



doughty street  
chambers

## Zambrano child cases: challenging decisions

*Simon Cox, Agata Patyna*



@DoughtyStImm @SimonFrCox @APatyna

# Why does Zambrano matter?

- Most important right for British citizen children of parents who do not have British or EEA citizenship
- Can prevent parent's removal & give right to a residence card
- Can give rise to right to leave to remain under EU Settled Status Scheme
- Very contested right
- (But *does not* count as a right to reside for benefits)

# Legal basis for Zambrano rights

- UK's legal duty to recognise the right is Article 21 Treaty on Functioning of the European Union, interpreted by the Court of Justice of EU in [C-34/09 Ruiz Zambrano, 8 March 2011](#)
- This “right was implemented in UK law”\* by regulation 16 of the [Immigration \(European Economic Area\) Regulations 2016](#)

\* [Patel v SSHD, UK Supreme Court \[2019\] UKSC 59](#) at 2.

# Who this webinar is not about

This webinar is about Zambrano rights of parents and carers of British citizen children.

It is not about:

- Where the British citizen is an adult & the applicant is a carer.
- Other EU law rights, like Chen (reg 16(2)) or Ibrahim/Teixeira (reg 16(3),(4)) - but regulation 16(7)-(12) apply to these too.
- Other family members of a Zambrano family, eg non-British children of the parents: they are under reg 16(6).

# Myth-busting using Guidance, Regs and Rules

1. Applicant has limited leave to remain or might be given it - UKVI say applicant does not “have to leave UK” & so does not have Zambrano right. **Regs show HO Guidance is wrong.**
2. Child has another direct relative or legal guardian in UK who is caring for child – UKVI say this means applicant doesn’t have Zambrano right. **Regs show this is wrong**
3. Applicant is subject to an automatic deportation order – UKVI are proceeding with deportation. **Regs and Guidance show that is wrong**
4. Applicant denied under EU Settled Status because has not applied for Appendix FM leave. **Regs and Rules show that Guidance is wrong**

# Regulation 16(1) of Immigration (EEA) Regs 2016

## Derivative right to reside

16.—(1) A person has a derivative right to reside during any period in which the person—

(a) is not an exempt person; and

(b) satisfies each of the criteria in one or more of paragraphs (2) to (6).

# Zambrano – the basic regulation

## Regulation 16(5) of Immigration (EEA) Regs 2016

(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.

# “Exempt person”

## Regulation 16(7) of Immigration (EEA) Regs 2016

(7) In this regulation—

(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; or

(iv) who has indefinite leave to enter or remain in the United Kingdom

# Must applicant show she would have to leave UK?

HO Guidance on derivative rights says (p 41)

*“Does the primary carer have leave in the UK?*

*You must consider whether the applicant either already has leave to enter or remain in the UK, or if they could make an alternative application for leave to remain in the UK*

*If alternative leave to enter or remain is held, or other avenues for leave are available, the British citizen would not be forced to leave the UK, and the EEA.”*

Except for people who already have indefinite leave to remain - this has no basis in the Immigration EEA Regs. It is wrong in law.

# Home Office Guidance – “alternative means”

Home Office claims:

*“In the case of [Patel v SSHD \[2017\] EWCA Civ 2028](#), the Court of Appeal ruled that someone holding leave to remain under domestic law would not benefit from a derivative right to reside.*

*The Court also ruled 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.*

*This means that a Zambrano application must be refused if the applicant:*

- has never made an application under Appendix FM to the Immigration Rules or any other Article 8 ECHR claim, where that avenue is available*
- has been refused under Appendix FM or Article 8 ECHR but their circumstances have changed since the decision was made.”*

# Does Patel say applicants have to apply for leave?

Court of Appeal judgment in *Patel* says

*“42. . . Ms Smyth for the Secretary of State began by emphasising that Mr Bourouisa has never made an application for leave to remain in the United Kingdom on family life grounds. I pause to remark that such an application might well be open to him. We have seen material in the course of the case which might well be relevant to such an application, although it cannot bear upon the decision we must take.*

*68. . . . In Patel's case, the Appellant has already failed in an Article 8 claim. Had he succeeded, the result would have been a grant of leave to remain which would obviate the need for leave under the Zambrano principle.*

*76. . . Those who marry a British citizen and have children, without having (or acquiring) leave to remain, do so at the risk that they may be compelled to leave the country, facing the real quandary that arises for these families. The Zambrano principle cannot be regarded as a back-door route to residence by such non-EU citizen parents.”*

The Court was asking “what does EU law – the Zambrano principle require of UK”.

The Court did not – could not – remove people’s rights under the UK Regulation.

# What does a single parent have to show?

A parent counts as a “direct relative” under reg 16 (HO Guidance)

The child is a British citizen living in UK: reg 16(5)(b)

The child “would be unable to reside in the UK or in another EEA State if the [parent] left the UK for an indefinite period.”

HO Guidance: “You must not refuse an application for a derivative residence card on the basis that the British citizen [child] has a right of free movement within the EEA unless the applicant is an EEA national” p. 42

# What does an applicant in a couple have to show?

Applicant has to be 1 out of 2 “primary carers”.

(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.**

# What is “shared equal responsibility for care”?

Home Office Guidance – p 49

*“Evidence of shared responsibility*

*A person will, generally, be considered to share equal responsibility . . . where both parents are:*

- *living together in the same household with the child*
- *separated but share responsibility for the child - evidence of this may include . . . :*
  - *custody agreement or court order*
  - *statement(s) from the parent(s) to this effect*

***Equal responsibility does not mean there has to be evidence of equal sharing of responsibilities. . . a child may reside with . . . the mother full-time, but the father has regular contact with the child. Whilst the father may not provide the majority of care for the child, . . . the father is actively involved in the child’s life and continues to have parental responsibility for the child. 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 responsibility.”***

# What if the “other parent” is British / has ILR?

The fact that the other parent is British / has ILR doesn't matter – any more.

At the time of *Patel* in the Court of Appeal, Immigration (EEA) Regs excluded applicants where responsibility was shared with an “exempt person” – including a British citizen / person with ILR

[Immigration \(EEA\) \(Amendment\) Regs 2018](#) deleted that to give effect to the CJEU judgment in *C-133/15 Chavez Vilchez*.

With effect from 24 July 2018.

# What does an applicant in a couple have to show?

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(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 ~~who is not an exempt person~~

# Zambrano – basic regulation applied to ‘mixed’ couples

## Regulation 16(9) of Immigration (EEA) Regs 2016

“In paragraph . . . (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”.

## Regulation 16(5) of Immigration (EEA) Regs 2016

(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 **both primary carers** left the United Kingdom for an indefinite period.

# Zambrano – criminal conduct or removal

## Regulation 16(12) of Immigration (EEA) Regs 2016

“(12) A person does not have a derivative right to reside where the Secretary of State or an immigration officer has made a decision under regulation 23(6)(b), 24(1), 25(1), 26(3) or 31(1), unless that decision is set aside or otherwise no longer has effect. ”

So: a person who meets the reg 16(5) requirements has the derivative right to reside and is **lawfully present** until a reg 16(12) decision is made.

**Deportation or removal is unlawful before that decision.**

# Zambrano – EU settlement scheme

Definition of “person with a Zambrano right to reside”

“(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 the criteria in: (i) paragraph (5) of that regulation ”

and

“(b) without leave to enter or remain in the UK granted under another part of these Rules”.

# Zambrano – EU settlement scheme

Appendix EU of Immigration Rules excludes people who:

- already have “leave to enter or remain in the UK granted under another part of these Rules”.
- are subject to an EU public policy decision on deportation/exclusion. This decision can be taken as part of Settlement Scheme decision.

Appendix EU of Immigration Rules does not require:

- Application for / issue of Zambrano residence card
- Application for leave to remain under Appendix FM.

# Who is excluded from Zambrano right to reside?

- EU citizens with a right to reside as a qualified person = “exempt person” under reg 16(7)(c)(i)
- People with right to reside under EEA Regs as family member of an EU citizen = “exempt person” under reg 16(7)(c)(i)
- Parent who could not exercise their responsibility for the British citizen child’s care > cannot be a ‘primary carer’ under reg 16(8)(b)(ii)
- People with indefinite leave to remain under Immigration Rules

NB

- People with limited leave to remain under Rules have the Zambrano right to reside, but are not eligible for the EU Settlement Scheme.

# What to expect

- Home Office will ignore the EEA Regs and talk about leave applications and alternative care arrangements.
- But the EEA Regs set out the requirements under UK law and who is excluded from the Regs. The Regs ask “if” both parents had to leave, would the child have to leave too. The Regs don’t ask “would both parents in fact have to leave”. The Regs do not exclude people with limited leave or who can apply for leave.
- Appeals are being won.
- Refusals of EU Settlement Scheme applications made after 30 Jan 2020 have right of appeal: [Immigration \(Citizens’ Rights Appeals\) \(EU Exit\) Regs 2020](#)