The Quality of Sovereignty

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It can generally be agreed that the purpose of sovereignty is to enable a government to protect the best interests of its citizens. To what extent did UK membership of the EU preclude this?

In order to answer this question, evaluative criteria are required. In the context of the EU, the discussion on sovereignty tends to focus on *quantity* – the greater the scope of action of the EU and its institutions, the lower the sovereignty of the Member States. From this perspective, sovereignty is a zero-sum affair – less means less. However, sovereignty can also be assessed from a qualitative perspective, with a focus on its *quality*, or character, rather than its scope. Needless to say, the *character* of sovereignty should also protect the best interests of the citizens.

Taking this latter as my focus, my question is therefore whether membership of the EU affects the *character* of sovereignty and prevents Member States from protecting the best interests of its citizens. Such a broad question will be narrowed down in this short contribution to a focus on equality. In the following paragraphs I will therefore explore whether withdrawal from the EU by the UK was a prerequisite to improve the *quality* of sovereignty in the UK and protect the best interests of the citizen in relation to equality.

An answer to this question can be found by examining the response of the British government to the decision of the Court of Justice of the EU (CJEU) in the *Zambrano* case. The response suggests that EU membership did not affect the quality of sovereignty and in contrast demonstrates the ongoing autonomy of the UK to determine the character of sovereignty whilst still an EU Member State. A close examination shows that in fact the government was able to use its sovereign powers to tailor-make inequality by introducing new laws that created a hostile environment not only for tax-paying non-nationals but also for the British citizen children in their care.

The Zambrano Decision

The Zambrano case concerned the attempt by the Belgian authorities to deport a family who had remained in the country after an unsuccessful claim for asylum. Despite the failed asylum claim, the family resided lawfully – the father had full employment and paid all relevant taxes. Whilst there, two children were born who were given Belgian citizenship and so as per Article 21 TFEU automatically became EU citizens.

The attempt to deport the parents was deemed contrary to EU law by the CJEU. Disagreeing that this was a ‘wholly internal’ situation, Advocate General Sharpston argued that persons should not be treated in the same way as goods and services

and taking *Rottman* and *Chen* as a new starting point, she argued that once nationality is granted to persons,

> … the children [Jessica and Diego] became citizens of the Union and entitled to exercise the rights conferred on them as citizens, concurrently with their rights as Belgian nationals. They have not yet moved outside their own Member State. Nor, following his naturalisation, had Dr. Rottman. If the parents do not have a derivative right of residence and are required to leave Belgium, the children will, in all probability, have to leave with them. That would, in practical terms, place Diego and Jessica in a position capable of causing them to lose the status conferred [by their citizenship of the Union] and the rights attaching thereto. [para. 95]

In response the Grand Chamber of the CJEU concluded that Article 20 TFEU does indeed preclude a Member State from refusing residency to a third country national upon whom his minor children, who are European Union citizens, are reliant – such a decision was deemed to deprive those children of the genuine enjoyment of the substance of the rights attaching to the status of European Union citizen.

The response in the UK I – legislative autonomy and the quality of sovereignty

Zambrano extended the boundaries of EU citizenship beyond the limits set out in the earlier case of *Chen*: it extended derived rights to the carers of *non*-migrant EU citizens, granting them residency rights under EU law regardless of their status under national law. This seemingly infuriated the British authorities – while some countries, such as Ireland re-opened previous cases to re-appraise removal decisions, in the UK national law was in 2013 specifically changed to limit the impact of *Zambrano*. The objective was to maintain the specific character of a hostile environment to migrants in Britain, as per official Conservative/Liberal Democratic policy by intentionally designing measures to exclude Zambrano carers from key mainstream benefits: sovereignty was ultimately used *against* the best interests of child British citizens.

The legislative response saw the introduction of three Regulations (SI 2012/2587, 2012; SI 2012/2612, 2012; SI 2012/2588, 2012) designed to exclude anybody residing on the basis of *Zambrano* from welfare rights *that they would otherwise have* as lawfully resident persons. In 2012, at the same time that the EEA Regulations 2006 implementing Citizenship Directive 2004/38 were amended to give effect to the *Zambrano* decision, the Coalition government introduced these statutory instruments as part of the Immigration (European Economic Area) (Amendment) (No.2) Regulations 2012 (the 'Zambrano Amendments') which banned Zambrano carers – those in work and those out of work – from mainstream income-linked housing and welfare benefits including income support, jobseekers allowance, employment allowance, pension credit, housing benefit, council tax benefit, child benefit and child tax credit. Zambrano carers became part of a group that has 'no recourse to public funds' or NRPF.

The response in the UK II – judicial autonomy and the quality of sovereignty

Although challenged before the national courts, the Amendments have been upheld and sanctioned by the UKSC. The judicial response was to support the Amendments as lawful in a series of cases, culminating in the Supreme Court decision in *HC*. Ultimately, the UK Supreme Court focused on the immigration status of the non-UK national rather than parental status or the status of the child.

In one of the first cases, *Harrison,* Elias LJ introduced in the standard dicta for understanding the *Zambrano* principle. Dismissing a broad approach to the CJEU ruling, he stated:

> … The right of residence is a right to reside in the territory of the EU. It is not a right to any particular quality or life or to any particular standard of living. Accordingly, there is no impediment to exercising the right to reside if residence remains possible as a matter of substance, albeit that the quality of life is diminished (paragraph 67).

The *Harrison* dicta was repeated in all challenges to the Zambrano amendments.

The idea of focusing on the best interests of the child was explicitly excluded – judges confirmed that the quality of life of these infant black British citizens is not a primary concern. For example, in *Hines* Vos J. explicitly stated that the 'best interest of the child' was not a priority. Maureen Hines, a Jamaican citizen without permission to remain in the UK, was refused housing assistance despite being mother to a five-year old British boy, Brandon. Lambeth Council decided that even if the refusal caused Hines to leave the UK, Brandon's father, who had an EU right to permanent residence in the UK, could – and partially did – look after him.

Hines unsuccessfully appealed Lambeth's decision but two specific questions went to the Court of Appeal: first, should a higher level of review apply given the engagement of Article 20 TFEU and secondly, what is the correct test when considering whether the removal of the mother jeopardized the continued residence of the EU citizen: the EU Charter 'best interests' of the child especially given Articles 7 (respect for private and family life) and 24 (rights of the child) CFR or the UK statutory test of practicality laid out in Regulation 15A (4A) (c) of the Immigration Regulations?

Vos J. ruled that

> …. The reviewer was not obliged to consider Brandon's interests as paramount, though his interests were indeed to be taken into account … (*Hines* EWCA Civ 660, 25).

The courts in the UK held that the substance of the *Zambrano* right to reside remained intact even if the *Zambrano* carer was left destitute and thus unable to care for their child who was a British/EU citizen. *Zambrano* carers were left in no doubt

that – at least while the UK was a member of the EU – they had a right to reside; however, they could not expect support to provide safe and secure lives for their British child. For their children who are British citizens and differed from other British citizens only because their primary carer was not an EU national, it meant they had no right to the quality of life guaranteed to their fellow citizens in similar need.

Throughout the cases, only Supreme Court President Lady Hale recognised that Zambrano carers "are not like any other third country nationals. They have British (or other EU citizen) children dependent upon them" (paragraph 41). She made explicit the link between the treatment of the mother and the life-experience of the British child:

> I have found this a very troubling case. It is not a case about adults' rights. It is a case about children's rights – specifically the right of these two very young British children to remain living in their own country and to have the support which they need in order to enable them to do so. Self-evidently they need the support of their mother in the shape of the care which she is able to give them. But they also need support in the shape of a place to live and enough to live on (paragraph 39).

Finally, COVID demonstrates Lady Hale's foresight in posing the fundamental question ignored by all others: how the "…children would be supported if the parent looking after them was unable to work, whether because of the demands of childcare or for any other good reason"' (paragraph 41). Although the Zambrano Amendments were temporarily disapplied by some councils, they may indeed have contributed to the disproportionate rates of infection, hospitalisation and death during COVID-19 in Black and minority ethnic communities across the UK.

Autonomy to determine the quality of sovereignty

The purpose of this post is to consider sovereignty by examining the extent to which membership of the EU prevented the UK government from pursuing the best interests of its citizens. In order to answer this question, I looked not at the scope of sovereignty but at its character, in particular in relation to equality.

Analysing the legislative and judicial response of the government to the CJEU decision in *Zambrano* shows how national law was used to create first, hostility to citizens from beyond the EU and second, a new generation of unequal – predominantly – Black British citizens: the hostile environment for all immigrants was transferred into an especially hostile environment for (black) British citizens. The Amendments made their parents unequal residents, transforming the children into unequal citizens, a status that could potentially stretch beyond childhood into adolescence and throughout adulthood. Instead of British nationality improving the situation of the non-EU parent, non-EU nationality worsened the situation of the British child.

The Zambrano Amendments demonstrate the ability of the government to exercise legislative autonomy in Britain to maintain the desired character of sovereignty

despite membership of the EU. Furthermore, the Zambrano carers were also initially excluded from the EU Settlement Scheme, created for EU citizens in the UK to retain a right to reside. It was only from May 1st 2019 that those resident in the UK as Zambrano carers became eligible to apply for settled status through this scheme, albeit with limited success. The decision by the Court of Appeal in the Akinsanya case further increased the scope of application for Zambrano carers. Since Brexit, Zambrano carers in the UK therefore have lost a right to reside based on EU law and must apply for this right under national law. It is a status that now only applies to those present in the UK prior to Brexit.

The UK response to the *Zambrano* decision illustrates how national sovereignty is exercised as a member of the EU – the government used national law to restrict to the minimum its obligations under EU law to carers and parents from beyond the EU/ EEA looking after EU/British nationals. It is noteworthy that during the many years of deliberation on Zambrano Amendments, at no point was a question referred to the CJEU under Article 267 TFEU, highlighting the extent to which the British judiciary claimed competence to determine the quality of sovereignty in the UK. This further suggests that even as part of the EU, the UK retained autonomy to determine the quality of legislative and judicial sovereignty.

This blog post builds upon Iyiola Solanke (2020) 'The Impact of Brexit on Black Women, Children and Citizenship' Journal of Common Market Studies.