



Garden Court Chambers training on Zambrano carer applications to the EU Settlement Scheme (EUSS)

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Zambranos and the EUSS: the basics

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Key documents

Appendix EU

“EU Settlement Scheme: person with a Zambrano right to reside Version 4.0”



Appendix EU: person with a Zambrano right to reside

A person who has satisfied the Secretary of State, including (where applicable) by the required evidence of family relationship, that, by the specified date, they are (and for the relevant period have been), or (as the case may be) for the relevant period in which they rely on having been a person with a Zambrano right to reside (before they then became a person who had a derivative or Zambrano right to reside) they were:

(a) resident for a continuous qualifying period in the UK with a derivative right to reside by virtue of regulation 16(1) of the EEA Regulations, by satisfying:

- (i) the criterion in paragraph (1)(a) of that regulation; and
- (ii) the criteria in:

(aa) paragraph (5) of regulation 16 of the EEA Regulations; or

(bb) paragraph (6) of that regulation where that person's primary carer is, or (as the case may be) was, entitled to a derivative right to reside in the UK under paragraph (5), regardless (where the person was previously granted limited leave to enter or remain under paragraph EU3 of this Appendix as a person with a Zambrano right to reside and was under the age of 18 years at the date of application for that leave) of whether, in respect of the criterion in regulation 16(6)(a) of the EEA Regulations, they are, or (as the case may be) were, under the age of 18 years; and

(b) without leave to enter or remain in the UK, unless this was granted under this Appendix



Appendix EU: eligibility

Persons eligible for indefinite leave to enter or remain as a relevant EEA citizen or their family member, or as a person with a derivative right to reside or with a Zambrano right to reside

EU11. The applicant meets the eligibility requirements for indefinite leave to enter or remain as a **relevant EEA citizen** or their family member (or as a **person with a derivative right to reside** or a **person with a Zambrano right to reside**) where the Secretary of State is satisfied, including (where applicable) by the **required evidence of family relationship**, that, at the date of application, one of conditions 1 to 7 set out in the following table is met:



Appendix EU: eligibility

EU 11.3

(a) The applicant:

(i) is a relevant EEA citizen; or

(ii) is (or, as the case may be, for the relevant period was) a family member of a relevant EEA citizen; or

(iii) is (or, as the case may be, for the relevant period was) a family member who has retained the right of residence by virtue of a relationship with a relevant EEA citizen; or

(iv) is a person with a derivative right to reside; or

(v) is a person with a Zambrano right to reside; or

(vi) is a **person who had a derivative or Zambrano right to reside**; and

(b) The applicant has completed a **continuous qualifying period** of five years in any (or any combination) of those categories; and

(c) Since then no supervening event has occurred



Appendix EU: eligibility

EU14. The applicant meets the eligibility requirements for limited leave to enter or remain where the Secretary of State is satisfied, including (where applicable) by the required evidence of family relationship, that, at the date of application and in an application made by the required date, condition 1 or 2 set out in the following table is met:

1.(a) The applicant is:

(i) a relevant EEA citizen; or

(ii) a family member of a relevant EEA citizen; or

(iii) a family member who has retained the right of residence by virtue of a relationship with a relevant EEA citizen; or

(iv) a person with a derivative right to reside; or

(v) a person with a Zambrano right to reside; and

(b) The applicant is not eligible for indefinite leave to enter or remain under paragraph EU11 of this Appendix solely because they have completed a continuous qualifying period of less than five years



EUSS caseworker guidance

Stage 1: assessing British citizenship

Stage 2: direct relative or legal guardian

Stage 3: primary carer

Stage 4: British citizen unable to reside in the UK or the EEA



Stage 1: Assessing British citizenship

Whether a person has British citizenship is a matter that can only be determined conclusively by the courts. However, any one of the following documents, for example, will normally be enough to determine that a person is a British citizen:

current valid British citizen passport

certificate of registration or naturalisation as a British citizen

UK birth certificate showing birth in the UK before 1 January 1983

UK birth certificate showing birth in the UK on or after 1 January 1983 and evidence that either parent was a British citizen or settled in the UK at the time of the birth

a certificate of entitlement to the right of abode issued under section 2(1)(a) of the Immigration Act 1971

a derivative residence card or EEA family permit issued under the EEA Regulations on the basis that the applicant is the primary carer of the relevant British citizen

The definition of ‘parent’ will depend on whether the child was born before or after 1 July 2006. Where the relevant person being cared for was born before 1 July 2006 and they are relying on their father being British or settled in the UK at the time of their birth, then their parents must have been married when they were born for them to be a British citizen.



Stage 2: Assessing British citizenship

Where the applicant has been issued with a residence card or a family permit under the EEA Regulations on the basis that they are the direct relative of the relevant British citizen, you can accept that this has already been confirmed and move to the next stage.

Where the applicant has not been issued with such a document or has been issued with one based on legal guardianship, you must be satisfied from information or evidence provided by the applicant that they are the direct relative of the relevant British citizen or that they are (or, as the case may be, for the relevant period were) the British citizen's legal guardian



Stage 3: Primary carer?

A primary carer is defined under regulation 16(8) of the EEA Regulations as a direct relative or legal guardian who either:

has primary responsibility for the British citizen's care • shares equally the responsibility for the British citizen's care with one other person

Where **the applicant has been issued with a residence card or an EEA family permit under the EEA Regulations** on the basis that they were the primary carer of the relevant British citizen, you must assess whether the applicant remains (or, as the case may be, for the relevant period remained) the primary carer of the relevant British citizen.



Stage 4: British citizen unable to reside in the UK or the EEA

The fourth stage is to assess whether the British citizen would be (or, as the case may be, for the relevant period would have been) unable to reside in the UK or the EEA if the applicant were (or, as the case may be, had been) required to leave the UK for an indefinite period



Does the applicant have leave in the UK?

You must consider whether the applicant either already has (or, as the case may be, for the relevant period had) leave to enter or remain in the UK (unless this was granted under Part 1 of Appendix EU), **or whether there is (or was) a realistic prospect that an application by them for leave to enter or remain under Appendix FM to the Immigration Rules, or otherwise relying on Article 8 (the right to respect for private and family life) of the European Convention on Human Rights (ECHR), would succeed (or would have succeeded).**

Where the applicant has leave to enter or remain granted under another part of the Immigration Rules the application must be refused with reference **to part (b) of the definition of 'person with a Zambrano right to reside' in Annex 1 to Appendix EU.**

An Appendix FM application, or ECHR Article 8 claim, will be considered to have (or to have had) a realistic prospect of success where the applicant has family life in the UK with a British citizen and there is no apparent reason why such an application would be refused.



Post-*Patel* guidance

In the case of *Patel v SSHD* [2017] EWCA Civ 2028 (13 December 2017), the Court of Appeal noted that a person with leave to remain under domestic law cannot benefit from a derivative right to reside on the basis of *Zambrano*. The Court of Appeal also noted that *Zambrano* is not a back-door route to residence for those who have a British citizen child without having or acquiring leave to remain.

As a *Zambrano* case centres on a person seeking to remain in the UK with a dependent British citizen, there is significant overlap with the right to respect for private and family life which is protected by ECHR Article 8.

For example, where a person wishes to remain in the UK on the basis of family life with a British citizen, they should first make an application for leave to remain under Appendix FM to the Immigration Rules or otherwise rely upon ECHR Article 8, if there is a realistic prospect that this would succeed.

An Appendix FM application, or ECHR Article 8 claim, will be considered to have (or to have had) a realistic prospect of success where the applicant has family life in the UK with a British citizen and there is no apparent reason why such an application would be refused.



“Not Zambranos”

An applicant cannot be considered a ‘person with a Zambrano right to reside’ if they:

have (or, as the case may be, for the relevant period had) leave to enter or remain in the UK (unless this was granted under Part 1 of Appendix EU)

- have never made an application under Appendix FM to the Immigration Rules or any other ECHR Article 8 claim, but where there is (or, as the case may be, was) a realistic prospect that, had they done so, this would succeed (or, as the case may be, would have succeeded)
- have been refused leave under Appendix FM or otherwise under ECHR Article 8 but their circumstances have changed since that decision was made such that there is now a realistic prospect that a further such application would succeed – for example, the applicant applied on the basis of their relationship with a British citizen spouse, but the couple now have a British citizen child



DRC?

Where the applicant has been issued with a residence card under the EEA Regulations on the basis of their relationship with the relevant British citizen, unless there is evidence that the card was issued in error or is otherwise invalid, you must accept this as evidence that there is not (or was not) a realistic prospect that an application by them for leave to enter or remain under Appendix FM to the Immigration Rules, or otherwise relying on ECHR Article 8, would succeed (or would have succeeded).



Final sting?

- Can the British citizen live in an EEA Member State?
- Alternative care arrangements?



Some matters arising in Ruiz Zambrano appeals

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4 May 2021



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A reminder

- Case C-34/09 [*Ruiz Zambrano v Office national de l'emploi \(ONEm\)*](#) [2011] ECR I-1177, [2012] QB 265
- Case C-256/11 [*Dereci v Bundesministerium für Inneres*](#) [2011] ECR I-11315, [2012] All ER (EC) 373
- Case C-133/15 [*Chavez-Vilchez and Others v Raad van Bestuur van de Sociale Verbekeringsbank and Others*](#) [2017] 3 WLR 1326, [2017] 3 CMLR 35 (10 May 2017)
- C-304/14 [*SSHD v CS*](#) [2017] QB 558 (13 September 2016)
- Case C-82/16 [*K.A. and others v Belgische Staat*](#) [2018] 3 CMLR 28 (8 May 2018)



And in UK courts

- [Patel v SSHD](#) [2019] UKSC 59, [2020] 2 All ER 557 (16 December 2019)
- [Patel v SSHD](#) [2017] EWCA Civ 2028, [2018] 2 All ER 1093 (13 December 2017)
- [MS \(Malaysia\) v SSHD](#) [2019] EWCA Civ 580 (09 April 2019)



EUSS

- Policy refers to the RZ right being “A ‘Zambrano right to reside’ is derived from wider EU law rather than from the Free Movement Directive 2004/38/EC and has been confirmed by CJEU judgments.”
 - EUSS imports Immigration (European Economic Area) Regulations 2016 – essential criterion
- (5) The criteria in this paragraph are that—
- (a) the person is the primary carer of a British citizen (“BC”);
 - (b) BC is residing in the United Kingdom; and
 - (c) BC would be unable to reside in the United Kingdom or in another EEA State if the person left the United Kingdom for an indefinite period.



EUSS

In policy... satisfied SSHD that for the relevant period relied on

they were, resident for a continuous qualifying period in the UK with a derivative right to reside by virtue of regulation 16(1) of the EEA Regulations, by satisfying the criterion in paragraph (1)(a) of that regulation (that is, they must not be, or for the relevant period have been, an ‘exempt person’ as defined in regulation 16(7)(c)) and the criteria in either:

- o paragraph (5) of that regulation

- o paragraph (6) of that regulation where that person’s primary carer is, or (as the case may be) was, entitled to a derivative right to reside in the UK under paragraph (5), regardless (where the person was previously granted limited leave to enter or remain under rule EU3 of Appendix EU as a person with a Zambrano right to reside and was under the age of 18 at the date of application for that leave) of whether, in respect of the criterion in regulation 16(6)(a) of the EEA Regulations, they are, or (as the case may be) were, under the age of 18 years

In addition, the person must be (or for the relevant period have been) without leave to enter or remain in the UK, unless this was granted under Appendix EU.



Exempt Person

Reg. 16(7)(c) an “exempt person” is a person—

- (i) who has a right to reside under another provision of these Regulations;
- (ii) who has the right of abode under section 2 of the 1971 Act;
- (iii) to whom section 8 of the 1971 Act, or an order made under subsection (2) of that section, applies; or
- (iv) who has indefinite leave to enter or remain in the United Kingdom [(but see paragraph (7A))].

(7A) Leave to enter, or remain in, the United Kingdom under the 1971 Act which has been granted by virtue of Appendix EU to the immigration rules is not to be treated as leave for the purposes of paragraph (6)(b) or (7)(c)(iv).



Exempt Person

- has (or for the relevant period had) a right to reside in the UK under another provision of the EEA Regulations, for example, as a person who is (or was) already exercising free movement rights as an EEA citizen or who is (or was) the family member of such a person: see Immigration (European Economic Area) Regulations 2016 (where the applicant has (or had) a right to reside in the UK under another provision of the EEA Regulations, they will be an exempt person so cannot be considered a ‘person with a Zambrano right to reside’, but you must then go on to consider whether they are eligible on other grounds for leave under Appendix EU)
- has (or for the relevant period had) the right of abode in the UK under section 2 of the Immigration Act 1971 (the 1971 Act), for example, the person is a British citizen: see Right of abode
- is (or for the relevant period was) a person to whom section 8 of the 1971 Act, or an order made under section 8(2), applies (or applied): see persons exempt from control
- has (or for the relevant period had) indefinite leave to enter or remain in the UK, unless this was granted under Appendix EU. You can ascertain this by checking Home Office records. If they do, they may be eligible for indefinite leave to enter or remain under the scheme under condition 2 of rule EU11 of Appendix EU



Exempt Person

- If they are exempt because may have RTR under another provision of EEA Regs – must consider EUSS leave first
- Application “void” for 2 and 3– mysterious term – must mean refusal



Primary Carer - Regulations

Reg. 16 (8) A person is the “primary carer” of another person (“AP”) if—

(a) the person is a direct relative or a legal guardian of AP; and

(b) either—

(i) the person has primary responsibility for AP’s care; or

(ii) shares equally the responsibility for AP’s care with one other person

(9) In paragraph (2)(b)(iii), (4)(b) or (5)(c), if the role of primary carer is shared with another person in accordance with paragraph (8)(b)(ii), the words “the person” are to be read as “both primary carers”.

(10) Paragraph (9) does not apply if the person with whom care responsibility is shared acquired a derivative right to reside in the United Kingdom as a result of this **regulation** prior to the other person’s assumption of equal care responsibility.

(11) A person is not be regarded as having responsibility for another person’s care for the purpose of paragraph (8) on the sole basis of a financial contribution towards that person’s care.



Primary Carer – SSHD Guidance

Equal primary carer responsibility does not mean there has to be evidence of equal sharing of responsibilities, as this is not always practical. For example, a child may reside with their mother during the week and their father at weekends or they may reside with the mother full-time, but the father has regular contact with the child. Whilst the father may not provide most of the care for the child, in both examples, the father is actively involved in the child's life. In such cases, unless there is evidence to indicate the father is unable to care for the child, it can be accepted that both parents share equal primary carer responsibility.

Or, for example, a dependent parent might live with one adult child full-time, but another adult child has regular contact with their parent and is involved in their day- to-day care. Again, unless there is evidence to indicate the second adult child is unable to care for their parent, it can be accepted that both share equal primary carer responsibility.



Primary Carer - SSHD Guidance

If there are 2 primary carers of the same British citizen, they can both be considered a 'person with a Zambrano right to reside' for the purposes of Appendix EU, even if they apply under the scheme at different times.

In line with regulation 16(10) of the EEA Regulations, where one primary carer has a Zambrano right to reside on the basis of shared equal primary carer responsibility, the second primary carer can only have a Zambrano right to reside on that basis if they had shared equal primary carer responsibility for the British citizen with, and at the same time as, the first primary carer.

Both primary carers can also have a Zambrano right to reside for any period in which they are (or, as the case may be, for the relevant period were) the British citizen's sole primary carer.



Primary Carer and Unable to reside

- Policy: Alternative Care -Where there is another person able to care in the UK or the EEA, consider if appropriate
- Unless there is information that there is another parent, direct relative, legal guardian (or, in the case of an adult, a local authority or private care provider) in the UK, the EEA or Switzerland (or, where relevant, elsewhere) who is currently caring for the relevant British citizen, or is (or, as the case may be, for the relevant period was) able to do so, you can accept that there are (or were) no alternative care arrangements for them. This means that the relevant British citizen would not be able (or, as the case may be, for the relevant period would not have been able) to continue residing in the UK, the EEA or Switzerland if the applicant left (or had left) the UK for an indefinite period. Or, in the case of a dependant of a primary carer, the primary carer would be prevented from residing in the UK if the applicant left (or had left) the UK for an indefinite period. If you reach this conclusion, you can accept that, in respect of this element, the applicant meets (or, as the case may be, met) the definition of a ‘person with a Zambrano right to reside’ in Appendix EU.



Previous Leave

- EUSS Definitions: *person with a Zambrano right to reside - (b) without leave to enter or remain in the UK, unless this was granted under this Appendix*
- Policy: *The Secretary of State considers that this test cannot be met where the applicant has leave to enter or remain in the UK (or a realistic prospect of obtaining such leave were they to apply) [Appendix EU definition]*



Previous Leave

SSHD policy relying on the two Patel cases (pp 13-14)

In the case of Patel v SSHD [2017] EWCA Civ 2028 (13 December 2017), the Court of Appeal noted that a person with leave to remain under domestic law cannot benefit from a derivative right to reside on the basis of Zambrano. The Court of Appeal also noted that Zambrano is not a back-door route to residence for those who have a British citizen child without having or acquiring leave to remain.

In its judgment in that case (Patel v SSHD [2019] UKSC 59, 16 December 2019), the Supreme Court was not required to rule on the implications of leave to remain under domestic law for the scope to benefit from a derivative right to reside on the basis of Zambrano, but it confirmed (at paragraph 22 of the judgment) that the test to be met to benefit from that right is one of compulsion: “What lies at the heart of the Zambrano jurisprudence is the requirement that the Union citizen would be compelled to leave Union territory if the third country national, with whom the Union citizen has a relationship of dependency, is removed”. In an application for leave under Appendix EU as a ‘person with a Zambrano right to reside’, the Secretary of State considers that this test cannot be met where the applicant has leave to enter or remain in the UK (or a realistic prospect of obtaining such leave were they to apply: see Stage 4: British citizen unable to reside in the UK, the EEA or Switzerland), unless they have leave granted under Appendix EU.



Previous Leave

- Patel in CA
 - Concerned construction of EU obligations
 - Two applicants who in fact did not have alternative leave
 - Patel noted the presence of extensive evidence of in particular A8 ECHR and A7 CFR EU material to RZ RTR but not dispositive of whether RZ RTR is established – having found compulsion to be the core of the test.
- Patel in SC – not necessary to deal with the matter.



Previous Leave

- Reg. 16 (5) The criteria in this paragraph are that—
 - (a) the person is the primary carer of a British citizen (“BC”);
 - (b) BC is residing in the United Kingdom; and
 - (c) BC would be unable to reside in the United Kingdom or in another EEA State if the person left the United Kingdom for an indefinite period.



Previous Leave

- Construction of Reg 16(5) turns on “if”
- Some leave is better than other
- Test case to be heard by the Administrative Court on 20 May 2020 – Hackney Community Law Centre



Thank you

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