THE EUROPEAN COURT OF JUSTICE IN THE CONTEXT OF FREE MOVEMENT OF PERSONS: JUDICIAL ACTIVISM OR BUILDING "AN EVER CLOSER UNION"?

Andreas Kjeldsen

Introduction

Among the three branches of government, the judicial branch inhabits a somewhat precarious position: It is called upon to interpret the law, but in doing so, it must often resort to unwritten principles of law, effectively engaging in a degree of lawmaking of its own. At the same time, this quasi-legislative role often leaves the courts open to the accusation of *judicial activism*. The European Court of Justice has not been spared from this, either, and among the more contentious recurring topics have been the interaction between Union citizenship and the free movement of persons. Indeed, the Court has been facing increasing criticism over several recent judgements, such as the *Zhu and Chen*, *Metock* and *Zambrano* cases.[1]

Thus, very recently, Danish professor of law Hjalte Rasmussen (whose 1986 doctoral dissertation *On Law and Policy in the European Court of Justice*[2] more or less created the academic debate about judicial activism in the Court of Justice) delivered a particularly scathing critique of the *Metock* and *Zambrano* judgements in two op-ed pieces in the Danish national newspaper *Berlingske Tidende*, going so far as to argue that the Court's judgements in these and other cases were "illegal", on the grounds that they violated the subsidiarity principle, [3] and that the Danish courts and government should engage in "legal disobedience" to protect national sovereignty.[4]

These are very aggressive statements, yet not ones that can just be dismissed out of hand. Nor do they stand alone: Similar criticism has come from other sources as well, such as the former German President Roman Herzog and the then Austrian Chancellor Wolfgang Schüssel.[5] But nor should such claims be accepted uncritically. Thus, the following analysis will review the Court's reasoning in *Zhu and Chen*, *Metock* and *Zambrano*, and, considering them in the light of the earlier *Martínez Sala*, *Grzelzcyk* and *Baumbast* cases,[6] examine whether or not the accusations of judicial activism are justified.

---

[1] Case C-200/02 *Kunqian Catherine Zhu and Man Lavette Chen v Secretary of State for the Home Department* [2004] ECR I-9925 Case C-127/08 *Blaise Baheten Metock and Others v Minister for Justice, Equality and Law Reform* [2008] ECR I-6241; Case C-34/09 *Gerardo Ruiz Zambrano v Office national de l'emploi (ONEm)* [2011] (not yet reported in ECR)

[2] Rasmussen (1986)

[3] Hjalte Rasmussen, "EU-Domstolen dømmer ulovligt", *Berlingske Tidende*, March 16, 2011, http://www.b.dk/kronikker/eu-domstolen-doemmer-ulovligt

[4] Hjalte Rasmussen, "Danmark bør vise juridisk ulydighed", *Berlingske Tidende*, March 17, 2011, http://www.b.dk/kronikker/danmark-boer-vise-juridisk-ulydighed

[5] 'Editorial Comment: The Court of Justice in the limelight — again', *Common Market Law Review* 45 (2008), pp. 1571–9

[6] Case C-85/96 *María Martínez Sala v Freistaat Bayern* [1998] ECR I-2691; Case C-184/99 *Rudy Grzelczyk v Centre public d'aide sociale d'Ottignies-Louvain-la-Neuve* [2001] ECR I-6193; Case C-413/99 *Baumbast and R v Secretary of State for the Home Department* [2002] ECR I-7091

Analysis

Black's Law Dictionary defines judicial activism as:

> A philosophy of judicial decision-making whereby judges allow their personal views about public policy, among other factors, to guide their decisions, usu. with the suggestion that adherents of this philosophy tend to find constitutional violations and are willing to ignore precedent. [7]

It lies implicitly in this definition that the judges would have reached a different verdict in a given case had they not been influenced by such views. So were one to look for a 'judicial activism test', as it were, it would be a useful exercise to consider what the implications would be had the Court ruled differently from how it did in the case at hand.

In *Zhu and Chen*, the British and Irish governments argued that the resources requirement in Directive 90/364[8] should be interpreted so that prospective residents should possess such resources in their own right, rather than merely have access to such resources in a general sense. However, such a requirement is not mentioned anywhere in the text of the Directive itself, and had the Court agreed with this reasoning, it would essentially have imposed an unreasonably narrow interpretation beyond both the letter and the spirit of the Directive;[9] in that case one might well speak of judicial activism.

Such a judgement would not just have been unreasonable for the individuals involved in that particular case, but also set a problematic precedence for the future. Aside from the question of proportionality – is it reasonable or necessary to demand that an infant possesses resources specifically in his or her own right, rather than through a parent or other adult? – it also raises issues of legal certainty if the rights of citizens are limited by provisions that are not specifically in the text of law, or at least logically derived from it. Considering these issues, it is difficult to see how the Court could have ruled differently in *Zhu and Chen*.

The *Metock* case presented the Court with almost the opposite situation: A question regarding the freedom of movement of a citizen, but under circumstances which the relevant legislation (the Citizens Rights Directive 2004/38)[10] did not account for. As Advocate General Maduro observed, "Directive 2004/38 does not provide an explicit answer … Since an analysis of the text provides no assistance, it is necessary to refer to its objectives."[11] And the Court agreed: "Having regard to the context and objectives of Directive 2004/38, the provisions of that directive cannot be interpreted restrictively, and must not in any event be deprived of their effectiveness…"[12]

These examples of case law illustrate the dilemma facing the Court. It is called upon to apply legislation to actual controversies in which the rights of individuals are at stake. In doing so, and

---

[7] Black, Henry Campbell, *Black's Law Dictionary*, 9th edition, ed. Bryan A. Garner (St. Paul, MN: West, 2009), p. 922

[8] Council Directive 90/364/EEC of 28 June 1990 on the right of residence

[9] *Zhu and Chen*, AG's Opinion, §69-70

[10] 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

[11] *Metock*, AG's Opinion, §5

[12] *Metock*, §84

according to Art. 19 TEU, it must "...ensure that in the interpretation and application of the Treaties the law is observed." But as mentioned in the Introduction, since no legislation can account a priori for all possible situations that may arise under its provisions, courts must sometimes resort to more general principles of law to reach a satisfactory outcome in a case.

It is apparent from the case law that when such interpretation is required, and in the absence of legislative directions to the contrary, the Court prefers to err on the side of citizens' rights, in particular where the freedoms of the single market are concerned. As Advocate General Tizzano observed in *Zhu and Chen*, with the declaration in the Maastricht and later treaties of freedom of movement and residence as fundamental rights of Union citizens subject to specific limitations, secondary legislation such as Directives 90/364 (and the later 2004/38) have,

> …become a measure which limits the exercise of a fundamental right. The conditions imposed by it must therefore be interpreted restrictively, in the same way as all exceptions and limitations imposed on the freedoms upheld by the Treaty.[13]

This is an important point. The Court's decision in a case such as *Zhu and Chen* is of great importance not just (obviously) for the parties in that particular case, but also through the precedence of case law that it establishes, and which may at a later point serve to further limit the rights of other citizens, the exercise of a freedom, and potentially the continuing integration of Europe, which, it will be recalled, has consistently been mentioned in successive Treaties as a crucial element of legislative intent.

Further, when considering legislative intent, the Court must necessarily do so on the basis of the text as it is. As such, it must also recognise and give appropriate weight to the fact that the drafters of the Maastricht Treaty introduced the concept of Union citizenship, and that they presumably did so for a reason. Rather than denouncing it as 'judicial activism', the Court's subsequent case law on citizenship rights should be seen as one long process of examining this concept and what its implications are for the rights of Europeans as 'citizens' rather than 'workers'.

Throughout this process, the Court has followed a reasonably clear line of development in the post-Maastricht case law beginning with *Martínez Sala*, through *Grzelczyk* and *Baumbast*, to the more recent rulings in the three more recent cases already considered, continuing to evolve and build upon the precedences established in earlier cases.

Thus, in *Martínez Sala*, the Advocate General proposed that Union citizenship was "…the fundamental legal status guaranteed to the citizen of every Member State by the legal order of the Community and now of the Union."[14] The Court itself agreed with this interpretation a few years later in *Grzelczyk*, using almost the same words and further tying citizenship together with the principle of non-discrimination:

> Union citizenship is destined to be the fundamental status of nationals of the Member States, enabling those who find themselves in the same situation to enjoy the same

[13] *Zhu and Chen*, AG's Opinion, §74

[14] *Martínez Sala,* AG's Opinion, §18

> treatment in law irrespective of their nationality, subject to such exceptions as are expressly provided for.[15]

And the judgement in *Baumbast* continued the process by detaching economic activity from citizenship, eliminating the requirement to:

> …pursue a professional or trade activity, whether as an employed or self-employed person, in order to enjoy the rights provided in Part Two of the EC Treaty, on citizenship of the Union. [16]

Only with the most recent *Zambrano* case do we find the Court venturing into somewhat more treacherous legal waters. On the surface, *Zambrano* shares many similarities with *Zhu and Chen* – is it proportional to demand that the Zambrano family leave Belgium, or would that constitute a breach of the children's rights as citizens, and of the right to family life?[17] However, the crucial difference is the lack of a cross-border element, as the family had never exercised any rights of movement. Thus, Art. 21 TFEU could not be invoked, nor did Directive 2004/38 apply.

Instead, the Court chose to derive a right to reside exclusively from Art. 20 TFEU. Whereas the Court's judgement itself is extremely concise, essentially contained in a single paragraph,[18] the Advocate General's opinion is more substantial and sheds considerable more light on the rationale behind the judgement. Drawing extensively on the *Rottmann* case,[19] Mr Sharpston argued that denying the family a right to reside would restrict the children's ability to exercise certain rights in the future, and that even this *potential* breach of rights was sufficient to move the case beyond the purely internal.[20]

Whether the Court actually agreed with this line of reasoning is not immediately apparent from the judgement,[21] but its brief references to Art. 20 TFEU and to *Rottmann*[22] would suggest that it did. If so, *Rottmann* notwithstanding, the ruling must be seen as a significant departure from precedence. That does not mean it is unreasonable – as Mr Sharpston pointed out, it seems particularly illogical that EU citizens should be denied a right to reside and have to leave the Union, only to be able to invoke a different set of rights (such as consular protection) once outside the territory of the Union.[23]

---

[15] *Grzelczyk*, § 31

[16] *Baumbast,* §83

[17] *Zambrano*, AG's opinion, §§61-66

[18] *Zambrano*, §44

[19] Case C-135/08 *Janko Rottman v Freistaat Bayern* [2010] ECR I-0000

[20] *Zambrano*, AG's opinion, §§95-97

[21] Indeed, the fact that a ruling with such significant potential implications for the law does not go into greater detail as to its reasoning is perhaps the greatest criticism that can be raised against *Zambrano*.

[22] *Zambrano*, §41-42

[23] *Zambrano*, AG's opinion, §87

But a ruling in the opposite direction would most likely have been equally reasonable, and this is where the Court opens itself up to charges of judicial activism, even if it – as seems more likely – was motivated by a desire to avoid an injustice rather than by any grand designs on national sovereignty.

Conclusion

On the balance, the argument that 'judicial activism' on the part of the Court is undermining national sovereignty seems somewhat misguided. In its case law up until *Zambrano,* it appears to have followed a consistent line of interpretation, only stepping in to expand on the legislation when gaps existed in the legislation that could erode the rights of Union citizens in specific cases.

In any event, given that the Treaties must necessarily be considered the ultimate expression of the Member States' opinion of the European Union; and that both the general Preamble statements of intent and the specific Treaty Articles according to which the Court have previously reached its supposedly 'activist' judgements have survived unchanged in the Lisbon Treaty, it does not seem an unreasonable conclusion that the Member States are in fact satisfied with the Court's interpretations.

On the contrary, if the Court were in fact infringing on the sovereignty of the Member States, as the critics of the Court assert,[24] one would expect the underlying primary legislation to have been changed when the opportunity presented itself, either by further refining the 'citizenship' concept and the rights that are to be derived from it, or by introducing limits in the Treaties on the Court's ability to interpret the law. None of this has happened. In fact, with the abolition of the pre-Lisbon 'three pillars' structure and the elevation of the Charter of Fundamental Rights to a legal position equal to that of the Treaties, the Court's jurisdiction and powers of review have been expanded even further.[25]

And indeed, given the unbroken chain of intent to move towards the "ever closer union" from the Treaty of Rome to the Lisbon Treaties, one could legitimately ask whether it would not be an even greater expression of judicial activism had the Court instead decided on a more narrow interpretation of the Treaties, thereby deliberately limiting the freedom of movement and the European integration that depends on it.

---

[24] For an opinion to the contrary, see Dougan, M., "The Constitutional Dimension to the case-law on Union citizenship", European Law Review 31:5 (2006), pp. 613-641

[25] Barents, René, 'The Court of Justice after the Treaty of Lisbon', *Common Market Law Review* 47 (2010), pp. 709-728

Bibliography

Legislation

Council Directive 90/364/EEC of 28 June 1990 on the right of residence

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

Cases

Case C-85/96 *María Martínez Sala v Freistaat Bayern* [1998] ECR I-2691

Case C-184/99 *Rudy Grzelczyk v Centre public d'aide sociale d'Ottignies-Louvain-la-Neuve* [2001] ECR I-6193

Case C-413/99 *Baumbast and R v Secretary of State for the Home Department* [2002] ECR I-7091

Case C-200/02 *Kunqian Catherine Zhu and Man Lavette Chen v Secretary of State for the Home Department* [2004] ECR I-9925

Case C-127/08 *Blaise Baheten Metock and Others v Minister for Justice, Equality and Law Reform* [2008] ECR I-6241

Case C-34/09 *Gerardo Ruiz Zambrano v Office national de l'emploi* (ONEm) [2011] (not yet in ECR)

Works

Barents, René, 'The Court of Justice after the Treaty of Lisbon', *Common Market Law Review* 47 (2010), pp. 709-728

Black, Henry Campbell, *Black's Law Dictionary*, 9th edition, ed. Bryan A. Garner (St. Paul, MN: West, 2009)

Chalmers, Damian, Gareth Davies and Giorgio Monti, *European Union Law. Text and Materials*, 2nd edition (Cambridge: Cambridge University Press, 2010)

Dougan, M., "The Constitutional Dimension to the case-law on Union citizenship", *European Law Review* 31:5 (2006), pp. 613-641

'Editorial Comment: The Court of Justice in the limelight — again', *Common Market Law Review* 45 (2008), pp. pp. 1571–9

Rasmussen, Hjalte, *On Law and Policy in the European Court of Justice. A Comparative Study in Judicial Policymaking* (Dordrecht: M. Nijhoff, 1986)

Rasmussen, Hjalte, "EU-Domstolen dømmer ulovligt", *Berlingske Tidende*, March 16, 2011, http://www.b.dk/kronikker/eu-domstolen-doemmer-ulovligt

Rasmussen, Hjalte, "Danmark bør vise juridisk ulydighed", *Berlingske Tidende*, March 17, 2011, http://www.b.dk/kronikker/danmark-boer-vise-juridisk-ulydighed