the European Communities who resides in or travels to the Kingdom and who:

(i) pursues or intends to pursue there an activity as an employed or self-employed person;

(ii) receives or intends to receive services there:

(iii) enjoys or intends to enjoy there a right to remain;

(iv) enjoys or intends to enjoy there a right of residence after ceasing a professional activity or occupation pursued in the Community;

(v) undergoes or intends to undergo there, as a principal pursuit, vocational training in an approved educational establishment; or

(vi) belongs to none of the categories under (i) to (v) above.

3. Subject to any contrary provisions of this Law, the following persons shall, whatever their nationality, be treated in the same way as an EC foreign national covered by paragraph 2(i), (ii) and (iii) above, provided that they come in order to settle, or do settle, with him:

(i) the spouse of that national;

(ii) the national's descendants or those of his spouse who are under 21 years of age and dependent on them;

(iii) the national's ascendants or those of his spouse who are dependent on them;

(iv) the spouse of the persons referred to in (ii) or (iii).

4. Subject to any contrary provisions of this Law, the following persons shall, whatever their nationality, be treated in the same way as an EC foreign national covered

by paragraph 2(iv) and (vi) above, provided that they come in order to settle, or do settle, with him:

- (i) the spouse of that national;
- (ii) the national's descendants or those of his spouse who are dependent on them;
- (iii) the national's ascendants or those of his spouse who are dependent on them;
- (iv) the spouse of the persons referred to in (ii) or (iii).

5. Subject to any contrary provisions of this Law, the spouse of an EC foreign national covered by paragraph 2(v) above and his children or those of his spouse who are dependent on them shall, whatever their nationality, be treated in the same way as the EC foreign national provided that they come in order to settle, or do settle, with him.

6. The spouse of a Belgian who comes in order to settle, or does settle, with him, and also their descendants who are under 21 years of age or dependent on them, their ascendants who are dependent on them and any spouse of those descendants or ascendants, who come to settle, or do settle, with them, shall also be treated in the same way as an EC foreign national.'

The dispute in the main proceedings and the questions referred for a preliminary ruling

¹⁴ On 14 April 1999, Mr Ruiz Zambrano, who was in possession of a visa issued by the Belgian embassy in Bogotá (Colombia), applied for asylum in Belgium. In February 2000, his wife, also a Columbian national, likewise applied for refugee status in Belgium.

- 15 By decision of 11 September 2000, the Belgian authorities refused their applications and ordered them to leave Belgium. However, the order notified to them included a *non-refoulement* clause stating that they should not be sent back to Colombia in view of the civil war in that country.
- 16 On 20 October 2000, Mr Ruiz Zambrano applied to have his situation regularised pursuant to the third paragraph of Article 9 of the Law of 15 December 1980. In his application, he referred to the absolute impossibility of returning to Colombia and the severe deterioration of the situation there, whilst emphasising his efforts to integrate into Belgian society, his learning of French and his child's attendance at pre-school, in addition to the risk, in the event of a return to Columbia, of a worsening of the significant post-traumatic syndrome he had suffered in 1999 as a result of his son, then aged 3, being abducted for a week.
- 17 By decision of 8 August 2001, that application was rejected. An action was brought for annulment and suspension of that decision before the Conseil d'État, which rejected the action for suspension by a judgment of 22 May 2003.
- 18 Since 18 April 2001, Mr Ruiz Zambrano and his wife have been registered in the municipality of Schaerbeek (Belgium). On 2 October 2001, although he did not hold a work permit, Mr Ruiz Zambrano signed an employment contract for an unlimited period to work full-time with the Plastoria company, with effect from 1 October 2001.
- 19 On 1 September 2003, Mr Ruiz Zambrano's wife gave birth to a second child, Diego, who acquired Belgian nationality pursuant to Article 10(1) of the Belgian Nationality

Code, since Columbian law does not recognise Colombian nationality for children born outside the territory of Colombia where the parents do not take specific steps to have them so recognised.

- 20 The order for reference further indicates that, at the time of his second child's birth, Mr Ruiz Zambrano had sufficient resources from his working activities to provide for his family. His work was paid according to the various applicable scales, with statutory deductions made for social security and the payment of employer contributions.
- 21 On 9 April 2004, Mr and Mrs Ruiz Zambrano again applied to have their situation regularised pursuant to the third paragraph of Article 9 of the Law of 15 December 1980, putting forward as a new factor the birth of their second child and relying on Article 3 of Protocol 4 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed at Rome on 4 November 1950 ('ECHR'), which prevents that child from being required to leave the territory of the State of which he is a national.
- 22 Following the birth of their third child, Jessica, on 26 August 2005, who, like her brother Diego, acquired Belgian nationality, on 2 September 2005 Mr and Mrs Ruiz Zambrano lodged an application to take up residence pursuant to Article 40 of the Law of 15 December 1980, in their capacity as ascendants of a Belgian national. On 13 September 2005, a registration certificate was issued to them provisionally covering their residence until 13 February 2006.
- 23 Mr Ruiz Zambrano's application to take up residence was rejected on 8 November 2005, on the ground that he '[could] not rely on Article 40 of the Law of 15 December

1980 because he had disregarded the laws of his country by not registering his child with the diplomatic or consular authorities, but had correctly followed the procedures available to him for acquiring Belgian nationality [for his child] and then trying on that basis to legalise his own residence'. On 26 January 2006, his wife's application to take up residence was rejected on the same ground.

- 24 Since the introduction of his action for review of the decision rejecting his application for residence in March 2006, Mr Ruiz Zambrano has held a special residence permit valid for the entire duration of that action.
- 25 In the meantime, on 10 October 2005, Mr Ruiz Zambrano's employment contract was temporarily suspended on economic grounds, which led him to lodge a first application for unemployment benefit, which was rejected by a decision notified to him on 20 February 2006. That decision was challenged before the referring court by application of 12 April 2006.
- 26 In the course of the inquiries in the action brought against that decision, the Office des Étrangers (Aliens' Office) confirmed that 'the applicant and his wife cannot pursue any employment, but no expulsion measure can be taken against them because their application for legalising their situation is still under consideration'.
- 27 In the course of an inspection carried out on 11 October 2006 by the Direction générale du contrôle des lois sociales (Directorate General, Supervision of Social Legislation) at the registered office of Mr Ruiz Zambrano's employer, he was found to be at work. He had to stop working immediately. The next day, Mr Ruiz Zambrano's employer terminated his contract of employment with immediate effect and without compensation.

- 28 The application lodged by Mr Ruiz Zambrano for full-time unemployment benefits as from 12 October 2006 was rejected by a decision of the ONEm (National Employment Office), which was notified on 20 November 2006. On 20 December 2006 an action was also brought against that decision before the referring court.
- 29 On 23 July 2007, Mr Ruiz Zambrano was notified of the decision of the Office des Étrangers rejecting his application of 9 April 2004 to regularise his situation. The action brought against that decision before the Conseil du contentieux des étrangers (Council for asylum and immigration proceedings) was declared to be devoid of purpose by a judgment of 8 January 2008, as the Office des Étrangers had withdrawn that decision.
- 30 By letter of 25 October 2007, the Office des Étrangers informed Mr Ruiz Zambrano that the action for review he had brought in March 2006 against the decision rejecting his application to take up residence of 2 September 2005 had to be reintroduced within 30 days of the notification of that letter, in the form of an action for annulment before the Conseil du contentieux des étrangers.
- 31 On 19 November 2007, Mr Ruiz Zambrano brought such an action for annulment, based, first, on the inexistence of the 'legal engineering' of which he had been charged in that decision, since the acquisition of Belgian nationality by his minor children was not the result of any steps taken by him, but rather of the application of the relevant Belgian legislation. Mr Ruiz Zambrano also alleges infringement of Articles 2 and 7 of Directive 2004/38, as well as infringement of Article 8 of the ECHR, and of Article 3(1) of Protocol No 4 thereto.

32 In its written observations lodged before the Court, the Belgian Government states that, since 30 April 2009, Mr Ruiz Zambrano has had a provisional and renewable residence permit, and should have a type C work permit, pursuant to the instructions of 26 March 2009 of the Minister for immigration and asylum policy relating to the application of the former third paragraph of Article 9 and Article 9a of the Law of 15 December 1980.

33 It is apparent from the order for reference that the two decisions which are the subject-matter of the main proceedings, by which the ONEm refused to recognise Mr Ruiz Zambrano's entitlement to unemployment benefit, first, during the periods of temporary unemployment from 10 October 2005 and then 12 October 2006, following the loss of his job, are based solely on the finding that the working days on which he relies for the purpose of completing the qualifying period for his age category, that is, 468 working days during the 27 months preceding his claim for unemployment benefit, were not completed as required by the legislation governing foreigners' residence and employment of foreign workers.

34 Mr Ruiz Zambrano challenges that argument before the referring court, stating *inter alia* that he enjoys a right of residence directly by virtue of the EC Treaty or, at the very least, that he enjoys the derived right of residence, recognised in Case C-200/02 *Zhu and Chen* [2004] ECR I-9925 for the ascendants of a minor child who is a national of a Member State and that, therefore, he is exempt from the obligation to hold a work permit.

35 In those circumstances, the Tribunal du travail de Bruxelles (Employment Tribunal, Brussels) (Belgium) decided to stay proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

1. Do Articles 12 [EC], 17 [EC] and 18 [EC], or one or more of them when read separately or in conjunction, confer a right of residence upon a citizen of the Union in the territory of the Member State of which that citizen is a national, irrespective of whether he has previously exercised his right to move within the territory of the Member States?

2. Must Articles 12 [EC], 17 [EC] and 18 [EC], in conjunction with the provisions of Articles 21, 24 and 34 of the Charter of Fundamental Rights, be interpreted as meaning that the right which they recognise, without discrimination on the grounds of nationality, in favour of any citizen of the Union to move and reside freely in the territory of the Member States means that, where that citizen is an infant dependent on a relative in the ascending line who is a national of a non-member State, the infant's enjoyment of the right of residence in the Member State in which he resides and of which he is a national must be safeguarded, irrespective of whether the right to move freely has been previously exercised by the child or through his legal representative, by coupling that right of residence with the useful effect whose necessity is recognised by Community case-law [*Zhu and Chen*], and granting the relative in the ascending line who is a national of a non-member State, upon whom the child is dependent and who has sufficient resources and sickness insurance, the secondary right of residence which that same national of a non-member State would have if the child who is dependent upon him were a Union citizen who is not a national of the Member State in which he resides?

3. Must Articles 12 [EC], 17 [EC] and 18 [EC], in conjunction with the provisions of Articles 21, 24 and 34 of the Charter of Fundamental Rights, be interpreted as meaning that the right of a minor child who is a national of a Member State to reside in the territory of the State in which he resides must entail the grant of an exemption from the requirement to hold a work permit to the relative in the ascending line who is a national of a non-member State, upon whom the child is dependent and who, were it not for the requirement to hold a work permit under

the national law of the Member State in which he resides, fulfils the condition of sufficient resources and the possession of sickness insurance by virtue of paid employment making him subject to the social security system of that State, so that the child's right of residence is coupled with the useful effect recognised by Community case-law [*Zhu and Chen*] in favour of a minor child who is a European citizen with a nationality other than that of the Member State in which he resides and is dependent upon a relative in the ascending line who is a national of a non-member State?

The questions referred for a preliminary ruling

- ³⁶ By its questions, which it is appropriate to consider together, the referring court asks, essentially, whether the provisions of the TFEU on European Union citizenship are to be interpreted as meaning that they confer on a relative in the ascending line who is a third country national, upon whom his minor children, who are European Union citizens, are dependent, a right of residence in the Member State of which they are nationals and in which they reside, and also exempt him from having to obtain a work permit in that Member State.
- ³⁷ All governments which submitted observations to the Court and the European Commission argue that a situation such as that of Mr Ruiz Zambrano's second and third children, where those children reside in the Member State of which they are nationals and have never left the territory of that Member State, does not come within the situations envisaged by the freedoms of movement and residence guaranteed under European Union law. Therefore, the provisions of European Union law referred to by the national court are not applicable to the dispute in the main proceedings.

- 38 Mr Ruiz Zambrano argues in response that the reliance by his children Diego and Jessica on the provisions relating to European Union citizenship does not presuppose that they must move outside the Member State in question and that he, in his capacity as a family member, is entitled to a right of residence and is exempt from having to obtain a work permit in that Member State.
- 39 It should be observed at the outset that, under Article 3(1) of Directive 2004/38, entitled '[b]eneficiaries', that directive applies to 'all Union citizens who move to or reside in a Member State other than that of which they are a national, and to their family members ...' Therefore, that directive does not apply to a situation such as that at issue in the main proceedings.
- 40 Article 20 TFEU confers the status of citizen of the Union on every person holding the nationality of a Member State (see, inter alia, Case C-224/98 *D'Hoop* [2002] ECR I-6191, paragraph 27, and Case C-148/02 *Garcia Avello* [2003] ECR I-11613, paragraph 21). Since Mr Ruiz Zambrano's second and third children possess Belgian nationality, the conditions for the acquisition of which it is for the Member State in question to lay down (see, to that effect, inter alia, Case C-135/08 *Rottmann* [2010] ECR I-1449, paragraph 39), they undeniably enjoy that status (see, to that effect, *Garcia Avello*, paragraph 21, and *Zhu and Chen*, paragraph 20).
- 41 As the Court has stated several times, citizenship of the Union is intended to be the fundamental status of nationals of the Member States (see, inter alia, Case C-184/99 *Grzelczyk* [2001] ECR I-6193, paragraph 31; Case C-413/99 *Baumbast and R* [2002] ECR I-7091, paragraph 82; *Garcia Avello*, paragraph 22; *Zhu and Chen*, paragraph 25; and *Rottmann*, paragraph 43).

- 42 In those circumstances, 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 (see, to that effect, *Rottmann*, paragraph 42).
- 43 A refusal to grant a right of residence to a third country national with dependent minor children in the Member State where those children are nationals and reside, and also a refusal to grant such a person a work permit, has such an effect.
- 44 It must be assumed that such a refusal would lead to a situation where those children, citizens of the Union, would have to leave the territory of the Union in order to accompany their parents. Similarly, if a work permit were not granted to such a person, he would risk not having sufficient resources to provide for himself and his family, which would also result in the children, citizens of the Union, having to leave the territory of the Union. In those circumstances, those citizens of the Union would, in fact, be unable to exercise the substance of the rights conferred on them by virtue of their status as citizens of the Union.
- 45 Accordingly, the answer to the questions referred is that Article 20 TFEU is to be interpreted as meaning that it precludes a Member State from refusing a third country national upon whom his minor children, who are European Union citizens, are dependent, a right of residence in the Member State of residence and nationality of those children, and from refusing to grant a work permit to that third country national, in so far as such decisions deprive those children of the genuine enjoyment of the substance of the rights attaching to the status of European Union citizen.

Costs

- ⁴⁶ Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Grand Chamber) hereby rules:

Article 20 TFEU is to be interpreted as meaning that it precludes a Member State from refusing a third country national upon whom his minor children, who are European Union citizens, are dependent, a right of residence in the Member State of residence and nationality of those children, and from refusing to grant a work permit to that third country national, in so far as such decisions deprive those children of the genuine enjoyment of the substance of the rights attaching to the status of European Union citizen.

[Signatures]