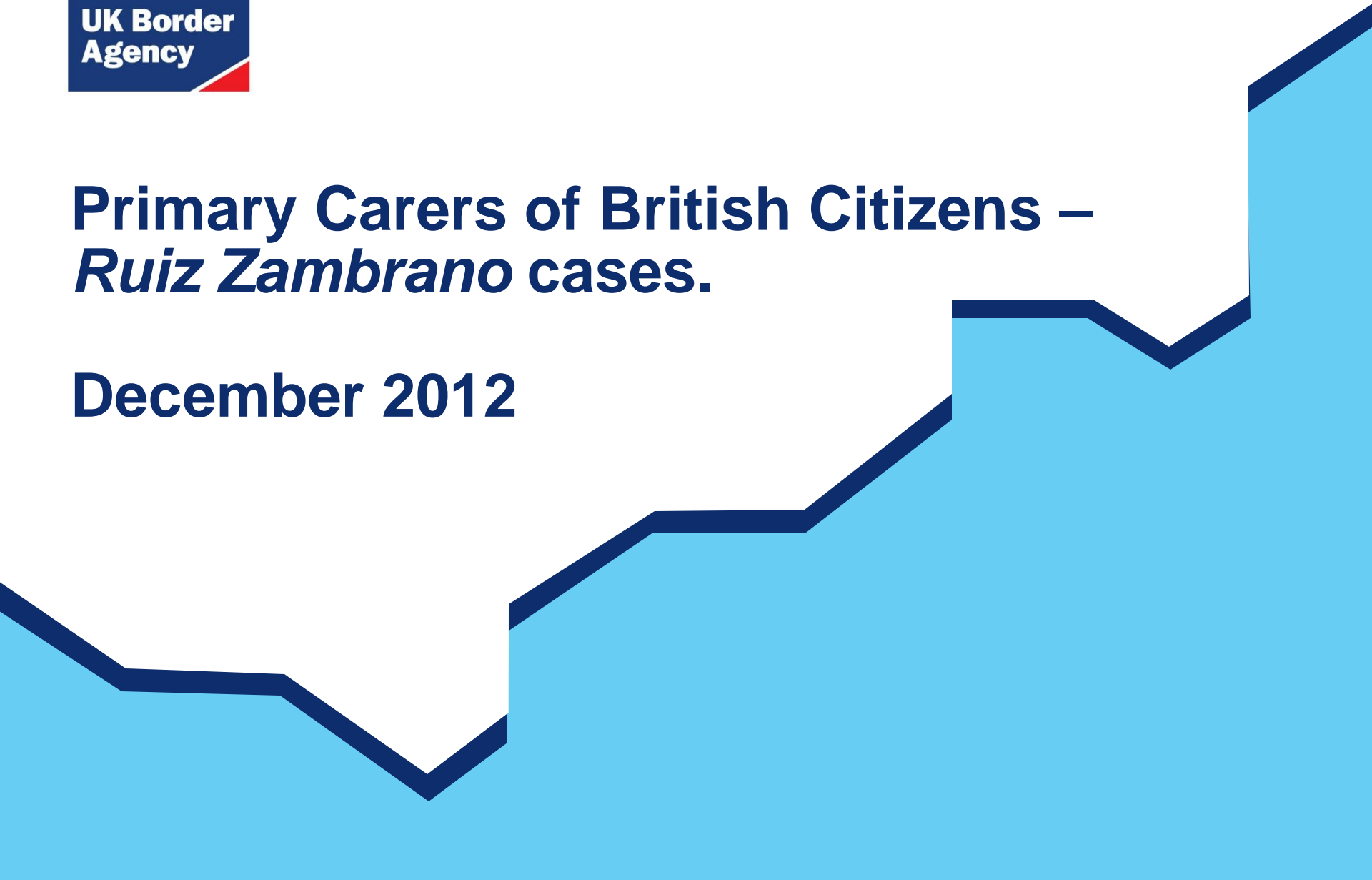




# Primary Carers of British Citizens – *Ruiz Zambrano* cases.

# December 2012



## Ruling of the Court of Justice of the European Union (ECJ) in the case of *Ruiz Zambrano* (C34/09)

The *Zambrano* judgment established that member states cannot refuse a person the right to reside and work in the host member state, where:

- that person is the primary carer of a Union citizen who is residing in their member state of nationality; and
- refusal of a right of residence to that primary carer would deprive the Union citizen of the substance of their European citizenship rights by forcing them to leave the EEA.

# Background

In practice, this means that the primary carer of a British citizen who is residing in the UK has a right to reside under EU law if their removal from the UK would require the British citizen to leave the EEA.

This right does not stem from Directive 2004/38/EC (the ‘free movement Directive’) and therefore is not equivalent to rights of residence of EEA nationals and their family members under the Directive.

Rights derived from EU law other than the Directive, including the rights set out in the judgment in *Ruiz Zambrano*, are referred to as ‘derivative rights of residence’.

# Amendments to the Regulations

**On 8 November 2012, amendments to the Immigration (European Economic Area) Regulations 2006 were made which implemented the decision of the ECJ in *Ruiz Zambrano*.**

Provision was made at new regulation 15A(4A) which recognised a right of residence for primary carers of British citizens where;

- the relevant British citizen is residing in the UK, **and**
- would be unable to reside in the UK or in another EEA state if their primary carer were required to leave the UK.

# Amendments to the Regulations

**Amendment was also made to the existing definition of primary carer as set out in Regulation 15A(7), as follows;**

**A primary carer is defined as:**

- a. A direct family member or legal guardian of the person from whom they would claim a derivative right, and**
- b. The person who:**
  - i. Has primary responsibility for that person's care, or**
  - ii. Shares the responsibility for that person's care equally with one other person who is not an exempt person.**

# Rights of a person meeting the criteria in regulation 15A(4A)

**A person who meets the criteria in regulation 15A(4A) has the following rights;**

- A right of admission to the UK under regulation 11
- A right to a family permit under regulation 12
- A right of residence in the UK under regulation 15A(4A)
- A right to a derivative residence card under regulation 18A

Persons with a derivative right of residence are able to take employment in the UK.

# Rights of a person meeting the criteria in regulation 15A(4A)

## Persons with a right under regulation 15A(4A) cannot:

- Sponsor wider family members to enter or reside in the UK on the basis of their status (except where dependent children qualify for a right of residence under regulation 15A(5))
- Acquire permanent residence in the UK, or
- Rely on public policy protection that is given to those exercising free movement rights – instead the test applied will be whether the applicant's presence is 'conducive to the public good'.

The Department for Work and Pensions (DWP) has also amended its regulations to restrict the benefits available to persons with a derivative right of residence to contribution-based benefits only.

# Zambrano rights of residence

## Exempt persons

As a Zambrano right need only be conferred where a refusal to grant would force the primary carer to leave the UK (thereby depriving the British citizen of their rights under EU law) certain 'exempt persons' cannot acquire a Zambrano right of residence.

'Exempt persons' include:

- A person with a right of residence under another provision in the Regulations
- A person with a right of abode under section 2 of the 1971 act
- A person to whom section 8 of the 1971 Act, or any order made under subsection (2) of that provision applies, or
- A person who has ILE/ILR in the UK.



# Zambrno rights of residence

## Exempt persons (continued)

A person who has limited leave (and so is not listed as one of the exempt categories above) and can demonstrate they meet all other requirements of regulation 15A, then they can acquire a derivative right of residence.

This is because a person with limited leave to remain does not have a permanent right of residence in the UK, and their leave may expire or be curtailed.

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# Primary carers

**A primary carer of a British citizen will qualify for a derivative right of residence under regulation 15A(4A) where they satisfy the conditions set out in that paragraph. The conditions are that:**

- a. The applicant is the primary carer of a British citizen (“the relevant British citizen”) who:
  - i. is residing in the UK, and
  - ii. would be unable to reside in the UK or in another EEA state if their primary carer were required to leave the UK.

Such a person must also meet the conditions for a primary carer as set out in regulation 15A(7).

# Primary carers

## Mere financial assistance

- A person will not fall within the definition of primary carer as set out in regulation 15A(7) on the basis of financial support alone. This is set out in regulation 15A(8).
- This prevents persons who are solely providing financial assistance and have no day-to-day caring responsibilities from benefitting from these provisions.

## Is the applicant the primary carer?

Once a caseworker has confirmed that the person is the direct relative or legal guardian of the British citizen (this can be evidenced by birth/marriage certificates or a Court order confirming guardianship), they must then determine whether that person has primary responsibility or shares equal responsibility with another person for that British citizen's care.

For persons who share equal responsibility with another person who is not an exempt person (see paragraph 9 of this notice) then they will be regarded as a primary carer and therefore potentially entitled to a derivative right of residence.

# Primary carers

**For persons who share equal responsibility with another person who is exempt then neither person will be able establish for the purposes of the Regulations, that they come within the definition of a primary carer and therefore neither will be entitled to a derivative right of residence.**

**Cases involving shared responsibility must be referred to a deputy chief caseworker.**

# Primary carers – responsibility for a British citizen child

In cases where the British citizen is a child under the age of 18, primary or shared responsibility will generally be established where that child is living with the primary carer(s) and the majority of their care is being provided for by that primary carer(s).

Evidence to demonstrate this responsibility can include custody/guardianship orders, or if this is not available, any additional evidence which shows:

- that the child lives with the primary carer(s) or spends the majority of their time there;
- that the primary carer(s) makes the day to day decisions for that child, for example decisions relating to their education or health; and
- that the primary carer(s) has financial responsibility for that child.

How this is evidenced will vary depending on the facts of the case, but the primary carer(s) may submit letters from the child's school, GP or from a solicitor to demonstrate primary/shared responsibility.

# Primary carers – responsibility for a British citizen adult

In cases where the British citizen is at, or over the age of 18, then the level of evidence required to demonstrate primary and shared responsibility will be significantly higher than in cases involving children. This is because it can generally be assumed an adult has the capacity to care for their own daily needs unless there are reasons such as a severe physical or mental disability which would prevent this. Only evidence that shows the British citizen's reliance on the primary carer is for such reasons will that person likely fall within scope of the judgment.

In order to demonstrate primary/shared responsibility for adults, the majority of the care must be provided by the primary carer(s). Evidence from the NHS/local authority/private care may be submitted to support this.

# Primary carers – responsibility for a British citizen adult

Appropriate medical evidence must also be presented that confirms the British citizen is, and will remain, wholly dependent upon the primary carer. Details must be provided as to whether any other sources of care are available and what the predicted effect would be on the British citizen if the primary carer was no longer able to care for them.

Such cases are likely to be rare and will require consideration on an individual basis. Referral to a deputy chief caseworker must be made for each case involving a dependent adult.



# Deciding whether *Zambrano* is engaged

## Would the British citizen be forced to leave the EEA if the primary carer was required to leave the UK?

Even where there is evidence of primary and shared responsibility, evidence to show why the British citizen would be forced to leave the EEA (for example because they cannot access alternative care in the UK) is still required.

If there is another person in the UK who can care for the British citizen, then a derivative residence card must be refused on the basis that such a refusal would not result in the British citizen being forced to leave the EEA.

# Deciding whether *Zambrano* is engaged

## Would the British citizen be forced to leave the EEA if the primary carer was required to leave the UK? (continued)

Therefore caseworkers must assess whether there is another direct relative or legal guardian in the UK who can care for the British citizen and, in the case of a child, who has already had established contact. In making this assessment, the burden of proof remains on the applicant and the standard of proof is the balance of probabilities.

This means the onus is on the applicant to demonstrate that their removal would force the British citizen to leave the EEA. If there is no information to demonstrate this, then caseworkers may wish to make further enquiries with the applicant as to the status or whereabouts of the other parent in the case of a child, or alternative care provisions in the case of a British citizen adult.

# Deciding whether *Zambrano* is engaged

Would the British citizen be forced to leave the EEA if the primary carer was required to leave the UK?

Examples of when it may be appropriate to issue a derivative residence card to a primary carer would be where:

- there are no other direct relatives or legal guardians to care for the British citizen; or
- there is another direct relative or legal guardian in the UK to care for the British citizen but there are reasons why this carer is not suitable; or
- in the case of an adult British citizen, there are no alternative care provisions available in the UK.

# Deciding whether *Zambrano* is engaged

## Would the British citizen be forced to leave the EEA if the primary carer was required to leave the UK? (continued)

An example of when a person may be considered unsuitable to care for a child would be where there are child protection issues which would prevent this child being placed with this particular relative/legal guardian- for example as a result of a particular criminal conviction or because of findings in family law proceedings. Another example might be where the person in question would be unable to care for the child due to a physical or mental disability.

A lack of financial resources or an unwillingness to assume care responsibility would not, by itself, be sufficient for the primary carer to assert that another direct relative or guardian is unable to care for a British citizen. Caseworkers must start from the assumption that where there is another direct relative or legal guardian in the UK, that they can care for the British citizen unless there is sufficient evidence to the contrary.

# Deciding whether *Zambrano* is engaged

## Assessing whether the British citizen would be forced to leave the EEA in cases involving persons with a shared responsibility

Regulation 15A(7A) makes it clear that when assessing primary carers with shared responsibility it is necessary to consider the claim on the basis that both persons would be removed from the UK. This prevents a situation where neither of the primary carers can obtain a derivative right because when their claims are assessed individually it would be possible to conclude that the British citizen would not be forced to leave the EEA as he or she could remain with the *other* primary carer.

# Deciding whether *Zambrano* is engaged

## Assessing whether the British citizen would be forced to leave the EEA in cases involving persons with a shared responsibility (continued)

Regulation 15A(7B) makes it clear though that the presumption in regulation 15A(7A) only applies if the primary carer in question has assumed responsibility for that British citizen's care at the same time as the other joint primary carer. This prevents someone from acquiring a derivative right as a carer with shared responsibility where there is already another person in the UK with a derivative right as the primary carer of that British citizen.

# Dependants of Primary Carer

**A child who is the dependant of a primary carer will also be entitled to a derivative right of residence under regulation 15A(5) where they are not an exempt person (see paragraphs 8 & 9) and where they satisfy the conditions of that paragraph. These conditions are that:**

- the person is the child of a primary carer who has a right of residence under regulation 15A(4A); and
- the child does not have leave to enter, or remain in, the UK; and
- requiring them to leave the UK would have the effect of preventing their primary carer from residing in the UK.

# Issue or Refusal of a Derivative Residence Card

A person who claims to have a derivative right of residence may apply for a derivative residence card under regulation 18A if they are in the UK. Applications made on this basis should be submitted on a 'DRF1' application form and will be considered free of charge. As the rights claimed on this basis do not stem directly from the Free Movement Directive, they are not subject to the normal 6 month timescales. However, such cases should be considered 'as soon as practicable'.

Derivative residence cards will ordinarily be issued for a period of five years. In certain circumstances caseworkers may issue for an alternative period depending on the individual facts of the case. For example, where a primary carer is claiming a derivative right of residence for their child who is due to reach the age of majority in 3 years time caseworkers should only issue a document for three years.



# Issue or Refusal of a Derivative Residence Card (continued)

Caseworkers should assess whether the evidence submitted demonstrates that the applicant satisfies the relevant conditions in regulation 15A. If the applicant qualifies for a right of residence, the caseworker should issue a derivative residence card unless the applicant falls for refusal on conduciveness grounds in accordance with regulations 19(3)(b), 20(1) and 20A(1) with reference to regulation 21A(3).

Where the applicant has not submitted sufficient evidence to demonstrate that they have a right of residence under regulation 15A, the application should be refused. Please see paragraph 30 below for further guidance on appeal rights against a refusal to issue a derivative residence card.

Any questions?