Neutral Citation Number: [2022] EWCA Civ 37

Case No: CA-2021-000662

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE

QUEEN'S BENCH DIVISION

ADMINISTRATIVE COURT

Mr Justice Mostyn

CO/4877/2020

Royal Courts of Justice

Strand, London, WC2A 2LL

Date: 25/01/2022

Before :

LORD JUSTICE UNDERHILL

(Vice-President of the Court of Appeal (Civil Division))

LORD JUSTICE BEAN

and

LADY JUSTICE ANDREWS

- -

Between :

OLORUNFUNMILAYO OLUWASEUN AKINSANYA

Cla

Respond

- and -

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respo

App

- -

- -

David Blundell QC and **Julia Smyth** (instructed by **the Treasury Solicitor**) for the **Appellant**

Simon Cox and **Michael Spencer** (instructed by **Hackney Community Law Centre**) for the **Claimant**

Hearing date: 7 December 2021

- -

Approved Judgment

This judgment was handed down remotely by circulation to the parties' representatives by email and released to BAILII. The date and time for hand-down is deemed to be

Tuesday, 25 January 2022 at 10:30 a.m.

Lord Justice Underhill:

INTRODUCTION

1.
The Claimant, who is the Respondent before us, is a Nigerian national. She came to this country in 2006. She has four children, of whom she is the sole carer. The eldest, Abraham, who was born on 26 October 2011, is a British citizen. On 15 September 2014 she was granted a "derivative residence card" under the Immigration (European Economic Area) Regulations 2006, as amended, on the basis that she was Abraham's "Zambrano carer" (a term which I explain below). On 4 April 2019 she applied for limited leave to remain under Appendix FM to the Immigration Rules, on the basis that she was the sole responsible parent of a British citizen child living in the UK (see paragraph R-LTRPT, read with paragraph E-LTRPT.2). On 12 July 2019 the application was granted, for a thirty-month period expiring on 11 January 2022.

2.
On 19 January 2020 the Claimant applied to the Secretary of State for the Home Department, who is the Appellant, for indefinite leave to remain ("ILR") under the EU Settlement Scheme ("the EUSS"). By letter from the Home Office dated 29 September 2020 her application was refused.

3.
On 31 December 2020 the Claimant issued judicial review proceedings challenging that decision. On 9 June 2021 Mostyn J upheld her challenge.

4.
The Secretary of State appeals against Mostyn J's decision with leave granted by Dingemans LJ. She is represented by Mr David Blundell QC, leading Ms Julia Smyth. The Claimant is represented by Mr Simon Cox, leading Mr Michael Spencer. Before the Judge the parties' representation was the same, save that Mr Colin Thomann led for the Secretary of State.

5.
The issue which we have to decide in this appeal depends on the effect of EU law and on how at the relevant time it applied in this jurisdiction. The law in question no longer applies since the withdrawal of the UK from the European Union, but it is more convenient to use the present tense when analysing it.

THE LEGAL FRAMEWORK

Articles 20 and 21 of the TFEU

6.
Article 20 of the Treaty on the Functioning of the European Union ("the TFEU") reads, so far as relevant:

"1. Citizenship of the Union is hereby established. Every person holding the nationality of a Member State shall be a citizen of the Union. Citizenship of the Union shall be additional to and not replace national citizenship.

2. Citizens of the Union shall enjoy the rights and be subject to the duties provided for in the Treaties. They shall have, inter alia:

(a) the right to move and reside freely within the territory of the Member States;

(b)-(d) …

…”

7.
Article 21 (1) of the TFEU reads:

“Every citizen of the Union shall have the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in the Treaties and by the measures adopted to give them effect.”

The Zambrano Jurisprudence

8.
The issue in this appeal derives ultimately from the well-known decision of the Grand Chamber of the Court of Justice of the European Union (“the CJEU”) in Ruiz Zambrano v Office National de l’Emploi, case no. C34/09, [2012] QB 265, which was promulgated on 8 March 2011 [1] . That case concerned a family living in Belgium. The two (minor) children of the family were Belgian citizens, and thus also EU citizens by virtue of article 20 of the TFEU. The parents, however, only had Colombian nationality: in the language of the case-law they were “third country nationals”. The proceedings arose out of a refusal to pay the father arrears of unemployment benefit on the basis that during the relevant period he had not been lawfully resident in Belgium or, therefore, working lawfully. It was his case that he had a derivative right to reside in Belgium, and to work, by virtue of his children’s rights under articles 20 and 21.

9.
The CJEU upheld the father’s case. Its reasoning appears at paras. 40-45 of its judgment, which read:

“40. Article 20 of the FEU Treaty confers the status of citizen of the European Union on every person holding the nationality of a member state: see, inter alia, D'Hoop v Office national de l'emploi (Case C-224/98) [2004] ICR 137, para 27, and Garcia Avello v Belgian State (Case C-148/02) [2003] ECR I-11613, para 21. Since Mr Ruiz Zambrano's second and third children possess Belgian nationality, the conditions for the acquisition of which it is for the member state in question to lay down (see, to that effect, inter alia, Rottmann v Freistaat Bayern (Case C-135/08) [2010] QB 761, para 39), they undeniably enjoy that status: see, to that effect, the Garcia Avello case, para 21, and the Chen case, [2005] QB 325, para 20.

41. As the court has stated several times, citizenship of the European Union is intended to be the fundamental status of nationals of the member states: see, inter alia, Grzelczyk v Centre public d'aide sociale d'Ottignies-Louvain-la-Neuve (Case C-184/99) [2002] ICR 566, para 31; Baumbast v Secretary of State for the Home Department (Case C-413/99, [2003] ICR 1347, para 82; the Garcia Avello case, para 22; the Chen case, para 25; and the Rottmann case, para 43.

42. In those circumstances, article 20 of the FEU Treaty precludes national measures which have the effect of depriving citizens of the European Union of the genuine enjoyment of the substance of the rights conferred by virtue of their status as citizens of the European Union: see, to that effect, the Rottmann case, para 42.

43. A refusal to grant a right of residence to a third country national with dependent minor children in the Member State where those children are nationals and reside, and also a refusal to grant such a person a work permit, has such an effect.

44. It must be assumed that such a refusal would lead to a situation where those children, citizens of the Union, would have to leave the territory of the Union in order to accompany their parents. Similarly, if a work permit were not granted to such a person, he would risk not having sufficient resources to provide for himself and his family, which would also result in the children, citizens of the Union, having to leave the territory of the Union. In those circumstances, those citizens of the Union would, as a result, be unable to exercise the substance of the rights conferred on them by virtue of their status as citizens of the Union.

45. Accordingly, the answer to the questions referred is that article 20 of [the TFEU] is to be interpreted as meaning that it precludes a Member State from refusing a third country national upon whom his minor children, who are European Union citizens, are dependent, a right of residence in the Member State of residence and nationality of those children, and from refusing to grant a work permit to that third country national, in so far as such decisions deprive those children of the genuine enjoyment of the substance of the rights attaching to the status of European Union citizen."

10.
It will be seen that the essence of that reasoning, as it applied in the actual case, is that unless the father enjoyed the right to live in Belgium, and the right to work, he would have to leave the EU, and the children would in practice have to go with him, and that that would deprive them of the substance of their rights as EU citizens under articles 20 and 21. Mr Blundell referred us to the judgment of Lady Arden (with which the other members of the Court agreed) in Patel v Secretary of State for the Home Department [2019] UKSC 59, [2020] 1 WLR 228. At para. 22 she said:

"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 TCN [third country national], with whom the Union citizen has a relationship of dependency, is removed."

He also referred us to para. 30, where Lady Arden observed that "[t]he test of compulsion is … a practical test to be applied to the actual facts and not to a theoretical set of facts".

11.
Zambrano represented a development of earlier case-law of the CJEU recognising that third country national parents of EU citizens might in certain circumstances enjoy rights to reside deriving from the rights of those citizens under EU law – so-called "derivative rights". I should mention three examples which are not directly relevant but which are referred to in the case-law or other materials which I will have to consider:

(1) In Baumbast v Secretary of State for the Home Department C-413/99, [2003] ICR 1347, a German national child who was living in the UK was entitled under EU law (article 12 of EU Regulation 1612/68) to go to school here. The Court held that her mother, who was her sole carer and who was a Colombian national, was entitled to a derivative right of residence in the UK in order to facilitate the exercise of that right.

(2) In Chen v Secretary of State for the Home Department C-200/02, [2005] QB 325, a child with Irish nationality had the right to move to and reside in the UK under the predecessor of article 21. The Court held that her mother, who was her sole carer and who was a Chinese national, was entitled to a

derivative right of residence in the UK because otherwise the child's right would be deprived of any useful effect.

(3) In the joined cases of London Borough of Harrow v Ibrahim C-310/08 and Teixeira v London Borough of Lambeth C-480/08, [2010] PTSR 1913, the Court essentially applied Baumbast in slightly different factual circumstances.

The development effected by Zambrano was that the children in that case had not (unlike in Chen) exercised their right under article 21 (1) to move from one member state to another, so that the father was seeking a right to reside with them in the very state of which they were nationals. The Court evidently did not regard that as a material distinction. [2]

12.
Although in Zambrano the Court was concerned only with the rights of the third country national to reside and to work, the principle which it establishes also entails a right to "social assistance" for a parent where that is necessary in order to enable them to fulfil the caring role without which the child would be unable to remain in the EU: see the decision of this Court in Sanneh which I consider at paras. 50-52 below. However, except where it is necessary to refer to the other Zambrano rights, I will in this judgment refer only to the right to reside, since it is with that that we are primarily concerned.

13.
There have been several later decisions of the CJEU addressing the application of Zambrano in particular factual situations. It will be necessary to consider two particular decisions in due course, but I should note that the authorities sometimes do not refer directly to Zambrano but to the decisions of the Grand Chamber in Dereci v Bundesministerium für Inneres C-256/11 and Chavez-Vilchez v Raad van Bestuur van de Sociale Verzekeringsbank (C-133/15), [2018] QB 103, in which the Zambrano principles are re-stated.

14.
It is convenient to adopt some shorthands. I will refer to circumstances where the removal of the third country national parent would in practice mean that the EU citizen child has to leave the EU as "the Zambrano circumstances". I will, without prejudice to the issues raised by the appeal, refer to the rights which in those circumstances may not be refused to the parent (i.e. the right to reside and to work and, where necessary, to receive social assistance) as "Zambrano rights". I will sometimes refer to "Zambrano carers", rather than parents, since the caring relationship need not always be parental. The principle may also be invoked by citizens of the European Economic Area ("the EEA"), but for simplicity I will refer only to EU citizenship.

15.
I should mention two EU Directives which are not directly concerned with Zambrano rights but which are referred to in the case-law or the legislative history which I will have to consider:

(1) Directive 2003/109 requires member states, subject to various exceptions, to grant "long-term resident status" to third country nationals who "have resided legally and continuously within their territory for five years immediately prior to the submission of the relevant application" (I take that summary from para. 37 of the judgment in Iida, considered at paras 42-45 below).

(2) Directive 2004/38 (which consolidates and updates a number of earlier Directives) contains detailed provisions covering the exercise of article 21 rights by EU citizens and their members.

The EU Settlement Scheme

16.
The EUSS is embodied in Appendix EU to the Immigration Rules. As explained at paragraph EU1, the Appendix “sets out the basis on which an EEA citizen and their family members, and the family members of a qualifying British citizen, will, if they apply under it, be granted indefinite leave to remain or limited leave to enter or remain”. “EEA citizen” of course includes citizens of the EU.

17.
The operative provision of Appendix EU which is relevant for our purposes is paragraph EU2. This reads, so far as material:

“The applicant will be granted … indefinite leave to remain … where

•
…

•
the applicant meets the eligibility requirements for indefinite leave to enter or remain in accordance with paragraph EU11 ...

•
…”

18.
Paragraph EU11 sets out a table of conditions of eligibility for “persons eligible for indefinite leave to enter or remain as a relevant EEA citizen or their family member, or as person with a derivative right to reside or with a Zambrano right to reside”. The relevant condition for our purposes is condition 3, namely:

“(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.”

It is the Claimant’s case that she had at the material date “a Zambrano right to reside” and accordingly that she satisfies alternative (v) under limb (a); and that she had completed the five-years continuous qualifying period so that limb (b) is also satisfied. No issue arises about limb (c).

19.

Annex 1 to Appendix EU (which applies by virtue of paragraph EU7 (1)) contains various definitions. The definition of "person with a Zambrano right to reside" is elaborate to the point of impenetrability, but the relevant parts for our purposes read:

"a person who has satisfied the Secretary of State that … they are …

(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) …; and

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

I will refer to that as "the Annex 1 definition".

20.
I deal in the following section with the reference to the EEA Regulations, but I should say something more about limb (b) of the definition. The basic structure of Part I of the Immigration Act 1971 is that persons with a "right of abode" – that is, British citizens and certain Commonwealth citizens – have an absolute right to live in the UK, but that everyone else is only entitled to live, work and settle here so far as permitted by the system of immigration control set out in the Act and in the Immigration Rules; the central feature of that system is the requirement that they have been granted leave to enter or remain. Leave to remain may, by section 3 (1) (b), be "either for a limited or for an indefinite period". Limited leave may be, and generally is, subject to conditions, which may include restrictions on the beneficiary's right to work or to access social security benefits; ILR, by contrast, cannot be granted subject to conditions. While the UK was a member of the EU this scheme had no application to EU nationals, or those with rights under EU law deriving from the rights of such nationals, since they were (broadly speaking) entitled to live and work here without any requirement for leave: see section 7 of the Immigration Act 1988.

The EEA Regulations

21.
"The EEA Regulations" referred to in the Annex 1 definition are the Immigration (European Economic Area) Regulations 2016. Those Regulations have ceased to have effect, save for certain transitional purposes, since 31 December 2020 (i.e. the end of the Brexit transition period).

22.
Part II of the Regulations provide for a series of substantive rights relating to admission and residence. Regulation 16, to which the definition refers, is headed "Derivative right to reside". Paragraph (1) provides:

"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)."

23.
The criteria at paragraph (2)-(6) identify various forms of derivative right. The relevant paragraph for our purposes is (5), which deals with third country national carers of British citizen children, i.e. Zambrano carers. It reads:

"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."

24.
Paragraph (7) contains various definitions. I need only set out that for "exempt person" (as referred to in paragraph (1) (a)):

"(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 [3]; or

(iv) who has indefinite leave to enter or remain in the United Kingdom (but see paragraph (7A))."

It will be noted that the persons covered by head (iv) are those with indefinite leave to remain: it does not cover those with only limited leave.

25.
I note for completeness, though nothing turns on it here, that paragraph (7A) (with the reference to it in paragraph (7) (c) (iv)) was introduced by the Immigration (European Economic Area Nationals) (EU Exit) Regulations 2019. It provides that leave to remain granted by virtue of Appendix EU "is not to be treated as leave for the purposes of paragraph … (7) (c) (iv)".

26.
Paragraphs (8)-(11) contain various provisions about who counts as a "primary carer", but no issue about their terms arises in this appeal. Paragraph (12) provides that a derivative right to reside shall not arise where (broadly speaking) decisions are made to remove or exclude the carer on grounds of public policy, public security or public health, or misuse of rights.

27.
Regulation 16 (5) replaces, in similar though not quite identical terms, regulation 15A (4A) of the amended 2006 Regulations to which I have already referred in para. 1 above. Paragraph (4A) was introduced, with effect from 8 November 2012, by the Immigration (European Economic Area) (Amendment) (no. 2) Regulations 2012 ("the Amendment Regulations"). Those Regulations were made on 11 October 2012 and took effect from 8 November. The Explanatory Note and Explanatory Memorandum confirm (although this would in any event be clear from their terms) that the intention of the Amendment Regulations was "to give effect to the ECJ's decision in Zambrano", which had been promulgated about eighteen months previously.

28.
I should note one other point about the Amendment Regulations. Regulation 15A had itself been introduced as recently as July 2012 in order (as the Explanatory Memorandum states) to give effect to the decisions in Chen, Ibrahim and Teixeira. Paragraph (1) in its original form conferred "a derivative right to reside in the United Kingdom" on various categories of person defined in paragraphs (2)-(5) if they were "not entitled to reside in the UK as a result of any other provision of these Regulations". As well as inserting the new paragraph (4A), the Amendment Regulations amended paragraph (1) so as to substitute the phrase "an exempt person" for the phrase "not entitled to reside in the UK as a result of any other provision of these Regulations", and to introduce a definition of "exempt person" in substantially the same terms as regulation 16 (7) (c) of the 2016 Regulations (save for the cross-reference to paragraph (7A)).

29.
Part III of the 2016 Regulations contains various provisions requiring the Secretary of State to issue "residence documentation" to persons enjoying rights under Part II. Persons with a derivative right to reside under regulation 16 are entitled by regulation 20 to be issued with a "derivative residence card" either for five years or for such lesser period as the Secretary of State may prescribe (see paragraph (3)).

30.
Both the 2016 Regulations and the 2006 Regulations (and the Amendment Regulations) were, in the relevant respects, made under section 2 (2) of the European Communities Act 1972. Since the rights recognised by them derive from EU law they do not form part of the scheme under the Immigration Act 1971: see para. 20 above. Specifically, a derivative right to reside does not constitute a form of leave to remain. One consequence of that is that it does not provide a "route to settlement".

THE FACTS AND THE SECRETARY OF STATE'S DECISION

31.
I have already stated the essential facts for our purposes at para. 1 above. The only additional point that it is necessary to record is that the reason why the Claimant chose to apply for leave to remain, rather than continuing to rely on her derivative residence right as a Zambrano carer, was that as a result of illness she was unable to work and needed to claim benefits. As a person with a derivative residence right she had only a limited entitlement to social assistance (see para. 50 below), whereas once she had leave to remain she became entitled to claim mainstream benefits (the Secretary of State not having imposed a "no recourse to public funds" condition).

32.
In its letter refusing the Claimant's application under the EUSS Scheme the Home Office gave its reason as follows:

"One of the requirements for qualifying for settled or pre-settled status as a person with a Zambrano right to reside is that you do not already hold leave to enter or remain in the UK, unless this was granted under the EU Settlement Scheme."

That is evidently an invocation of limb (b) of the definition of a person with a Zambrano right to reside: see para. 19 above.

THE ISSUES AND THE JUDGMENT OF MOSTYN J

33.

On the face of it, the Secretary of State was plainly entitled to refuse the Claimant's application. Limb (b) of the definition of the Annex 1 definition was that they should be "without leave to enter or remain in the UK"; but the Claimant had had such leave since 12 October 2019.

34.
However, in advance of the hearing below the Secretary of State accepted that her intention in framing the Annex 1 definition was that it should accurately state the actual right to reside enjoyed by Zambrano carers in the UK. It followed that if the Claimant in fact enjoyed such a right notwithstanding the grant of leave to remain the Secretary of State had in framing limb (b) proceeded under a misunderstanding, and she accepted that it would be unlawful for her to make her decision on that basis.

35.
Accordingly, as Mr Blundell put it at para. 28 of his skeleton argument before us, the only issue before Mostyn J was whether the Secretary of State had, in formulating the Annex 1 definition, "erred … in her understanding of (a) the Zambrano jurisprudence and (b) regulation 16 of the 2016 Regulations" – that is, by proceeding on the basis that the Zambrano right did not arise in circumstances where the carer in question had any form of leave to enter or remain. If she had, it was agreed that her decision would have to be quashed, and that she would be required to reconsider the terms of the definition.

36.
By a judgment handed down on 9 June 2021 Mostyn J held that the Secretary of State had erred in her understanding both of the Zambrano jurisprudence and of regulation 16. Without intending any disrespect, I will not set out his reasoning at any length since the appeal depends on questions of pure law on which I shall have to reach my own conclusion. In short:

(1) He held that a Zambrano right in EU law was not extinguished by "the existence of a concurrent limited leave to remain": see in particular para. 51 of his judgment.

(2) He further held that, even if the jurisprudence of the CJEU did not go that far, the domestic formulation of the Zambrano right in regulation 16 was quite clearly to the effect that the right conferred by paragraph (5) was only excluded where the carer enjoyed indefinite leave to remain, since paragraph (7) refers only to ILR: see in particular para. 70 of his judgment. He rejected an argument on behalf of the Secretary of State that the relevant provisions should be read down so as to confer rights that went no further than those accorded by EU law: see paras. 67-69.

On the same date he made an order quashing the decision of 29 September 2020 and two declarations. I need only set out the terms of the first, which read:

"The Secretary of State erred in law when providing, in Annex 1 to Appendix EU to the Statement of Changes to the Immigration Rules HC 395 as amended, that the definition of a 'person with a Zambrano right to reside' includes paragraph (b) 'a person …. without leave to enter or remain in the UK, unless this was granted under this Appendix'."

37.
There was an issue following the judgment about what other relief might be appropriate, and a further hearing was directed for 17 June. In the event, however, the Secretary of State confirmed, as recorded in recitals to an order of that date, that she would "reconsider the relevant provisions of Appendix EU" and would take a number of specified steps to preserve in the meantime the position of EUSS applicants who were relying on a Zambrano right to reside; and on that basis the hearing was

vacated and no order was made for any other relief. It is thus evident there are other EUSS applicants in a similar position to the Claimant, though we were not given any numbers.

38.
By her grounds 1 and 2 in this appeal the Secretary of State challenges both Mostyn J's conclusions. Mr Blundell acknowledged that the decision in the Claimant's case would have to be quashed even if we were to reject only ground 2, but he submitted that we should consider ground 1 in any event. In order to construe regulation 16 it is necessary to understand the effect of the Zambrano jurisprudence; and if we were to hold that regulation 16 went further than was required by that jurisprudence that would be material to the Secretary of State's reconsideration as referred to in the order of 17 June 2021. I agree that we should consider both grounds.

GROUND 1: THE EFFECT OF THE ZAMBRANO JURISPRUDENCE

39.
In the particular circumstances of this case it will be useful to summarise both parties' submissions, albeit addressing some points as I go, before proceeding to my conclusion.

The Secretary of State's Case

40.
The foundation of Mr Blundell's submission on behalf of the Secretary of State was that the explicit rationale for the CJEU's "creation" (as he put it) of Zambrano rights for third country nationals was to prevent their EU citizen children being in practice compelled to leave the EU and so deprived of their rights under articles 20 and 21 of the TFEU: see para. 10 above. That being so, he submitted, those rights were properly to be regarded as arising only when the third country national parent did not otherwise enjoy a right to reside in the member state in question: if they did, then there was no risk of the children being compelled to leave the EU. It followed that from the moment that she was granted leave to remain, albeit limited, the Claimant enjoyed no Zambrano right to reside.

41.
Mr Blundell submitted that that analysis was supported by two decisions of the CJEU subsequent to Zambrano. I take them in turn.

42.
The first is Iida v Stadt Ulm C-40/11, [2013] Fam 121, promulgated on 8 November 2012. The applicant was a Japanese national. He married a German citizen in the United States. They had a daughter, who enjoyed German nationality. In late 2005 the family moved to Ulm in Germany. The applicant had a residence permit from early 2006, initially on the basis of "family reunion" but latterly on the basis of his employment in Ulm. That permit was not due to expire until November 2010 (and was in fact then renewed for two years, with the possibility of a further discretionary extension). In 2007 the applicant's wife got a job in Austria and in early 2008 they separated, with the daughter going to live with the mother in Vienna. In May 2008 the applicant applied for a different form of residence card as a family member of an EU citizen. That was refused. He challenged the refusal. The German court referred various questions to the CJEU: I need not reproduce them here. By the date of the Court's decision, which was in November 2012, though not at the start of the original proceedings, the applicant had been resident in Germany for five years and was prima facie entitled to long-term resident status under Directive 2003/109.

43.

The relevant part of the Court's judgment is at paras. 66-77, under the heading "Interpretation of articles 20 and 21 TFEU". At paras. 67-71 the Court summarises the various types of situation in which derivative rights based on articles 20 and 21 have been held to apply, including the Zambrano situation (see para. 71). Paras. 72-77 read as follows:

"72. The common element in the above situations is that, although they are governed by legislation which falls a priori within the competence of the member states, namely legislation on the right of entry and stay of third country nationals outside the scope of Directives 2003/109 and 2004/38, they none the less have an intrinsic connection with the freedom of movement of a Union citizen which prevents the right of entry and residence from being refused to those nationals in the member state of residence of that citizen, in order not to interfere with that freedom.

73. As regards cases such as that at issue in the main proceedings, first, it must be observed that the applicant, who is a third country national, is not seeking a right of residence in the host member state in which his spouse and his daughter, who are Union citizens, reside, but in Germany, their member state of origin.

74. Next, it is common ground that that the applicant has always resided in that member state in accordance with national law, without the absence of a right of residence under European Union law having discouraged his daughter or his spouse from exercising their right of freedom of movement by moving to Austria.

75. Finally, as may be seen from paras 28 and 40–45 above, the applicant in the main proceedings has a right of residence under national law until 2 November 2012, which is prima facie renewable, according to the German Government, and can in principle be granted the status of long-term resident within the meaning of Directive 2003/109 .

76. In those circumstances, it cannot validly be argued that the decision at issue in the main proceedings is liable to deny Mr Iida's spouse or daughter the genuine enjoyment of the substance of the rights associated with their status of Union citizen or to impede the exercise of their right to move and reside freely within the territory of the member states: see McCarthy's case [McCarthy v Secretary of State for the Home Department C-434/09], para 49.

77. It must be recalled that the purely hypothetical prospect of exercising the right of freedom of movement does not establish a sufficient connection with European Union law to justify the application of that law's provisions: see Kremzow v Austrian State (Case C-299/95) [1997] ECR I-2629, para 16. The same applies to purely hypothetical prospects of that right being obstructed."

44.
Para. 72 in that passage recapitulates the rationale for the grant of Zambrano rights. Paras. 73-75 give three reasons why that rationale did not apply in the applicant's case. The first and second are not relevant in the circumstances of this case, but Mr Blundell submitted that the third is directly in point. The reason given in para. 75 is that the applicant currently enjoyed the right to reside under German law and was likely to continue to do so (whether under German law or by virtue of an entitlement to long-term resident status under Directive 2003/109). The significance of that can only, he submitted, be that the Court did not regard the Zambrano jurisprudence as being engaged in circumstances where the carer already enjoyed residence rights and where accordingly there was no current risk of them, or therefore their EU citizen dependants, having to leave the EU. Even if the domestic right in question might in principle lapse or be removed, leading to the potential

“obstruction” of the dependants’ article 21 rights, that did not engage Zambrano so long as that possibility was “purely hypothetical”: see the second sentence of para. 77.

45.
In my view Iida does indeed support Mr Blundell’s case, for the reasons that he gives. Mr Cox noted that at the end of para. 75 the Court refers to the fact that the applicant was now entitled to long-term residence status under Directive 2003/109, i.e. as a matter of EU law. That is true but it is not the essence of the point being made. The paragraph starts with the fact that the applicant enjoyed a right of residence as a matter of German law: it is that which was material to his position in the underlying proceedings and it was plainly part of the Court’s reasoning.

46.
The second decision relied on by Mr Blundell is NA v Secretary of State for the Home Department C-115/15, [2017] QB 109. In that case the applicant was a Pakistani national who married a German citizen. The couple moved to the UK, where the husband worked. They had two children who had German nationality. The applicant suffered domestic violence from her husband. They separated and he returned to Germany. They were subsequently divorced. The applicant was the primary carer of both children, who were at school in the UK. The Upper Tribunal found that she had a right to reside on the basis that she was a Zambrano carer. The Secretary of State appealed, and this Court referred various questions to the CJEU: again, I need not reproduce them.

47.
At paras. 52-68 of its judgment the Court decided that the case fell within the scope of the Baumbast decision and that the applicant accordingly had a derivative right to reside based on EU Regulation 1612/68: see para. 11 (1) above. It then went on to consider

“… whether Articles 20 and/or 21 TFEU must be interpreted as conferring a right of residence in the host Member State both on a minor Union citizen who has resided since birth in that Member State but is not a national of that Member State, and on the parent, a third country national, who has sole custody of that minor, where the persons concerned qualify for a right of residence in that Member State under national or international law”

(para. 69). At paras. 70-72 it recapitulates the Zambrano principle. It continues:

“73. As regards a situation such as that at issue in the main proceedings, account must, first, be taken of the fact that both the applicant in the main proceedings and her daughters qualify for a right of residence in United Kingdom under Article 12 of Regulation No 1612/68, as stated in paragraph 66 of this judgment.

74. The first condition on which the possibility of claiming a right of residence in the host Member State under Article 20 TFEU, as interpreted by the Court in … Zambrano …, depends, namely that the person concerned does not qualify for a right of residence in that Member State under European Union secondary law, is in this case not met.”

In short, the applicant was not entitled to a Zambrano right to reside because she already had a (derivative) right to reside based on EU Regulation 1612/68 – that being the “European Union secondary law” referred to (and the “international law” referred to in para. 69).

48.
That reasoning is to broadly the same effect as the reasoning in Iida, and I accept Mr Blundell’s submission that it supports his characterisation of the Zambrano right in the same way. Mr Cox

sought to distinguish NA on the basis that the right which was held to preclude the existence of a Zambrano right was itself an EU right: he submitted that this was simply a case of "a superior EU right" – or, perhaps, a lex specialis – excluding "an inferior EU right". I am not satisfied that that is a material distinction. The Court at para. 69 framed the issue in terms of whether the Zambrano right arose where the person in question already enjoyed a right of residence "under national or international law". On the facts of the particular case the right arose under international law, but I see nothing to suggest that the Court believed that the answer might be different if it arose under national law; nor can I myself see a reason why it should. And even if I were wrong about that, NA is at worst neutral: it says nothing to undermine Mr Blundell's reliance on Iida.

The Claimant's Case

49.
The essence of Mr Cox's case on behalf of the Claimant is that the existence of Zambrano rights is in principle independent of whether the parent enjoys an equivalent right as a matter of domestic law. The rights in question derive directly from articles 20 and 21 of the TFEU and do not require domestic implementation. It is true that if the substance of the relevant right – whether a right to reside or to work or to receive social assistance where necessary – is accorded by domestic law they will not need to invoke their Zambrano right; but that is not the same as saying that it is in those circumstances "extinguished", or that it only exists when required. It is wrong in principle to treat an obligation as ceasing to exist as long as it is discharged.

50.
Mr Cox submitted that that approach was supported by the reasoning of this Court in Sanneh v Secretary of State for Work and Pensions [2015] EWCA Civ 49, [2016] QB 455. The background to that case was that there was a substantial interval between the promulgation of the decision in Zambrano in March 2011 and the introduction of domestic legislation intended to address its consequences. On 8 November 2012, in addition to the Amendment Regulations considered at paras. 27-28 above, a further set of amendments were made to the relevant regulations in order to exclude Zambrano carers from entitlement to mainstream social security benefits (including income support). One of the issues in the appeal was whether those exclusions were in breach of EU law: the Court held that, although Zambrano carers were entitled under EU law to receive "social assistance" so far as necessary to prevent them, and thus their EU citizen children, being compelled to leave the UK, the level of assistance remaining available (primarily under section 17 of the Children Act 1989) was adequate. However the relevant issue for our purposes concerned the entitlement of Ms Sanneh in the period prior to the coming into force of those amendments. She contended that during that period she was lawfully resident in the UK in the exercise of her Zambrano rights and was accordingly entitled to income support under the terms of the relevant (unamended) regulations. The Secretary of State disputed that entitlement on the basis that she did not acquire the status of a Zambrano carer, and so was not entitled to any Zambrano rights, until the moment that her removal was imminent.

51.
This Court upheld Ms Sanneh's claim. Arden LJ delivered a very full leading judgment, but Elias LJ also delivered a concurring judgment on the issue with which we are concerned, and in the interests of succinctness it is easier to refer to that: there is no difference in substance between their reasons, and Burnett LJ agreed with both judgments. Elias LJ said:

"166. This appeal raises questions about the full implications of the Zambrano decision as a matter of EU law. The Secretary of State submits that they are extremely limited. Indeed, on his analysis there

is no right to reside as such until the point where removal of the carer is imminent; at that moment, but not before, the carer can claim the benefit of a right - more accurately described as an immunity - which provides the carer with a defence to any attempt to remove her from the country. The argument is that until steps to remove her are taken, the carer's presence in the country is de facto tolerated and therefore her charge, the EU citizen from whose right to reside the carer's right is derived, is not in jeopardy of being removed. The child is not at risk of being deprived of 'the genuine enjoyment of the substance of the right' conferred by virtue of the child's status as an EU citizen, to use the language in paragraph [42] of Zambrano. Accordingly, if no steps are taken against the carer (and assuming there is no issue of the carer being forced to leave for financial reasons) no Zambrano status ever arises and therefore there can be no question of any benefits being acquired by virtue of that status. Any benefits to which the carer is entitled must be derived from some other legal source.

167. I wholly reject this analysis of the nature of the Zambrano right. In my view, it is barely coherent. The logic appears to be that although the State at all times has the right to take action to remove the TCN [third country national], in practical terms it is necessarily and always meaningless. At the very same moment as the State takes steps to exercise it, a countervailing right magically springs into being which enables the carer to claim to be immune from the process. Presumably on this analysis if the State then agrees not to take removal action, the need to invoke the Zambrano principle disappears and the carer returns to the status of someone whose presence is simply tolerated but who has no right as such to remain in the country.

168. I cannot accept that this would be a proper implementation of the EU right. The right lawfully to remain and work in the UK can only sensibly mean that no action can be taken by the State to defeat those rights. Of course, the right to remain need only be asserted when the State seeks to interfere with it; that is so with all rights which confer freedom from State interference. It does not follow that the right arises only at the point when it is being asserted. At all times whilst the Zambrano conditions are met, the carer has the right not to have action taken to remove her from the country if the effect would be to deprive the child of his or her right, as a citizen of the EU, to remain within the EU.

169. The Secretary of State's submission is made all the more bizarre given that someone not lawfully present in the UK is under a duty to leave, and indeed is committing a criminal offence by remaining: see section 24 of the Immigration Act 1971. As I understand the response to this point of Mr Coppel QC, counsel for the Secretary of State, it is that in practice no proceedings are ever instituted against those illegally present, and if they were there would be an immunity from the criminal process. But to be effective the immunity must have the effect that at no time when the carer has been performing her role as a Zambrano carer has she been acting illegally by remaining in the country. The carer's presence in the circumstances must be lawful, not merely tolerated, and that can only be on the premise that there is at all times a right to stay."

The equivalent part of Arden LJ's judgment is at paras. 33-75, and in particular paras. 71-74.

52.
Mr Cox submitted that it is clear from Sanneh, most obviously from the final sentence of para. 168 of Elias LJ's judgment, that the Zambrano right to reside arises from the point when the Zambrano circumstances first arise and subsists thereafter so long as they obtain. I will return to that submission below.

53.
In his oral submissions, though not in his skeleton argument, Mr Cox made a submission of a rather different character. He submitted that almost all third country national primary carers of EU citizen

children would be entitled to leave to remain under Appendix FM to the Immigration Rules, as indeed was granted to the Claimant in 2019. If the Secretary of State's submission were right, the grant of settlement rights to Zambrano carers under the EUSS would in practice be a dead letter. The only group to whom it would be available would be those who had committed criminal offences sufficiently serious to exclude them from entitlement to leave to remain but not sufficiently serious to exclude the Zambrano right – the threshold in the latter case on grounds of public policy being rather higher. Such a result would be anomalous, to put it no higher. The legal basis of that submission was not very fully explored before us but I am prepared to assume that it is correct. I am not sure that everyone with a Zambrano right to reside would in fact at the material time have applied for leave to remain under Appendix FM – the Claimant, for example, only did so when she became ill – but that would not necessarily undermine Mr Cox's basic point. However, I do not see how the point can affect the issue under ground 1. The Zambrano jurisprudence says what it says. If that produces an anomaly, that is the consequence of the framing of the EUSS, which is a different matter.

Conclusion on Ground 1

54.
At first sight there is some force in Mr Cox's position that a right arising under the EU Treaty must exist independently of any domestic rights which purport to reproduce it or which are to substantially the same effect. However, that does not in my judgment correspond to the analysis of the nature of Zambrano rights adopted by the CJEU. It is clear from Iida and NA that the Court does not regard Zambrano rights as arising as long as domestic law accords to Zambrano carers the necessary right to reside (or to work or to receive social assistance). To put it another way, where those rights are accorded what I have called "the Zambrano circumstances" do not obtain.

55.
That analysis is perfectly sustainable at the theoretical level. As the Court recognises (see para. 72 of the judgment in Iida) the right of third country nationals to reside in a member state is normally a matter for that state. Zambrano rights are for that reason exceptional. They are not typical Treaty rights, since they arise only indirectly and contingently in order to prevent a situation where EU citizen dependants are compelled to leave the EU. That being so, it makes sense to treat them as arising only in circumstances where the carer has no domestic (or other EU) right to reside (or to work, or to receive necessary social assistance).

56.
I do not believe that that approach is inconsistent with Sanneh. In that case, unlike this, the claimant had no right to reside under domestic law, and the issue was whether her Zambrano right to reside arose prior to the point of imminent removal. It was to that issue that the observations of Elias LJ on which Mr Cox relies were addressed. His conclusion was, in effect, that the Zambrano circumstances arose as soon as the claimant had no leave to remain and was thus (as a matter of domestic law) under a duty to leave and liable to removal – see in particular para. 169. The Court was not considering a case where the claimant enjoyed leave to remain as a matter of domestic law. In such a case, on the CJEU's analysis, the Zambrano circumstances do not obtain, and Elias LJ's observations have no purchase.

57.
I thus prefer Mr Blundell's submissions. I should say, however, that that does not as such answer the question whether the Secretary of State misdirected herself in framing the definition in the EUSS. It depends what she was intending to achieve. Notwithstanding the analysis above, the fact remains that

if at any time a Zambrano carer loses their right to reside as a matter of domestic law, the Zambrano right will arise (assuming, that is, that the effect of the carer leaving will be that the EU citizen child also has to do so): Zambrano is always waiting in the wings, and so long as the Zambrano circumstances obtain the carer can never be put in a position where their residence is unlawful. If the Secretary of State's purpose in wanting to "understand the Zambrano jurisprudence" was indeed to restrict rights under the EUSS to people whose right to reside at the relevant dates directly depended on Zambrano, then her approach was consistent with the EU case-law. But if her intention was to extend those rights to all those carers whose removal would result in an EU citizen dependant having to leave the UK, then the exclusion of carers who currently had leave to remain on some other basis would evidently be inconsistent with that purpose. What the Secretary of State's purpose was is not something that this Court can answer. But fortunately it is not necessary for us to do so because of my conclusion on ground 2, with which I understand Bean and Andrews LJJ to agree.

58.
I have not found it necessary to refer to Mostyn J's reasoning on this issue, which broadly, though not in all respects, corresponded to the submissions of Mr Cox which I have rejected.

GROUND 2: THE CONSTRUCTION OF REGULATION 16

59.
The issue under this ground is whether the Secretary of State in framing the relevant definition in Annex 1 of the EUSS misunderstood the effect of regulation 16 of the EEA Regulations, which, as we have seen, was intended to give effect to the Zambrano jurisprudence in UK law. I have set out the relevant provisions at paras. 22-24 above. The Claimant's case is that limb (b) of the Annex 1 definition is inconsistent with the definition of "exempt person" in regulation 16 (7). Head (iv) of that definition covers a person "who has indefinite leave to enter or remain in the United Kingdom"; but it says nothing about persons with only limited leave. The Claimant contends that persons with limited leave are accordingly not exempt persons and by virtue of paragraph (1) (b) are entitled to a derivative right to reside, alongside their leave to remain, so long as they satisfy the criteria under one of paragraphs (2)-(6).

60.
On any natural reading of the language of paragraph (7) that submission is plainly right. It also reflects the understanding of the Home Office at the time that the Amendment Regulations, in which that language first appeared, were made. Para. 10 of the Guidance issued to UK Border Agency staff at the time of the 2012 amendments reads:

"Where someone 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."

61.
Mr Blundell accepts that the natural meaning of regulation 16 is indeed that a person with limited leave to remain is entitled to a derivative right to reside, but he submitted (a) that such a reading would mean that the Secretary of State in making the Regulations had accorded rights to carers of EU citizen children that go beyond their entitlement in EU law; and (b) that it followed that regulation 16 should be construed, despite the natural reading, in such a way as to avoid that result and to limit the rights conferred under it to carers who did not otherwise have leave to remain.

62.

As regards the first element in that submission, I have already accepted Mr Blundell's submission about the effect of the Zambrano jurisprudence, and I need say no more about it.

63.
As regards the second element, Mr Blundell relied on what he said was a presumption against "gold-plating" – that is (as defined in the Department for Business, Enterprise and Industrial Strategy's document Transposition guidance: how to implement EU Directives into UK law effectively) "going beyond the minimum necessary to comply with a Directive". The Guidance says that it is not Government policy to gold-plate in the absence of exceptional circumstances (see para. 2.7). Mr Blundell referred also to the judgment of Lord Mance in Nuclear Decommissioning Authority v Energy Solutions EU Ltd [2017] UKSC 34, [2017] 1 WLR 1373, which was concerned with UK legislation implementing the scheme for remedies for breach of the Public Procurement Directive. At para. 39 Lord Mance said that there was "a natural assumption that the UK legislator will not go further than required by EU law when implementing such a scheme, without considering this and making it clear".

64.
I should start by saying that I do not accept that there is any general presumption against "gold-plating". The correct position is as stated by Lord Mance in United States of America v Nolan [2015] UKSC 63, [2016] AC 463, at para. 14:

"Where a Directive allows a member state to go further than the Directive requires, there is … no imperative to achieve a 'conforming' interpretation. It may in a particular case be possible to infer that the domestic legislature did not, by a domestic formulation or reformulation, intend to go further in substance than the European requirement or minimum."

Although Lord Mance is there referring to the requirements of a Directive, the same principle must apply to any provision of EU law; and in the present case articles 20 and 21 of the TFEU would certainly not prevent a member state from granting further rights to third country national carers of EU citizen children than Zambrano requires. What Lord Mance says in that passage is not inconsistent with the phrase on which Mr Blundell relies from his judgment in Energy Solutions: that was not expressed as a general proposition but was explicitly directed to the particular scheme. In short, while it may well be relevant in construing implementing legislation of this kind to consider whether in the particular case the legislator is likely to have intended to go beyond the minimum required in order to achieve compliance with EU law, that is no more than a consideration forming part of the overall exercise of statutory construction.

65.
I am prepared to accept that in making the Amendment Regulations, and thus also the relevant parts of regulation 16, it is likely that the Secretary of State intended, in a broad sense, to do no more than implement the requirements of the Zambrano decision. But it is not as simple as that. In the first place, that required her to take a view as to what those requirements actually amounted to. It may well be that her initial view of the effect of Zambrano was in accordance with Mr Cox's submissions before us: Iida and NA had not been decided when the Amendment Regulations were made. If that were the case, her acceptance that persons with limited leave to remain could also have a derivative right to reside would be entirely consistent with an intention to do no more than implement the minimum requirements of Zambrano [4] : it would (on the basis of my conclusion on ground 1) be based on a misunderstanding of what those requirements were, but that is a different matter. Secondly, a broad intention not to gold-plate does not exclude a recognition that the practical business of adapting an EU right into a domestic scheme may mean going rather beyond the minimum

requirements of the right at the margins. It may be that the Secretary of State took the view that allowing a Zambrano right to reside to those who already had limited leave to remain was more straightforward than having to consider whether particular forms of leave to remain, and in particular the conditions about working to which they might be subject, were fully consistent with Zambrano rights. I should make it clear that I am not taking a view as to whether either of those points represents the Secretary of State's actual thinking. I merely wish to illustrate that the proposition that her intention was to do no more than was necessary to implement Zambrano begs further questions.

66.
In the end, however, the short answer to Mr Blundell's submission is that, whatever the contextual considerations, the language of regulation 16 (7) (c) (iv) is simply too clear to allow it to be construed as covering persons with limited leave to remain. The explicit reference to persons with indefinite leave to remain necessarily precludes its application to persons with limited leave. As Mostyn J says at para. 72 of his judgment, the Secretary of State is seeking to imply words into the provision which completely change its scope and meaning.

67.
I should note two arguments that Mr Blundell expressly disavowed. First, he made it clear that it was not his case that regulation 16 was ultra vires to the extent that it went beyond what was required by Zambrano. It follows that he accepted that even if the relevant provisions were not "for the purpose of implementing [an] EU obligation" within the meaning of section 2 (2) (a) of the 1972 Act, they were "for the purpose of dealing with matters arising out of or relating to" such an obligation within the meaning of section 2 (2) (b). He also disavowed any reliance on the decision of the House of Lords in Inco Europe Ltd v First Choice Distribution [2000] UKHL 15, [2000] 1 WLR 586, which permits a "corrective construction" in cases of patent drafting error. That is unsurprising, since the passage from the Home Office guidance quoted at para. 60 above establishes beyond doubt that this is not a case of drafting error: the Secretary of State intended persons with limited leave to be entitled to a derivative right to reside, even if that intention may have been based on an erroneous view of what Zambrano required. (That can equally be seen from the fact that the definition of "exempt person" introduced by the Amendment Regulations departed from the equivalent provision in the original regulation 15A: see para. 28 above.) Those concessions are not strictly inconsistent with Mr Blundell's positive case; but they sit uncomfortably with it.

68.
I would accordingly reject ground 2.

DISPOSAL

69.
My rejection of ground 2 means that I would in substance dismiss the appeal, despite my conclusion on ground 1. Accordingly Mostyn J's order quashing the Secretary of State's decision of 29 September 2020 stands. However, counsel have agreed a modification of the terms of the declaration which I have set out above in order more precisely to reflect our reasoning, as follows (added words italicised):

"The Secretary of State erred in law in her understanding of regulation 16 of the Immigration (European Economic Area) Regulations 2016 when providing, in Annex 1 to Appendix EU to the Statement of Changes to the Immigration Rules HC 395 as amended, that the definition of a 'person with a Zambrano right to reside' includes paragraph (b) 'a person …. without leave to enter or remain in the UK, unless this was granted under this Appendix'."

I would substitute a declaration in those terms.

70.
As I understand it, the reconsideration referred to in the order of 17 June 2021 has not been undertaken pending this appeal. It will no doubt now proceed. Nothing in this judgment should be taken as expressing any view about how the Secretary of State can or should amend the terms of the EUSS, as to which we heard no argument.

Bean LJ:

71.
I agree.

Andrews LJ:

72.
I also agree.

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[1] The applic ant's surname was in fact "Ruiz Zambrano", but it has become conventional to refer only to the second part.

[2] The point is not expressly discussed in the judgment itself but it is fully considered at paras. 69-122 of the Opinion of Advocate-General Sharpston .

[3] Section 8 of the 1971 Act concerns persons with diplomatic accreditation.

[4] There might be a question as to why she thought it right even to exclude persons with indefinite leave to remain ; but in fact that would not be unreasonable, since it hard to see how Zambrano could have any practical application to parents with settled status.