

**U N I V E R S I T Y** *of* **H O U S T O N**

Public Law and Legal Theory Series 2012-W-1



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*Michael A. Olivas*

Professor of Law, University of Houston Law Center  
Member, JURIST Editorial Board

and

*Dimitry Kochenov*

Professor of Law, University of Groningen

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## Case C- 34/09 *Ruiz Zambrano*: A Respectful Rejoinder

Michael A. Olivas, Professor of Law, University of Houston Law Center, member,  
JURIST Editorial Board and

Dimitry Kochenov, Professor of Law, University of Groningen

In summer 2011, the *Common Market Law Review* published a case-note dedicated to the legal analysis of the *Ruiz Zambrano* case of the CJEU, which is of great interest.<sup>1</sup> Both of us fully agree with the authors, Professors Hailbronner and Thym, that the case is of fundamental importance in that it represents ‘a permanent move beyond the confines of “market citizenship”’ (1269), supplying one of the first examples when EU citizenship alone sufficed to the CJEU to bring the case within the scope of EU law, building on ‘EU citizenship as such’ (1263). This general agreement is one of the reasons why we are of the opinion that their note warrants an elaboration and rejoinder—in accord with tradition and *Review* practice.<sup>2</sup>

The note written by two eminent scholars falls short, in our respectful opinion, of reflecting the essence of the case in a sufficiently accurate and objective manner. We have two concerns: the treatment of the facts on the ground, and the legal conclusions that flow from the analytic treatment of these ‘facts.’ The combination of the two results in demonizing and blaming the immigrant family, especially employing unfortunate restrictionist clichés and stereotypes that present immigrants from the third world who come to Europe as selfish criminals abusing the law. This phenomenon of scapegoating, of course, occurs regularly in the EU and throughout the West, both through nativist legislation and through the public discourse, which has given way to hateful terms and provocative and derogatory argot.<sup>3</sup>

We do not suggest that anything crafted by Professors Hailbronner and Thym is inappropriate. However, we are concerned that their careful parsing of the facts as they might wish them to be, might deter others from actually reading the important case under consideration. The presentation of the facts suffers from what Balibar characterized as an ‘immigration complex’.<sup>4</sup> The note avers that ‘Ruiz Zambrano has been residing in Belgium without a residence permit after the rejection of his asylum application’ (1254) and that ‘Belgian authorities did not actively pursue coercive measures to deport the family of failed asylum seeker’ (1254) ‘as they would nowadays be obliged to under Art. 6–8 of the “Return” Directive 2008/115/EC’ (1254, note 2). Ruiz Zambrano is ‘even involved [in] illegal employment in the shadow economy’ (1260). To regularize his situation and continue the presumably shady business, Mr. Ruiz Zambrano then fathers two children on Belgian soil and ‘deliberately’ (1254) fails to register them with the Colombian consulate in order to rely on their Belgian nationality

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<sup>1</sup> Hailbronner and Thym, “Annotation of Case C-34/09”, 48 CMLRev. (2011), 1253.

<sup>2</sup> Bohring, “The Scope of the EEC System of Free Movement of Workers: A Rejoinder”, 10 CMLRev. (1973), 81.

<sup>3</sup> Some of it has been facilitated by media technology and quotidian practices, such as the convention of the New York Manual on Style and Usage, which mandates “illegal immigrant” as the proper terminology for an unauthorized or undocumented immigrant.

<sup>4</sup> Balibar, “Racism in Crisis”, in Balibar and Wallerstein (eds.) *Race, Nation, Class: Ambiguous Identities* (1991), 219.

and EU citizenship in regularizing ‘illegal’<sup>5</sup> stay. If this has indeed been what actually happened with the Ruiz Zambrano family or if these were the facts that their case presented, it might be as troubling as the authors intimate.

However, carefully comparing the facts of the case as summarized against the text of the actual judgment of the CJEU produces a very different picture, and reminds readers of just how difficult judging such claims can be in various tribunals and courts in real life, especially in refugee and asylum law. Rather, the decision of the Belgian authorities not to grant asylum was accompanied by a *non-refoulement* clause (para. 15), which prohibited the deportation of the family from Belgian soil back to the country where their first-born son was abducted by the guerrillas for a week (para. 16). Colleagues would be aware, in this context, that the ‘Return’ Directive 2008/115/EC requires respect for and adherence to the principle of *non-refoulement* (Art. 5), consequently, obliging Belgium *not to deport* the family. Doing so would have violated international law. We are thus dealing with something quite different from ‘atypical’ facts (1254), and not the situation of an almost-criminal scofflaw abusing the law, but with an ordinary example of a legal limbo of which thousands are created in Europe every year: deportation is not required and work and reliance on social assistance are prohibited. This would be a perfect time for Mr. Ruiz Zambrano to engage with the ‘shadow economy’, as was suggested by Professors Hailbronner and Thym. Instead, however, he entered a contract of employment with a recognized entity and paid all taxes and social security charges throughout the whole five-year period of his employment, leading to the temporary suspension of his contract which resulted in the main proceedings (para. 20). Moreover, he and his ‘illegal’ family were also officially registered as residents in the municipality where they resided (para. 18). These actions hardly appear to be the actions of someone engaging in surreptitious or improper behavior; if it were so, he was hiding in plain sight by engaging in his civic duties.

Moreover, Colombian law does not require registering children of Colombian parents as Colombians abroad. Colombian law grants such a right, but it is not mandatory, and under the family’s circumstances, they made a reasonable and efficacious decision not to register their children with the government of the country from which they had fled. And the Colombian government could not guarantee their lives and safety. ‘Deliberate’ failure to use a right is obviously not a crime, especially in a situation where the family does not intend and, crucially, is not legally obliged to return to that country. A fair recitation of these facts on the record, we suggest, leads to a completely different tone in the analysis.

We now turn to the law. While the position which we share with regard to the effect of the *Ruiz Zambrano* case on the development of EU law is available elsewhere,<sup>6</sup> a point to mention here concerns the statement by Professors Hailbronner and Thym that ‘Belgium was not obliged to grant nationality under such generous conditions under Art. 1 of the 1961 Convention on the Reduction of Statelessness’ (1254, note 4). First of all, Belgium is of course not a party to this

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<sup>5</sup> Using this term seems ideological in and of itself: Dauvergne, *Making People Illegal* (CUP, 2009).

<sup>6</sup> Kochenov, “A Real European Citizenship; A New Jurisdiction Test; A Novel Chapter in the Development of the Union in Europe”, 18 CJEL (2011), 55.

international instrument. Secondly, the interpretation of the Convention to which colleagues hint is wrong. Although Belgium followed a number of other Member States<sup>7</sup> in changing its *Wetboek Belgische Nationaliteit*<sup>8</sup> to ensure that it does not cover cases of self-inflicted statelessness, the Belgian Constitutional Court had to intervene to ensure that the law allowed for exceptions,<sup>9</sup> and we believe that these are exactly the exceptions which would be met by the Ruiz Zambrano family circumstances. Both Article 1 of the 1961 Convention and Article 6 of the European Convention on Nationality (CETS 166) which contains a similar rule have been widely interpreted as obliging States to confer nationality on the children in the situation of Belgian-born Diego and Jessica of the Ruiz Zambrano family, since it would be most unreasonable to oblige refugees and asylum seekers to ask the representation of the State they are escaping from to grant nationality to their children. This is confirmed by the Committee of Ministers of the Council of Europe in Recommendation 2008/13,<sup>10</sup> which we believe, concurring with van der Mei and others,<sup>11</sup> governs in exactly this situation. Consequently, it is not correct to claim without stating the evident facts more carefully that Ruiz Zambrano ‘deliberately’ did not register his children (1254), just as it is incorrect to claim that Diego and Jessica should not have been granted Belgian nationality under Belgian and International law, as professors Hailbronner and Thym do.

Using the lenses we suggest allows a clearer view of the actual situation. Every day, various immigration and refugee authorities record and transmit facts, sometimes great and sometimes small and ordinary. Like false rumors that can become unrecognizable when retold over time, facts can get lost in the shuffle and morph into inconvenient facts. When this occurs for a terrorized family that finds itself enmeshed in a complex legal dispute, conducted in a foreign language, it is little wonder that such small details can get lost in translation and again in litigation. But, unlike these families, scholars can, and must take a step back and read carefully and appreciate the degrees of ambiguity and nuance inherent in the cases they read, drained of the lives they record.

Leaving aside the philosophical discussion on global equality<sup>12</sup> and possible justifications of closing the borders to prevent the arrival of the needy,<sup>13</sup> our point is quite simple: legal scholarship should not mischaracterize the basic, constitutive facts that gave rise to a legal dispute at hand, especially in situations where the destiny of the most vulnerable and needy is

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<sup>7</sup> See e.g. Finland (Art. 9(1) and (3) of the Law on Finnish Nationality) and France (Art. 19-1 of the *Code civil*), where the law was changed in 2003, and Luxembourg (Art. 1(3) and Art. 3(4) of the Law on Luxembourgian Nationality), where the law was amended in 2009.

<sup>8</sup> Wet of 27 December 2006.

<sup>9</sup> Grondwettelijke Hof van België, Decision 73/2008 of 24 April 2008.

<sup>10</sup> See also de Groot, “Strengthening the Position of the Children: Council of Europe’s Recommendation 2009/13” in Council of Europe (ed.), *Concepts of Nationality in a Globalised World* (Council of Europe, 2011).

<sup>11</sup> Van der Mei, van den Bogaert and de Groot, “De arresten *Ruiz Zambrano* en *McCarthy*”, NTER (2011), 188.

<sup>12</sup> Kingsbury, “Sovereignty and Inequality” 9 EJIL (1998), 599.

<sup>13</sup> Bauböck, “Global Justice, Freedom of Movement and Democratic Citizenship”, 51 Archives européennes de sociologie (2009), 1; Carens, “Aliens and Citizens: The Case for Open Borders”, 49 Rev. of Politics (1987), 250.

decided,<sup>14</sup> as occurs in immigration and refugee cases tried and adjudicated in the EU every day. We would conclude that facts in a case-note are particularly in need of care, when the facts might throw a shadow on the soundness of the derivative legal conclusions. With respect, we would dispute the treatment of the facts in the earlier case-note by professors Hailbronner and Thym, and would remand for reconsideration. We have learned much over the years from studying their earlier work, but the lesson learned here is not that which they intended.

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<sup>14</sup> The countries in which both current authors reside have very unforgiving practices for those like the Ruiz Zambrano family: 8 U.S.C. § 1182(a)(9)(B)(i)(II) (ten year penalty for overstay and/or unlawful entry). Chacon, “Loving Across Borders: Immigration Law and the Limits of *Loving*” 2007 Wis. L. Rev. (2007) 345; Ministry of the Interior and Kingdom Relations, Position paper: The Dutch standpoint on EU migration policy (2011), <http://www.government.nl/dsc?c=getobject&s=obj&objectid=128170>. Critiqued by Leerkes “Playing Hard(er) to Get: The State, International Couples, and the Income Requirement” 13 EJML (2011) 95; Groenendijk, “Pre-Departure Integration Strategies in the European Union: Integration or Immigration Policy?” 13 EJML (2011), 1.