

Over the EU Settlement Scheme Bridge

- Immigration Law Update after Brexit

2nd November 2021

Speakers:

Samina Iqbal & Sarah Pinder - Barristers and Joint-Heads of Immigration and Public Law Team Goldsmith Chambers

Bianca Valperga, Immigration Caseworker, Here for Good

Luke Piper, Head of Policy & Advocacy, the3Million



IMMIGRATION AND PUBLIC LAW

GOLDSMITH
CHAMBERS

HERE FOR GOOD

Free post-Brexit immigration advice

the 3 million

Introduction

- ▶ Late applications under the EUSS (*Sarah & Samina*)
- ▶ Zambrano-type applications (*Bianca*)
- ▶ Joining Family Members (*Bianca*)
- ▶ Extended Family Members & latest developments (*Luke*)
- ▶ CSI (*Luke*)
 - ▶ **WITHDRAWAL DATE** – 11pm, **31st January 2020**
 - ▶ Withdrawal Agreement **TRANSITION/IMPLEMENTATION PERIOD**: until 31st December 2020
 - ▶ In-country Applications under EUSS lodged after 31st January 2020 attract a statutory right of appeal as well as an Administrative Review.

Late Applications under the EUSS

Can applications be made after 30th June 2021 deadline?

- ❖ The UK-EU Withdrawal Agreement does allow (indefinitely) for applications to be made after the deadline set in the WA, i.e. six months after the end of the transition period. See WA Article 18 (c) (not v relevant to us) and 18 (d).
- ❖ Art.18(d): The competent authorities shall assess all the circumstances and reasons for not respecting the deadline and shall allow those persons to submit an application within a reasonable further period of time if there are reasonable grounds for the failure to respect the deadline;
- ▶ Must be '*reasonable grounds*' - see page 31 onwards of the EU Settlement Scheme: EU, other EEA and Swiss citizens and their family members, 20th July 2021 Guidance.
- ▶ Now incorporated in the Immigration Rules also refer to Annex 1.

Reasonable Grounds?

- ▶ *In line with the general approach under the EU Settlement Scheme of looking to grant status, rather than for reasons to refuse, you must take a flexible and pragmatic approach to considering, in light of the circumstances of each case, whether there are reasonable grounds for the person's failure to meet the deadline applicable to them under the EU Settlement Scheme.*
 - ❖ Examples of such reasonable grounds will include (non-exhaustive list):
 - ❖ Children whose parent, guardian or local authority fails to apply on their behalf;
 - ❖ Serious medical condition or significant medical treatment;
 - ❖ Victim of modern slavery;
 - ❖ Abusive or controlling relationship or situation;
 - ❖ Lack of physical or mental capacity to apply and/or have care or support needs;
 - ❖ Other compelling practical or compassionate reasons, including lack of awareness, lack of internet access, had limited computer literacy or limited English language skills or had been living overseas, lack of permanent accommodation, other personal circumstances;
 - ❖ Ceasing to be exempt from immigration control or holding leave to enter/remain which expires on/after 1st July 2021.

Reasonable Grounds?

- ▶ There may be other reasons impacting on delay but also impacting on ability to meet Appendix EU requirements
 - E.g. Durable Partners who were unable to marry before 31.12.2020 due to Covid public health restrictions.
 - Look to Article 8 ECHR and compatibility with WA if need be.
- ▶ Remember – the Guidance specifically states that *“In line with the general approach under the EU Settlement Scheme of looking to grant status, rather than for reasons to refuse, you **must** take a flexible and pragmatic approach to considering, in light of the circumstances of each case, whether there are reasonable grounds for the person’s failure to meet the deadline applicable to them under the EU Settlement Scheme.”*

Contact Details

- ▶ Q&A
- ▶ Thank you

Samina Iqbal & Sarah Pinder Barristers & Joint-heads of Team
Goldsmith Chambers

s.iqbal@goldsmithchambers.com

s.pinder@goldsmithchambers.com



[@IqbalSamina](https://twitter.com/IqbalSamina)

[@SarahPinder2](https://twitter.com/SarahPinder2)

Clerks: Neil Dinsdale & Jordan Lloyd – immpublic@goldsmithchambers.com

Tel: 0207 353 6802



EU SETTLEMENT SCHEME

Webinar Goldsmith Chambers– 2nd November 2021 – Over the EU Settlement Bridge

**Bianca Valperga, Immigration Caseworker at Here for Good based at South West London
Law Centre**

November 2021

HERE FOR GOOD

Introduction – Here for Good

- Here for Good is a legal charity which exists to provide free immigration advice to EU, EEA and Swiss citizens and their family members living in the UK.
- We primarily assist with complex applications under the EUSS.
- Services:
 - Email & phone advice service
 - Casework
 - Network of volunteer lawyers and barristers who are taking on cases pro bono around the UK.

HERE FOR GOOD

Content

- **Zambrano carers applications under the EUSS, developments and difficulties**
- **Joining family members and recent developments**

Zambrano carers

Who is a 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

HERE FOR GOOD

Zambrano carers-intro

Who is a person with a Zambrano right to reside in the EEA Regulations, Rule 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).

(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.

(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(13);

(iii) to whom section 8 of the 1971 Act(14), or an order made under subsection (2) of that section(15), applies; or

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

HERE FOR GOOD

Zambrano carers-requirements

1. Primary carer
2. British citizen
3. Residing in the UK
4. Child would be unable to remain in the UK or EEA if the primary carer left the UK
5. Must have been a Zambrano carer by 31/12/2020
6. Completed a continuous qualifying period as a Zambrano carer in the UK for less than 5 years/more than 5 years
7. Has submitted a valid application (paper application) by the deadline applicable to them
8. Suitability considerations

Zambrano carers-requirements

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

Appendix EU, as it stands at the time of writing, also requires for the applicant to be without leave to enter to remain in the UK.

Home Office Guidance on the subject states: *'A Zambrano right to reside is only available to a person who has no other means to remain lawfully in the UK as the primary carer of a dependent British citizen, or as a dependant of that primary carer'*.

[EU Settlement Scheme: Person with a Zambrano right to reside \(publishing.service.gov.uk\)](https://publishing.service.gov.uk)

HERE FOR GOOD

Zambrano carers- *Akinsanya* judgement

R (Akinsanya) v Secretary of State for the Home Department [2021] EWHC 1535 (Admin), 9 June 2021

- High court challenge by Hackney Community Law Centre
- The Court agreed with the claimant that the Secretary of State had misdirected herself in interpreting Regulation 16 of the EEA Regs 2016, which exempts only those with indefinite leave to remain from also holding the derivative Zambrano right.
- The exclusion of those holding a limited form of leave within the definition of a 'Zambrano right to reside' in Appendix EU and relevant Home Office Guidance was therefore **unlawful**.
- Judge allowed the Home Office time to reconsider Appendix EU. It is not clear whether the Home Office will amend it or how they will amend it.
- <https://hclc.org.uk/2021/06/zambrano-carers-and-the-euss-scheme-what-you-need-to-know/>
- [Akinsanya, R \(On the Application Of\) v Secretary of State for the Home Department \(Rev 3\) \[2021\] EWHC 1535 \(Admin\) \(09 June 2021\) \(baillii.org\)](#)

HERE FOR GOOD

Zambrano carers- *Akinsanya* judgement

R (Akinsanya) v Secretary of State for the Home Department [2021] EWHC 1535 (Admin), consent order 17 June 2021

- The Secretary of State will not determine applications made under Appendix EU on the basis that the applicant is or was a person with a Zambrano right to reside ('Zambrano application') and is affected by the Court's judgment, until after she has completed her reconsideration of Appendix EU;
- Para 34BB will be disregarded where there is (i) an outstanding valid Zambrano application for leave to remain under Appendix EU and a valid application for leave to remain is subsequently made under Appendix FM based on the same circumstances; and (ii) an outstanding valid application for leave to remain under Appendix FM and a valid Zambrano application for leave to remain is subsequently made under Appendix EU based on the same circumstances as the Appendix FM application
- Secretary of State intends to implement and publicise a policy under which, for a reasonable period of time which she will specify, but which will be for a period of not less than six weeks after publication of the outcome of her reconsideration referred to at a. above, Zambrano applications made on or after 1 July 2021 will be deemed, under the definition of 'required date' in Annex 1 to Appendix EU, to have reasonable grounds for the person's failure to make that application at the earlier date relevant under that definition;

HERE FOR GOOD

Zambrano carers-deadline

- If the applicant has limited leave to remain which expires after 30 June 2021, they have the right to make a late application under Appendix EU at any time before the limited leave expires according to the definition given of 'required date'
- If applicant did not have leave before 30 June 2021, the best way to protect their residence rights was to submit an EUSS application on or before 30 June 2021.
- In the Consent Order, the Home Office agreed that they will accept Zambrano carer late EUSS applications for a specified period running from publication of the outcome of her Zambrano reconsideration of Appendix EU to have reasonable grounds for the person's failure to make that application at the earlier date relevant under that definition;. The Home Office will announce this period, but it will be at least 6 weeks.

HERE FOR GOOD

Zambrano carers-difficulties

- We do not know when the Home Office will complete the reconsideration. It is very unlikely she will do this before the Court of Appeal has made its decision in Akinsanya. But, the Home Office has agreed not to make any decisions on EUSS applications from Zambrano carers until that process is complete.
- PSS and Settled status, NRPF and access to benefits
- To ensure continuity of residence it is strongly advised that applicants extend their current leave at the same time as applying for immigration permission under Zambrano route

Joining family members

EU free movement law ended on 31 December 2020. This means from 01 January 2021, EU / EEA / Swiss citizens are now subject to the UK's domestic immigration laws and border controls and generally unless visiting the UK on a short term basis (tourism, family visits etc), EEA citizens must apply from outside of the UK under designated visa routes (work, study etc)

- There are two categories of family members:

1. Those who lived in the UK with an EEA citizen before 31 December 2020 and must submit an in-time applications by end of June 2021

2. Those who want to join their EEA family member in the UK from 01 January 2021 (called joining family members). JFM can apply at any time under the Scheme and then join their family member.

- .

HERE FOR GOOD

Joining family members

JFM applications can be made from outside the UK or from inside the UK.

Outside the UK:

In most cases applicants will need to apply for a EUSS family permit first. This is due to the rules around applications made from outside the UK ([EU Settlement Scheme: applying from outside the UK - GOV.UK \(www.gov.uk\)](https://www.gov.uk/eu-settlement-scheme-applying-from-outside-the-uk)) *'If you're an EU, EEA or Swiss citizen, you must use your current valid passport or national identity card with a biometric chip. If you're not an EU, EEA or Swiss citizen, you must use your UK residence card with a biometric chip'*

If applicant applies for an EUSS family permit, they will then need to apply under EUSS within 3 months of arrival (if after 01 April 2021) or applies directly for EUSS and enters the country with this.

Inside the UK:

- Rules used to require for the applicant not to be in the UK as a visitor (Rule 11a and 14a Appendix EU). Rules changed with Statement of changes in Immigration Rules: HC 617, 10 September 2021. Such applicants still need to meet the same family relationship and residence requirements, but the requirement not to be in the UK as a visitor was removed

HERE FOR GOOD

Joining family members

Who can apply?

- spouse
- civil partner
- specified spouse or civil partner of a Swiss citizen
- durable partner (unmarried partnership akin to marriage or civil partnership)
- child under the age of 21 or dependent child over the age of 21 (including of the spouse or civil partner)
- dependent parent (including of the spouse or civil partner)

And the relationship existed before the end of December 2021

unless, in the case of a child, the person was born after that date, was adopted after that date in accordance with a relevant adoption decision or after that date became a child within the meaning of that entry in this table. They will need to apply within 3 months of their birth

Sponsor is a relevant EEA citizen

HERE FOR GOOD

Joining family members

In addition, the applicant must meet one of the following requirements:

- under sub-paragraph (a) (where sub-paragraph (c) or (d) as described below does not apply), **they were not resident in the UK and Islands on a basis which met the definition of ‘family member of a relevant EEA citizen’ in Annex 1 to Appendix EU (where that relevant EEA citizen is their relevant sponsor) at any time before the specified date**
- under sub-paragraph (b) (where sub-paragraph (c) or (d) as described below does not apply), **they were resident in the UK and Islands before the specified date, and either:** o **one of the events referred to in sub-paragraph (b)(i) or (b)(ii) in the definition of ‘continuous qualifying period’ in Annex 1 to Appendix EU has occurred, and after that event occurred they were not resident in the UK and Islands again before the specified date** o the event referred to **in sub-paragraph (a) in the definition of ‘supervening event’ in Annex 1 to Appendix EU has occurred, and after that event occurred they were not resident in the UK and Islands again before the specified date** o they are the specified spouse or civil partner of a Swiss citizen, and they do not rely on any period of residence in the UK and Islands before the marriage was contracted or the civil partnership was formed

HERE FOR GOOD

Joining family members

- under sub-paragraph (c) (where sub-paragraph (d) as described below does not apply), **where the person is a child born after the specified** date or adopted after that date in accordance with a relevant adoption decision, or after the specified date became a child within the definition in Annex 1 to Appendix EU on the basis of one of sub-paragraphs (a)(iii) to (a)(xi) of that entry (with the references below to ‘parents’ construed to include the guardian or other person to whom the order or other provision referred to in the relevant sub-paragraph of (a)(iii) to (a)(xi) of that entry relates), **one of the following requirements is met:** o **both of their parents are a relevant sponsor** o **one of their parents is a relevant sponsor and the other is a British citizen who is not a relevant sponsor** o **one of their parents is a relevant sponsor who has sole or joint rights of custody of them, in accordance with the applicable rules of family law of the UK, of the Islands or of an EEA country or Switzerland** (including applicable rules of private international law under which rights of custody under the law of a third country are recognised in the UK, in the Islands or in an EEA country or Switzerland, in particular as regards the best interests of the child, and without prejudice to the normal operation of such applicable rules of private international law)
- under sub-paragraph (d), where the person is a child born after the specified date to (or adopted after that date in accordance with a relevant adoption decision by or after that date became, within the meaning of the entry for ‘child’ in Annex 1 to Appendix EU and on the basis of one of sub-paragraphs (a)(iii) to (a)(xi) of that entry, a child of) a Swiss citizen or their spouse or civil partner (as described above in relation to sub-paragraph (a)), the Swiss citizen or their spouse or civil partner is a relevant sponsor

Extended Family Members And Comprehensive Sickness Insurance

An overview



2 November 2021

Extended Family Members ('EFM')

Who is impacted?

- EFM were required to apply before the 31 December 2020 to join EEA citizen family members in the UK relying on the EEA regulations 2016
- Many applications were refused / appealed / delayed resulting in many of postponed decisions
- The relevant parts to the EEA regulations 2016 stopped having effect on 1 July 2021
- the Home Office stopped issuing documents
- Estimated that hundreds / thousands impacted



Extended Family Members ('EFM')

Why is it still important?

- Hundreds of families continue to be separated because of decisions not being made /decisions being made too late / refusal because the EEA Regulations 2016 had ceased
- Following campaigning and litigation - The Home Office have acknowledged that Article 10(3) of the Withdrawal Agreement protects successful EFM applicants - they need to be issued with leave to enter / remain
- The Home Office published new guidance yesterday setting out their approach



Extended Family Members

What has happened?

- Draft Consent Orders in judicial review claims:
 - *the application for the EEA family permit was made by 31 December 2020;*
 - *the EEA citizen sponsor was resident in the UK by 31 December 2020;*
 - *the relationship of the Applicant to the EEA citizen sponsor is an extended family member (other than a durable partner);*
 - *the Applicant would have qualified for an EEA family permit, including following an allowed appeal, had the route not closed;*
 - *there has been no material change in circumstances; and*
 - *the Applicant does not fall to be refused on suitability grounds;*
- New policy seems to replicate the directions / we are awaiting rule changes



Extended Family Members

What should I do?

- Those litigating judicial reviews should carefully consider consent orders and responses - further review of cases is inconsistent with Home Office appeals policy and arguably the (controversial) approach in *Ullah [2019] EWCA Civ 550*
- Preparing clients for requests for further information about their cases in line with guidance
- Consider Article 9(a)(ii) of the Withdrawal Agreement and possible applications ?



Comprehensive Sickness Insurance ('CSI')

Why is it still important?

- Applications for naturalisation and the assessment of a persons residence in the UK - Residence requirements and Good Character
- Children born to parents who should have had CSI
- Future immigration applications for family members via EUSS - naturalised EEA nationals need to show that they were exercising treaty rights prior to acquiring citizenship
- Deportation cases and threshold of protection



Comprehensive Sickness Insurance ('CSI')

What is happening?

- The CJEU is considering questions that are linked to the question Case C-247/20 - not directly asked the question but identified as relevant
- Advocate General Hogan opinion comments on CSI - a 'last remark'
- *I consider that a sickness insurance cover must be regarded as being 'comprehensive' within the meaning of Article 7(1)(b) of Directive 2004/38 where the **cover enjoyed by the EU citizen corresponds to that provided free of charge by the host Member State to its own nationals** – all the more so as Member States may provide that access to their sickness insurance system is not free of charge – or to that which a Member State requires its own nationals to subscribe to, in particular where EU citizens contribute to the tax base from which the health system is financed in the same way as the nationals of the Member State concerned.*

We don't know when judgment will be handed down...



Comprehensive Sickness Insurance ('CSI')

What else?

- New Clause 3 to the Nationality and Borders Bill
- Creates a registration process for those impacted by CSI at birth / removes the requirement in naturalisation framework / removes reliance of it in other areas of law
- Also note potentially relevant litigation where PRCBC are instructed in case of *AR v SSHD* which relates to those born between 2000 and 2006 and the decision of *Capparrelli (EEA Nationals – British Nationality)* [2017] UKUT 00162

