

# Right to remain via rights of a child

**Section 55** of the 2009 Borders, Citizenship and Immigration Act means that there is a statutory duty - required by law - that the Home Secretary ensures Home Office decisions concerning children *safeguard and promote the welfare* of children.

This duty is usually referred to as having to consider the “**best interests**” of the child, referring to Article 3(1) of the United Nations Convention on the Rights of the Child 1989, which the UK has signed.

This duty applies to third parties acting on behalf of the Home Office, and the duty also applies when the Home Office makes immigration decisions that will affect a child (the decision does not have to be about the child).

Subsequent case law has further emphasised that the best interests of the child must not just be considered, but must be considered *first*.

In the important case of ZH (Tanzania), the Supreme Court judges said that though British citizenship was not a "trump card" (it doesn't overcome all other considerations), "**British citizenship** will hardly ever be less than a **very significant and weighty factor**" against moving children who have British citizenship to another country with a parent who has no right to remain in the UK. This will be particularly the case if the effect of leaving the UK is that they will lose the benefits and advantages of this citizenship (growing up in their own country, with their culture and language) for the rest of their childhood. The current Home Office policy is that in non-deportation cases (deportation after a criminal conviction), it is never reasonable to expect British children to leave the UK.

A child may be British by birth or descent, in which case you may need to provide proof/confirmation of this. A child might already be a British citizen if they were born in the UK **on or after 1 July 2006** to a mother or father who is British or who has settled status (Indefinite Leave to Remain or EU Permanent Residence). If the child was born in the UK **before 1 July 2006**, to a British or settled mother, or a British or settled father who was married to the mother or later marries the mother, they might also be a British citizen.

There are also other circumstances in which a child or adult may be a British citizen. This UK government website is useful for checking if you or your child is a British citizen:

[www.gov.uk/check-british-citizen](http://www.gov.uk/check-british-citizen)

A child not British by birth or descent may have the right to register as a British citizen by entitlement. This may help in establishing both the child and parent/carer's rights to stay in the UK. You can read more about some of the situations in which a child can register as a British citizen by entitlement on the website of the Project for the Registration of Children as British Citizens, here: [prcbc.wordpress.com/information-and-resources](http://prcbc.wordpress.com/information-and-resources)

A parent/carer seeking to establish the right to remain in the UK through their child's best interests will need to look at the Immigration Rules, Appendix FM: family members. As best interests arguments are often connected to Article 8 family life claims, you should also read the Toolkit section on *Human Rights*, Article 8.

## Seven year rule?

Until 2008, the Home Office had a seven-year policy for children, under which it was presumed that a child who had spent seven years in the UK should not be removed unless there were other significant factors to consider, such as the child's parent having a serious criminal conviction.

Although that policy no longer exists, the "seven years" factor is still considered in family cases and can be found in the Immigration Rules, Appendix FM.

- The rules refer to claims on the following basis:
- the parent has a "genuine and subsisting parental relationship" with a child;
- that child is under 18 years old;
- that child is in the UK;
- that child is a British citizen or **has lived in the UK for at least seven years immediately prior to the application**; and
- it would not be reasonable to expect the child to leave the UK.

If a non-British child has not lived in the UK for seven years prior to the application, they do not meet these criteria. However, you may still be able to argue that their best interests are not being considered and/or their Article 8 rights would be breached if they had to leave the UK.

A parent making a claim must also meet certain suitability criteria, which criminal convictions, poor immigration history and unpaid NHS debts can negatively affect.

## Making your claim

If you are making a claim to remain in the UK based on the best interests of your child, you will need to show you meet the criteria of the Immigration Rules, above.

You will need to explain what **relationship** you have with the child - are they your biological child, adopted child, or step child? Or are you their legal guardian or other primary carer?

You will need to demonstrate a **genuine and subsisting relationship** with the child. Does the child live with you, or nearby? How often do you see the child? If relevant, is access to the child guaranteed by a court order? Is your supporting role for the child purely financial, or do you provide emotional and other support? It may help to get supporting

letters/statements to prove how you support the child, and how the child's needs may be being met by you (for example, statements from other family members, social workers, teachers or other appropriate professionals). This will be particularly relevant if the child has special behavioural, emotional or learning needs. How long have you been supporting the child? If it has only been for a short period, this may be used to say you do not have a "subsisting" relationship with the child.

It will be helpful to demonstrate the **life the child has established in the UK**, even if the child is a British citizen, because if there are strong factors in favour of removal of a parent, the Home Office may argue these outweigh the needs of the British citizen child. Have you got extended family in the UK that the child is dependent on? Are there other support needs that can only be, or can better be, met in the UK?

You need to demonstrate **it would not be reasonable to expect the child to leave the UK**. If the child has particular needs, make sure you provide evidence of this (see above). If these are particularly severe, you should seek evidence from specialists, particularly if they have been providing services/support for the child. This might be a doctor, educational psychologist or psychiatrist, or other medical, mental health or educational professional. Would these needs be made worse if the child were to live outside of the UK? Is there a lack of appropriate support in the country the Home Office are suggesting you could move to? You will need to try and provide evidence of this.

A child's ability or otherwise to integrate into another country will depend on the individual, family and country circumstances. Factors might include whether you or your child is a citizen of the country and so able to enjoy the full rights of being a citizen in that country; whether you and/or your child has lived or visited the country before for significant periods of time - not just a few weeks' holiday; whether you or your child has existing family or social ties with the country; whether the child has attended school in that country. Are there differences in quality of education, health and other public services and socio-economic opportunities that mean the best interests of the child would be significantly affected?

## **ACTION SECTION**

You or your friends/supporters can gather/provide evidence that shows your child has established a life in the UK, and why they would not be able to sufficiently integrate into the country of your birth/residence.

Read the section above for ideas.

### **Leave to remain**

If successful in your application, you will be granted 30 months leave to remain, without recourse to public funds (welfare benefits, homeless housing etc).

You can apply to renew your leave to remain which, if successful, will result in further grants of leave for periods of 30 months without recourse to public funds. When applicable, you can then apply for indefinite leave to remain via the family migration routes (see next section on *Family Migration*) - the five-year route if your child is British or has settled status in the UK and you meet the requirements; the ten-year route if not.

### **Zambrano**

In the Zambrano case of 2011, the European Court of Justice ruled that the parents of a dependent child who is an EU national must be granted the right to work and the right of residence in the EU Member State of which the child is a national. In the Zambrano case, the parents were Colombian (so, not from the EU) but their children were Belgian (EU nationals), and the family wanted to stay in Belgium. If the parents were not given the right to stay in Belgium, the family would have had to leave the EU, breaching the children's rights to free movement in the EU.

This was a very significant decision, and predictably the UK government watered down its impact as much as they could when incorporating the judgment into UK immigration rules.

Currently in the UK, Zambrano can only be used when a British citizen child is cared for by a non-EEA national parent or carer, there is no British or UK-settled parent to care for the child, and removal of the non-EEA national parent/carers would result in the child being unable to live in the UK or another EEA state.

If, for example: you are from Nigeria; you have a British citizen child; the other parent is British; you either live together with the other parent or, if separated, the other parent is the

primary carer for the child, then Zambrano would not apply (according to the Home Office's current interpretation). If the British parent/carer is not able to care for the child on their own (for medical or other reasons), you may be able to make a Zambrano argument.

Since Zambrano applications became possible, there has been a problem with the Home Office refusing applications on the basis there is a British parent/carer even if that parent/carer has been absent from the child's life and even if they are unwilling to assume care for the child. Read more here: [www.asirt.org.uk/wordpress/?p=187](http://www.asirt.org.uk/wordpress/?p=187)

If the Home Office position is that Zambrano does not apply to your case, you can see if section 55 best interests (see above) could apply, though that is focused on the child rather than the parent/carer, and/or Article 8 arguments. (see the Toolkit section on *Human Rights*, Article 8.) Remember the Home Office commonly argue that family life is not necessarily disproportionately breached by forcing one parent to leave the UK - they argue that visits, telephone calls, Skype etc are enough to maintain family life.

### **If you meet the Zambrano criteria**

To prove you are entitled to reside and work in the UK because of Zambrano, you can apply for an EEA Derivative Residence Card.

The “derivative” right of residence granted if you meet the Zambrano criteria does not in itself mean you get the right to permanently reside in the UK, and also does not contribute to the 5 years needed for permanent residence under EU law (see the Toolkit section on *EU Law*.)

You should be entitled to the right as long as the child you are parent/carer for, is under 18 and you remain the sole or primary carer.

The right of residence under Zambrano does not allow you to bring other members of your family to the UK. You also cannot rely on a “public policy protection” argument against removal or deportation from the UK that is given to those exercising free movement rights under EU law.

If you are successful in securing the right to remain under Zambrano, this gives you the right to work in the UK. In the UK, Zambrano carers do **not** have access to mainstream welfare benefits. If the child of a Zambrano carer is in a situation of homelessness and destitution, Section 17 support should be provided by the local authority - but this support is meant to be a temporary solution only. Read more about Section 17 support here: <http://www.nrpfnetwork.org.uk/Documents/Subsistence-support-families.pdf>