



Summer 2019

Zhu and Chen Revisited: An Update on the ECJ's Jurisprudence on the Derivative Rights of Third-party Nationals

David H. King

Follow this and additional works at: <https://digitalcommons.lmu.edu/ilr>



Part of the [Comparative and Foreign Law Commons](#), [Conflict of Laws Commons](#), [European Law Commons](#), [Immigration Law Commons](#), [International Humanitarian Law Commons](#), [International Law Commons](#), [Jurisdiction Commons](#), [Juvenile Law Commons](#), [Law and Politics Commons](#), [Law and Society Commons](#), [Legislation Commons](#), [Public Law and Legal Theory Commons](#), and the [Transnational Law Commons](#)

Recommended Citation

David H. King, *Zhu and Chen Revisited: An Update on the ECJ's Jurisprudence on the Derivative Rights of Third-party Nationals*, 42 Loy. L.A. Int'l & Comp. L. Rev. 357 (2019).

Available at: <https://digitalcommons.lmu.edu/ilr/vol42/iss3/3>

This Symposium is brought to you for free and open access by the Law Reviews at Digital Commons @ Loyola Marymount University and Loyola Law School. It has been accepted for inclusion in Loyola of Los Angeles International and Comparative Law Review by an authorized administrator of Digital Commons@Loyola Marymount University and Loyola Law School. For more information, please contact digitalcommons@lmu.edu.

Zhu and Chen Revisited: An Update on the ECJ's Jurisprudence on the Derivative Rights of Third-party Nationals

BY DAVID H. KING*

In 2007, I wrote a note for the *Loyola of Los Angeles International and Comparative Law Review* (“*Review*”) regarding the European Court of Justice’s 2004 decision, *Zhu and Chen v. Secretary of State for the Home Department*. In that case, the court considered whether or not to grant a right of European Union (“Union”) residency to a child born in Belfast, Northern Ireland, and to her mother, as her caregiver.¹ The case exemplified the issue of ‘birth tourism’ and so-called ‘anchor babies.’ It also highlighted a legal loophole in the Union: at the time of the case, Ireland was the only Member State that recognized the *jus soli* principle²—that is, automatic Irish citizenship was given to anyone born on the isle of Ireland.³ The European Court of Justice ultimately decided the case in favor of both the child and her mother, a case that bolstered the importance of Union citizenship and reshaped the law in both Ireland and the Union.⁴

As part of the 40th Anniversary of the *Review*, this Update briefly reviews the *Zhu and Chen* decision, provides a brief update on how the

* David King is a practicing attorney and adjunct clinical professor at Loyola Law School, Los Angeles. He graduated from Loyola Law School in 2007 and served as Editor-in-Chief of the *Loyola of Los Angeles International and Comparative Law Review* from 2006-2007.

1. Kunqian Catherine Zhu & Man Lavette Chen, 2004 E.C.R. I-9969 [hereinafter *Zhu and Chen*].

2. Sometimes spelled as “*ius soli*,” it means “right of the soil.” See ISEULT HONOHAN, *IUS SOLI CITIZENSHIP: EUDO CITIZENSHIP POLICY BRIEF NO. 1* (July 31, 2010), <http://eudo-citizenship.eu/docs/ius-soli-policy-brief.pdf> (noting that in 2010 *ius soli* existed in some form in 19 of the 33 European countries included in the EUDO Citizenship study).

3. Dimitry Kochenov & Justin Lindeboom, *Breaking Chinese Law – Making European One: The Story of Chen, Or: Two Winners, Two Losers, Two Truths* (unpublished draft) 7 (University of Groningen Faculty of Law Research Paper, Paper No. 2015/09, May 2015).

4. See *id.* at 1-2 (showing that in June 2004, a referendum changed the Irish constitution, requiring lawful residence of three years within the four years immediately preceding the child’s birth for third-country national parents, before a child born to them can acquire Irish nationality).

law has evolved since the decision, and concludes with final thoughts on the issue.

I. BRIEF REVIEW OF *ZHU AND CHEN*

In the groundbreaking case, *Zhu and Chen v. Secretary of State for the Home Department*, the Court of Justice of the European Communities (“ECJ”) considered the tale of a 25-year old Chinese woman, Man Lavette Chen, who traveled to Belfast, Northern Ireland, to have her second child, Kunqian Catherine Zhu.⁵ Ms. Chen and her husband were wealthy Chinese nationals with a controlling interest in Skychem Corporation, a successful chemical company with a significant presence in the United Kingdom (“UK”).⁶ The couple desired to have a second child, but this was problematic due to China’s “one-child” policy.⁷ On the advice of her lawyers, Ms. Chen travelled to Northern Ireland seven months into her pregnancy.⁸

Catherine was born on September 6, 2000, and because of Irish law at the time, automatically became an Irish citizen.⁹ Soon after, Ms. Chen and Catherine relocated to Cardiff, Wales, in the UK.¹⁰ Because Catherine was covered by private health insurance and supported by her parents’ resources, she fulfilled the residency requirements of Union Law. When Ms. Chen applied for long-term residence permits for both herself and Catherine, however, the UK Secretary of State for the Home Department denied her application.¹¹ Ms. Chen appealed the decision to the Immigration Appellate Authority (“IAA”). The IAA Adjudicator heard the case in 2002 and referred it to the ECJ.¹²

Before the ECJ, the UK and Irish governments asserted that the ECJ did not have jurisdiction in the case because Catherine had never crossed a border, and thus had not exercised any free movement rights.

5. Zhu and Chen, *supra* note 1, at I-9958.

6. JACQUELINE BHABHA, CHILD MIGRATION AND HUMAN RIGHTS IN A GLOBAL AGE 84 (2014); Kochenov and Lindeboom, *supra* note 3, at 1-2.

7. Kochenov & Lindeboom, *supra* note 3, at 5-6 (referencing China’s Family Planning Law).

8. *Id.* at 7-9.

9. Irish Nationality and Citizenship Act 1956 (Act No. 26/1956) (Ir.), available at <http://www.irishstatutebook.ie/eli/1956/act/26/enacted/en/html?q=+Irish+Nationality+and+Citizenship+Act+>.

10. BHABHA, *supra* note 6, at 84 (stating that, unlike Ireland, Britain does not grant automatic citizenship to those born on British soil. Instead, Britain requires that one of the parents be a lawful permanent resident.); see British Nationality Act 1981, ch. 61 (Eng.).

11. BHABHA, *supra* note 6, at 84; Kochenov & Lindeboom, *supra* note 3, at 9.

12. Kochenov & Lindeboom, *supra* note 3, at 11.

For this reason, the UK and Irish governments claimed the case was a “wholly internal situation.”¹³ Ireland also questioned whether Catherine qualified as an Union citizen due to her age, arguing that she lacked the capacity to exercise Union rights, such as the right of movement or residence.¹⁴ The UK also complained that Ms. Chen’s choice to have her child in Belfast to secure Irish citizenship, and thus immigration entitlements in Britain, was an abuse of Union Law.¹⁵

The ECJ first evaluated whether Catherine was entitled to Community rights of residence.¹⁶ Under the then-current Treaty establishing the European Community (EC Treaty),¹⁷ the exercise of the right to free movement—i.e. crossing the borders of Member States—triggered the operation of Union citizenship and its provisions.¹⁸ Originally, the concept of free movement was associated with economic activity: the EC Treaty was originally interpreted as allowing free movement for employed persons who would not be a financial burden on the Member States and would help achieve the Community’s objective of a fully-integrated free market economy.¹⁹ Although the free movement principle was established in the EC treaties, Member States still retained the ability to impose limitations on the right of Community citizens to enter and take up work within their respective territories.²⁰ The UK and Irish governments relied on these principles in claiming that the situation was “purely internal.”

The ECJ however, rejected that argument, ruling in favor of Catherine. In a relatively short judgment, the ECJ emphasized the fact that Catherine had received Irish citizenship while residing in the UK,

13. *Id.* at 13.

14. BHABHA, *supra* note 6, at 84; Kochenov & Lindeboom, *supra* note 3, at 14.

15. Kochenov & Lindeboom, *supra* note 3, at 13.

16. *Id.* at 15.

17. In December 2007, the Lisbon Treaty was signed and established that the Treaty on the European Union shall be renamed as the “Treaty on the Functioning of the European Union.” Consolidated Version of the Treaty on the Functioning of the European Union, May 9, 2008, 2008 O.J. (C 115) 47 [hereinafter TFEU]. Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community art. I, Dec. 13, 2007, 2007 O.J. (C 306) 10 [hereinafter Treaty of Lisbon Amending the Treaty on European Union]. The Lisbon Treaty abolished the term “European Community.” Treaty of Lisbon Amending the Treaty on European Union, *supra* note 17, art. 2, 2007 O.J. (C 306) 42.

18. See RALPH H. FOLSOM, PRINCIPLES OF EUROPEAN LAW INCLUDING BREXIT 20-23, 124 (5th Ed. 2017).

19. See *id.* at 149.

20. See *id.* at 153.

which according to the ECJ gave it jurisdiction in the case.²¹ By ruling that Catherine was entitled to Community rights of residence, the ECJ seemed to create a precedent that having the nationality of a Member State other than the one in which you are residing triggers the operation of Union citizenship law.²² The ECJ also dismissed Catherine's youth as irrelevant and rejected the UK's abuse argument.²³ Because Catherine fulfilled the legal requirements for citizenship and residency, the court declined to look at the reasons surrounding the child's birth.²⁴

Next, the ECJ considered whether Article 18(1) of the EC Treaty allowed Ms. Chen a derivative right of residence.²⁵ Before *Chen*, the right of residence for a primary caregiver was typically contingent on the movement of an economically active Union citizen.²⁶ But because Catherine was a child, she was not an economically active Union citizen. Therefore, Ms. Chen could not rely on secondary legislation, such as the Council of the European Community's Directive 90/364/EEC on the right of residence, because it only made a right of residence possible for dependent blood relatives in the ascending line of a member state national and Ms. Chen was plainly not dependent on Catherine.²⁷

In its decision in favor of Ms. Chen, the ECJ granted a right of residence to the primary caregiver of a non-economically active citizen for the first time.²⁸ In its ruling, the ECJ relied heavily on *Baumbast & R.*, noting that refusing to permit a parent to stay would in fact frustrate the Community rights of the child.²⁹ Thus, the ECJ held that the Union citizenship of a dependent child is sufficient in order to confer a right of residence on the caring third-country parent.³⁰ In its decision, the ECJ

21. Kunqian Catherine Zhu & Man Lavette Chen, 2004 E.C.R. I-9963 (“[t]he situation of a national of a Member State who was born in the host Member State and has not made use of the right to freedom of movement cannot, for that reason alone, be assimilated to a purely internal situation”); Kochenov & Lindeboom, *supra* note 3, at 15.

22. Annette Schrauwen, *European Union Citizenship in the Treaty of Lisbon: Any Change at All*, 15 MAASTRICHT J. EUR. & COMP. L. 55 (2008).

23. Zhu and Chen, *supra* note 1, at I-9963, I-9967.

24. BHABHA, *supra* note 6, at 85; Kochenov & Lindeboom, *supra* note 3, at 16.

25. Zhu & Chen, *supra* note 1, at I-9965.

26. See Case C-413/99, *Baumbast & R v. Sec’y of State for the Home Dep’t*, 2002 E.C.R. I-7091.

27. See Zhu and Chen, *supra* note 1, at I-9959; JEREMY B. BIERBACH, FRONTIERS OF EQUALITY IN THE DEVELOPMENT OF EU AND US CITIZENSHIP 349 (2017).

28. See Zhu and Chen, *supra* note 1, at I-9951.

29. *Id.* at I-9969.

30. *Id.* at I-9969-70; Kochenov & Lindeboom, *supra* note 3, at 17.

again declared that states could not decide which nationals of other Member States they would recognize as Union citizens.³¹

The ECJ's decision was a complete victory for both Ms. Chen and Catherine. The decision is considered an unprecedented expansion of the court's interpretation of then-European Community principles, specifically the Freedom of Movement and Residence, and the Right to Enjoyment of Family.

II. DEVELOPMENTS AFTER *ZHU AND CHEN*

This section briefly summarizes post-*Zhu and Chen* developments in the Union and the UK, and ECJ jurisprudence.

A. *The European Union and the Lisbon Treaty*

Since the *Zhu and Chen* decision in 2004, the primary legislation that served as the basis for the decision changed. In 2007, President Nicolas Sarkozy of France and President Angela Merkel of Germany promoted a “mini-treaty” between the Member States that would remove references to “European Community.”³² The Lisbon Treaty was presented later that year and described technical amendments to the existing EC Treaty, which it renamed as the “TFEU”.³³

Although most of the changes were superficial, Article 9 of the TFEU was amended to read, “Union citizenship shall be *additional* to national citizenship and shall not replace it,” as compared with the 1997 Amsterdam version, which stated “Union citizenship shall *complement* and not replace national citizenship” (emphasis added).³⁴ Some commentators wondered if this indicated that Union citizenship could someday exist without corresponding national citizenship.³⁵ Those same commentators also speculated that Union citizens would increasingly appeal directly to their Union citizenship in court cases, rather than to nationality of a Member State.³⁶

B. *ECJ Jurisprudence*

The ECJ regulates the implementation of Union law, ensuring that the extensive and growing body of Union law (on free movement, etc.)

31. See BIERBACH, *supra* note 27, at 332.

32. FOLSOM, *supra* note 18, at 31.

33. *Id.*

34. Baumbast & R, 2002 E.C.R. I-7139; Schrauwen, *supra*, note 22, at 59.

35. Schrauwen, *supra*, note 22, at 60.

36. *Id.*

is appropriately implemented by the Union Member States.³⁷ Historically, the ECJ's jurisprudence involved Union legislation dealing with the internal market. Since the Treaty of Amsterdam in 1999, and particularly after the Treaty of Lisbon Amending the Treaty on European Union, the ECJ has increasingly decided immigration cases.³⁸

The *Zhu and Chen* case strongly reaffirmed the importance of Union citizenship. The case "is one of the first 'pure' EU citizenship cases decided by the ECJ where the citizenship provisions in the Treaty proved usable and consequential."³⁹ Further, the case serves as essential precedent for protecting the rights of family members of Union citizens and for fully extending the protections of the law to Union citizen children.⁴⁰ The ECJ's finding that denying Ms. Chen residence "would deprive the child's right of residence of any useful effect," (*i.e.*, the doctrine of *effet utile*) became a standard remark in subsequent ECJ cases, particularly in the 2011 case of Gerardo Ruiz Zambrano.⁴¹

Ruiz Zambrano decided the case of Gerardo Ruiz Zambrano and his wife, both Colombian nationals, who applied for asylum in Belgium.⁴² In 2000, Belgian authorities rejected the Zambranos' applications and ordered them to leave Belgium.⁴³ Due to a non-refoulement clause in the order,⁴⁴ and a civil war in Colombia, however, the Zambranos were not sent back.⁴⁵

While Gerardo continued to attempt to regularize his situation in Belgium, Gerardo's wife gave birth to two children, Diego and Jessica.⁴⁶ At the time Jessica and Diego were born, Belgium's Nationality Code

37. BHABHA, *supra* note 6, at 83. The ECJ must not be confused with the European Court of Human Rights, which oversees the implementation of the European Convention on Human Rights in the member states of the Council of Europe.

38. C.M.A. McCauliff, *EU Citizenship: Why Can't the Advocates General Keep Sheila McCarthy's Family Together?* 36 *Fordham Int'l. L. J.* 1372, 1377-78 (2013).

39. Kochenov & Lindeboom, *supra* note 3, at 3.

40. *See generally id.*

41. *Zhu and Chen*, *supra* note 1, at I-9969; *see* Case C-34/09, *Gerardo Ruiz Zambrano v. Office national de l'emploi (ONEm)*, 2011 E.C.R. I-1248 (quoting *Kunqian Catherine Zhu and Man Lavette Chen v. Secretary of State for the Home Department*, CJEU Case C-200/02, 2004 E.C.R. I-9925) [hereinafter *Ruiz Zambrano*]; *see also* Gerard-Rene de Groot & Ngo Chun Luk, *Twenty Years of CJEU Jurisprudence on Citizenship* 15 *GER. L.J.* 821, 829 (2014); BIERBACH, *supra* note 27, at 349.

42. *Ruiz Zambrano*, *supra* note 41, at I-1243.

43. *Id.*

44. Non-refoulement refers to the practice of not forcing refugees or asylum seekers to return to a country in which they are likely to be persecuted.

45. de Groot & Luk, *supra* note 41, at 828-29.

46. *Ruiz Zambrano*, *supra* note 41, at I-1236.

provided that any child who was born stateless in Belgium had a right to Belgian nationality.⁴⁷ Under Colombian nationality law, children born abroad to Colombian nationals are not automatically Colombian nationals; instead, their birth had to be duly reported to a Colombian embassy or consulate.⁴⁸ Gerardo intentionally did not register Jessica and Diego's births at the Colombian embassy and thus the children did not obtain Colombian nationality.⁴⁹ Accordingly, Belgian law granted both children Belgian nationality.⁵⁰

When Gerardo was denied an unemployment benefit because he did not have a right to work in Belgium, he challenged the decision.⁵¹ Gerardo asserted his right to work because he was the parent of a Union citizen.⁵² Essentially, Gerardo asserted that, like Man Chen and Catherine Zhu, his children had a right of residence and that their third-country national parent had not only the right to reside, but also the right to provide for them.⁵³ However, unlike the *Zhu and Chen* case, Jessica and Diego were in a "purely internal situation": they were Belgians who had never left Belgium to live in another member state and had never exercised their right of free movement.⁵⁴

Nonetheless, in another momentous and far-reaching decision, the ECJ allowed the minor Union citizens' rights of residence to breach the wall of the "purely internal situation" for the first time.⁵⁵ While Directive 2004/38 was by its very design only applicable to mobile Union citizens, the Court reasoned that the primary legislation, Article 21 of the TFEU (formerly Art. 18 of the EC Treaty),⁵⁶ "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."⁵⁷ This was a new "jurisdictional test" by the ECJ; rather than travel based on free movement, "the severity of a Member State's interference with EU

47. *Id.*

48. *Id.* at I-1244-45.

49. *See id.*

50. *Ruiz Zambrano*, *supra* note 41, at I-1236.

51. *Id.*

52. *Id.* at I-1248.

53. *Id.* at I-1251.

54. *Id.* at I-1245-46.

55. *Id.* at I-1252.

56. At the time of the *Ruiz Zambrano* decision, the Lisbon Treaty had entered into force. The EC Treaty was renamed the "Treaty on the Functioning of the European Union," and certain sections were re-numbered. *See FOLSOM*, *supra* note 18, at 31.

57. *Ruiz Zambrano*, *supra* note 41, at I-1177.

citizenship' should be weighed."⁵⁸ Based on this reasoning, the ECJ concluded that Diego and Jessica's parents must be granted a right of residence because otherwise the children would have to leave Union territory to be with and be cared for by their parents.⁵⁹ Indeed, this new jurisdictional test appears to have been applied in even more recent ECJ cases.⁶⁰

The ECJ also held that "Jessica's and Diego's right of residence meant that their parents also had to be given the right to work, since otherwise they could not satisfy the requirements of sufficient resources to have a right of residence as economically inactive Union citizens"⁶¹ Because the derivative rights flowed from the children to the parents in an ascending line, even when such children were naturalized citizens and had never exercised freedom-of-movement rights, the ECJ's decision was an unprecedented development in Union law.⁶²

In *Ruiz Zambrano*, the ECJ extended *Chen* to the situation in which a minor Union citizen was not outside of her home Member State and there were no other apparent cross-border aspects.⁶³ Also, unlike in *Chen*, where Ms. Chen already had sufficient resources and the health insurance required to satisfy Catherine's right of residence, Jessica and Diego's parents had to be given the right to work to be able to help Jessica and Diego satisfy the requirement.⁶⁴ Thus, the Court gave greater weight to the Union citizens' rights of residence than to the limitations and conditions placed on it by secondary legislation.⁶⁵

The case of *Ruiz Zambrano* is surprising, in part, because of the Court's decision to allow the non-European parents of Union citizens, who were young children and had never lived outside of the Union, to stay with them, even though it conflicted with the immigration law of their Member State of nationality (Belgium).⁶⁶ For that reason, at least one commentator has compared the *Ruiz Zambrano* case to the seminal U.S. case of *Brown v. Board of Education of Topeka*.⁶⁷ *Brown* marked "the first time that [the U.S. Supreme] Court dared to intervene between

58. C.M.A. McCauliff, "supra note 38, at 1391 (quoting Lenaerts, Civis, at 7).

59. BIERBACH, supra note 27, at 402; see *Ruiz Zambrano*, supra note 41, at I-1177.

60. BIERBACH, supra note 27, at 393-94.

61. *Ruiz Zambrano*, supra note 41, at I-1177.

62. BHABHA, supra note 6, at 85-86; see BIERBACH, supra note 27, at 391-92.

63. See BHABHA, supra note 6, at 84-86.

64. *Ruiz Zambrano*, supra note 41, at I-1252;

65. *Id.*

66. See BIERBACH, supra note 27, at 402.

67. *Id.* at 444.

a state . . . and a duplex citizen who “belonged” to that state, without . . .” requiring the citizen to be actively engaged in interstate movement.⁶⁸ The U.S. Supreme Court “invoked the importance of children’s education as a foundation of the citizenship of the United States.”⁶⁹ Likewise, the ECJ invoked “the importance of not depriving the children of the most essential of their rights as Union citizens. . .”: if the parents were to be deported, it would thereby force the children to leave the territory of the Union.⁷⁰

The *Zhu and Chen* and *Ruiz Zambrano* decisions reflect a forward-looking approach to residency rights and birthright citizenship. Rather than basing residency rights on the adult’s time spent in a country, the ECJ instead evaluates the substantive meaning of the right from the perspective of the affected citizen.⁷¹ Accordingly the ECJ held that the Union citizenship law looks to the future to define the rights and obligations it confers. For that reason, the rights of the child who achieves Union citizenship by birth includes the allowance of rights of residency for the parents to ensure that the child has the continuing right to future residency anywhere within Union territory.⁷²

C. UK and Ireland

In addition to the referendum in Ireland that changed the Irish constitution to eliminate birthright citizenship, the *Zhu and Chen* case also led to the current (informal) practice of the UK immigration courts refusing to refer cases to the ECJ, allegedly in violation of Article 267

TFEU.⁷³ The practice derives from the UK’s well-known contempt of Union Law.⁷⁴ Commentators complain that “[a]s a result, we can expect numerous claimants to have been barred from receiving justice in the UK, left with no access to the ECJ, the only court empowered to clarify the meaning of Union law.”⁷⁵

68. *Id.*; see generally *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954) [hereinafter “*Brown*”].

69. BIERBACH, *supra* note 27, at 444; *Brown*, 347 U.S. at 493.

70. BIERBACH, *supra* note 27, at 444; BHABHA, *supra* note 6, at 85.

71. BHABHA, *supra* note 6, at 85-86.

72. *Id.* at 85.

73. See *Kochenov & Lindeboom*, *supra* note 3, at 11, 17. (Before the *Zhu and Chen* case, most British courts would leave the dialog with the ECJ to the Court of Appeal and the then House of Lords. The *Zhu and Chen* case was unique because the case was referred to the ECJ at first instance).

74. *Id.* at 17.

75. *Id.* at 2, 4.

III. UPDATE REGARDING KUNQIAN CATHERINE ZHU

Zhu and Chen is not simply an important legal case that bolstered Union citizenship and the rights of non-nationals; it is also a very human story, about a young, wealthy mother pursuing the best interests of her child.⁷⁶ Indeed, lawyers who argued the case on behalf of the Chens understood that the case had significant implications for Catherine's life and future.⁷⁷ Even the Commission's representative, who argued in favor of Catherine and Ms. Chen before the ECJ, emphasized the underlying humanity in the case, contending, "it was not a baby case, it was a *Catherine* case."⁷⁸

After the ECJ's decision in 2004, Catherine and her mother moved back to ZhuHai, China, to rejoin Catherine's father and brother. Later, Catherine's family moved to the U.S. where Catherine studied and graduated from Howe Military Academy in Howe, Indiana. Catherine is now a college student majoring in Health Sciences at Purdue University in West Lafayette, Indiana.⁷⁹ Catherine's parents still have a controlling interest in Skychem Corporation.

Catherine explains that while initially it was a "shock" when she realized that she was the subject of an important ECJ case, her role in the case motivated her to aspire to do great things with her life. Catherine indicates that her current plan is to graduate from Purdue and one day become a medical doctor, and this author wishes her much success in her future endeavors.

76. *Id.* at 7.

77. *Id.*

78. *Id.* at 13. (emphasis in original). See also Kochenov and Lindeboom, *supra* note 3 (providing fascinating insight into the story behind the case, with interviews of the attorneys representing the Chens, Ramby De Mello and Adrian Berry, and Adjudicator Michael Shrimpton).

79. Interview with Kunqian Catherine Zhu, Feb. 20, 2019.



Kunqian Catherine Zhu and her mother, Man Lavette Chen, in 2018.
Photo courtesy of Catherine Zhu.

IV. FINAL THOUGHTS

As an American law student in 2007, the *Zhu and Chen* case piqued my interest because it touched on the issues of birthright citizenship and so-called ‘anchor babies’ – topics that were familiar to me because they were issues that had been debated in California and throughout the U.S. during my entire life.⁸⁰ Since the Note was published in 2007, such topics have persisted.⁸¹ For example, in October 2018, President Donald Trump raised the issue of birthright citizenship, announcing that he was preparing an executive order to end birthright citizenship in the U.S.⁸² This announcement set off a firestorm of criticism, since most Americans are of the opinion that American birthright citizenship is protected by the 14th Amendment of the U.S. Constitution.⁸³

Additionally, in January 2019, U.S. authorities announced that they had charged twenty people in an unprecedented crackdown on businesses that helped hundreds of Chinese women travel to the U.S. to

80. See LEAH PERRY, *THE CULTURAL POLITICS OF U.S. IMMIGRATION* (2016).

81. Hans A. von Spakovsky, *Trump is right – ending birthright citizenship is constitutional*, FOX NEWS (Oct. 31, 2018), <https://www.foxnews.com/opinion/trump-is-right-ending-birthright-citizenship-is-constitutional>.

82. *Id.*

83. See JOSE J. MENDOZA, *THE MORAL AND POLITICAL PHILOSOPHY OF IMMIGRATION: LIBERTY, SECURITY, AND EQUALITY* 11 (2017).

give birth to American citizen children. While it is not illegal to visit the U.S. while pregnant, authorities said the businesses touted the benefits of having U.S. citizen babies, who could get free public education and help their parents immigrate in the future.⁸⁴

Interestingly, the issue of birthright citizenship is also currently being debated in Canada. Recently, many Chinese nationals have been having babies in Canada so that their children are automatically Canadian citizens at birth.⁸⁵ For example, in a city outside Vancouver that is 53% ethnic Chinese, one in five births at the local hospital were to nonresident mothers.⁸⁶ Because birthright citizenship is allowed under its immigration law (not its Constitution), Canada's Conservatives adopted a resolution in August 2018 calling for an end to "birth tourism" in Canada.⁸⁷

The *Zhu and Chen* and *Ruiz Zambrano* decisions demonstrate the Union's dramatically different approach to immigration as compared to the U.S.'s approach. In the U.S., illegal alien parents of U.S.-born children still face deportation. According to the Board of Immigration Appeals "[t]he mere fact that an alien's child has been born in the United States does not entitle the alien to *any* favored status in seeking discretionary relief from deportation" (emphasis added).⁸⁸ At least one commentator has argued that, in such situations "where the parent's alienage trumps the right of the citizen child to parental care and companionship at home, citizenship loses all effective meaning for children."⁸⁹ In this sense, the child who achieves citizenship by birth in the U.S. becomes a "mere bystander" in his or her parents' deportation proceedings.⁹⁰ Some argue that giving young citizen children the 'option' of staying in their home country without their deported adult caregivers trivializes the citizenship that was given to the child.⁹¹ A

84. Amy Taxin, *US prosecutors announce Chinese birth tourism crackdown*, THE SPOKESMAN-REVIEW, <http://www.spokesman.com/stories/2019/jan/31/us-prosecutors-announce-chinese-birth-tourism-crack/> (last updated Jan. 31, 2019, 11:12 PM).

85. Dan Bilefsky, *'Birth Tourism' Is Legal in Canada. A Lawmaker Calls It Unscrupulous*, N.Y. TIMES (Dec. 31, 2018), <https://www.nytimes.com/2018/12/31/world/canada/china-birth-tourism.html>.

86. *Id.*

87. Konrad Yakabuski, *Canada Needs An Honest Debate About Birthright Citizenship*, GLOBE & MAIL (Nov. 1, 2018), <https://www.theglobeandmail.com/opinion/article-canada-needs-an-honest-debate-about-birthright-citizenship/>.

88. BHABHA, *supra* note 6, at 88; *Villena v. INS*, 622 F.2d 1352, 1359 (9th Cir. 1980).

89. BHABHA, *supra* note 6, at 89.

90. *Id.* at 89-90.

91. *Id.* at 91-92.

“just legal framework,” according to some, is one that “incorporat[es] a child’s perspective . . . and increase[s] the burden on the deporting state to demonstrate that the benefits of parental removal outweigh the costs of child separation”⁹²

On the other hand, of course, is the concern that granting rights to the parents of so-called ‘anchor babies’ rewards potential bad behavior of the parents. The argument is that attaching parental immigration rights to children’s birthright citizenship produces undesirable migratory outcomes.⁹³ For such reasons, punishing or deporting a parent who desires to gain U.S. citizenship by having a child in the U.S. may be socially and politically justifiable.⁹⁴

The *Zhu and Chen* and *Ruiz Zambrano* decisions, and others like them, serve as essential reminders of the human element to this complicated issue. Because such cases involve innocent children—who obviously have no control over where they are born or to whom they are born—these cases are even more sympathetic and intriguing. The ECJ appears to be deciding immigration cases from the perspective of the child Union citizen, to protect their rights of residence above all other limitations or conditions. Only time will tell whether the ECJ’s approach is the best one for the Union and her Member States.

92. *Id.* at 92-93.

93. *Id.* at 92.

94. *Id.*