

June 2021

Zambrano carers granted leave to remain under Appendix FM are entitled to apply for settled or pre- settled status under Appendix EU

R (on the application of Olorunfunmilayo Oluwaseun Akinsanya) v SSHD [2021]EWHC 1535 Admin 9/6/2021

Background: The Zambrano Principle and the Home Office Policy

An EU citizen, who happens to be a small child, is entitled to enjoy the full benefits of EU citizenship of which the principle one is living in EU territory. If the child's primary carer were to be expelled from the territory of the EU, and if in the real world the EU citizen would have to accompany the carer, then the EU citizen child is denied the benefits of their EU citizenship. Therefore, the carer will have to be granted residence in the relevant EU state in order to avoid this.

This principle applies to all primary carers of British Citizen children before 31.12.2021, who were also EU citizens.

Zambrano carers are entitled to apply for pre settled (limited leave) or settled status (indefinite leave to remain) under Appendix EU of the Immigration Rules (the EU Settlement Scheme). The advantage of Zambrano leave under the EU settlement scheme is that carers are entitled to apply for indefinite leave to remain after 5 years continuous residence in the UK on this basis, instead of 10 years under Appendix FM private and family life 10 year route. There is no application fee and applicants are granted leave for 5 years. This means there is no need to pay for the exorbitant application fee and the immigration health surcharge every 30 months in order to apply for an extension of stay under Appendix FM 10 year route.

The Home Office policy approach, however, is that those who have been granted leave under Appendix FM private and family life 10 year route, are not entitled to apply for pre settled (limited leave) or settled status (indefinite leave to remain) under the EU Settlement Scheme. Further, a Zambrano application

will be refused if the applicant has never made an application under Appendix FM, or any other Article 8 Right to Family Life claim, where this avenue is available.

The claimant challenged the lawfulness of this policy.

Facts:

The claimant is a Nigerian national who was issued with a derivative residence card as a Zambrano carer in 2014, on the basis of being the primary carer of a British Citizen child in the UK. In 2019, she applied and was granted leave to remain under Appendix FM family/private life 10 year route. In January 2020, she applied for indefinite leave to remain (settled status) under the EU Settlement Scheme. The Home Office refused her application because she had already been granted limited leave to remain under Appendix FM, and was therefore barred from being granted settled status.

What was the result of this case?

The Court found that the Home Office policy is unlawful. Under EU and domestic law, and the EEA Regulations 2016, the only form of leave that can extinguish Zambrano right of residence is indefinite leave to remain. The intention of the Zambrano right of residence is to grant long term right of residence, at least while the children are minors, in order to facilitate genuine enjoyment by the children of their substantive rights as EU citizens. Limited leave granted under national law, such as under Appendix FM 10 year route, is inherently precarious. It does not reflect the extent of rights confer by the Zambrano right of residence. Further, the Zambrano right of residence is not meant to be a fallback position of last resort. It can co-exist with a right to reside deriving from limited leave under domestic law.

Comments:

This is a belated victory. The deadline for Zambrano carers to apply for pre-settled or settled status under the EU Settlement scheme is 30.6.2021. The Home Office has discretion to extend the deadline in individual cases where there are reasonable grounds to do so. It could be strongly argued that the deadline should be extended for Zambrano carers as they were prevented from making an application for pre-settled status (limited leave to remain) or settled status (indefinite leave to remain) under the EU Settlement Scheme due to the unlawful policy of the Home Office.

If you wish to have further advice on Zambrano applications, please contact us.

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If you would like advice or assistance on any of the issues raised in this note/article, please contact Agnes Lai by email at

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