The Potential Impact of Brexit on the Immigration Status of Children / Legal Opinion

1. I am instructed by the Children's Commissioner for England ("the Commissioner") to advise on some of the issues relevant to children arising out of the projected British withdrawal from the European Union ("Brexit"). In particular, the Commissioner wishes to clarify the legal issues that policymakers will need to consider when thinking about the future immigration status of EU national children in the UK and – to a lesser degree – British children residing in the EU. This Opinion is intended to inform and assist with that consideration.

2. Against that background, I am asked to address the following specific questions:
   i. What immigration rights do EU national children in the UK, and UK children in the EU, have under EU law?
   ii. What immigration rights do EU national children currently in the UK have under British law?
   iii. What is the status of EU children in the care of the state today in the UK under (i) and (ii)?
   iv. How will those rights in (i), (ii) and (iii) above be impacted by a Brexit without a new legal agreement covering any of these points.

3. I will address those questions in turn, but before doing so I should make three preliminary points, each of which was presaged in the initial discussion with those instructing me:
   Firstly, there is a vast body of EU and domestic law which touches upon children's immigration status and rights. This Opinion can do no more than provide an overview of some of the main aspects of each system of law, focusing on those that are most likely to have a direct impact on a significant number of children. It will focus on the rights and status of children themselves, and the rights of parents will generally only be addressed where they arise in connection with their role as parent or carer.

   Secondly, this Opinion is intended to be relatively concise, in the context of the breadth of the topic. I have tried to keep extracts from legal instruments, caselaw and academic commentary relatively brief, and to focus on the key points that have a real practical bearing on the

immigration rights of children in the UK[1]. I will, however, endeavour to identify the most relevant materials, either in the text, or by way of footnotes or bibliography, so the reader can refer to the full text if necessary.

Thirdly, although some EU rights only benefit children who are themselves nationals of an EU Member State[2], it is important to recognise that many of the relevant provisions of EU law will also apply to children who are not themselves nationals of an EU Member State, but whose immigration status initially derived from their relationship with an EU national parent or carer[3]. Unless the relevant EU rights are preserved and/or incorporated into domestic law, Brexit will have a significant impact on the immigration status of such third country national ("TCN") children.

Q.1: Children's Immigration Rights under EU Law

A. The Citizen's Rights Directive: 2004/38/EC

4. Although EU free movement rights were originally (i.e. under the Treaty of Rome[4]) limited to persons engaged in economic activity as workers or in self-employment, or in relation to the provision or receipt of services, those rights have been expanded over time, and the right to freedom of movement is now enshrined in Article 45 of the Charter of Fundamental Rights of the European Union ("the Charter")[5]. The Maastricht Treaty[6] introduced the concept of citizenship of the EU. By Article 20 of the consolidated Treaty on the Functioning of the EU ("TFEU"[7]) "*Every person holding the nationality of a Member State shall be a citizen of the Union*" in addition to their national citizenship and by Articles 20 and 21 every citizen of the EU has 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 to the measures adopted to give effect to that right.

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[1] And, *mutatis mutandis*, the rights of British children living in other EU Member States.

[2] e.g. the rights deriving directly from the child's own EU citizenship – see the discussion of the ***Zambrano*** principle below.

[3] e.g. the provisions allowing the dependent children (including step-children) of an EU migrant worker to remain in the host State to continue with their education, which apply irrespective of the nationality of the child – see the discussion of the ***Baumbast*** line of cases, below.

[4] Treaty establishing the European Economic Community, signed in Rome in 1957 which entered into force on 1 January 1958

[5] "*Every citizen of the Union has the right to move and reside freely within the territory of the Member States*". The Charter is legally binding under the TFEU

[6] Treaty on the European Union, signed in Maastricht in 1992, which entered into force on 1 November 1993

[7] As renamed following the Treaty of Lisbon, in force as of 1 December 2009

5. For present purposes, the key measure adopted to give effect to those rights is Directive 2004/38/EC of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States (often referred to as "the Citizens' Rights Directive"). This consolidated and extended various rights previously contained in other instruments (a point that needs to be borne in mind when reading older caselaw). Whilst this Opinion will, for convenience, refer to "EU citizens", it is important to note that the Directive has been applied by the European Economic Area ('EEA') Agreement to the remaining non-EU EEA States (Iceland, Norway and Liechtenstein). An agreement between the EU, its Member States and Switzerland provides similar rights to nationals of Switzerland ('the Switzerland Agreement'). Domestic law reflects this position[8].

6. Article 3 of the Directive confirms that it applies to "*all Union citizens who move to or reside in a Member State other than that of which they are a national, and to their family members as defined in point 2 of Article 2 who accompany or join them*". Under Article 2(2)(c) the phrase "*family member "* is defined so as to include **direct descendants who are under the age of 21** or are dependants of the EU citizen or the spouse or partner.

7. Article 5 of the Directive provides for a **right of entry** for Union citizens and their family members. It provides that no entry visa or equivalent formality may be imposed on Union citizens and that possession of a valid residence card shall exempt TCN – i.e. non-EU citizen - family members from any visa requirement.

8. Article 6 of the Directive confers an **initial right of residence** in another Member State for a period of up to 3 months "*without any conditions or any formalities other than the requirement to hold a valid identity card or passport*" and applies to both Union citizens and TCN family members who are "*accompanying or joining the Union citizen "*: Article 6(2).

9. By Article 14 the rights of residence under Article 6 are retained by the EU citizen and their family members shall have the right of residence provided for as long as they do not become an unreasonable burden on the social assistance system of the host Member State.

[8] See the 2016 Regulations, discussed below

10. Article 7 of the Directive confers an **extended right of residence** in another Member State for a period of more than three months to EU citizens who:

"(a) are workers or self-employed persons in the host Member State; or

(b) have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State during their period of residence and have comprehensive sickness insurance cover in the host Member State; or

(c) are enrolled at a private or public establishment, accredited or financed by the host Member State on the basis of its legislation or administrative practice, for the principal purpose of following a course of study, including vocational training; and have comprehensive sickness insurance cover in the host Member State and assure the relevant national authority, by means of a declaration or by such equivalent means as they may choose, that they have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State during their period of residence; or

(d) are family members accompanying or joining a Union citizen who satisfies the conditions referred to in points (a), (b) or (c)."

11. Article 7(2) confers an extended right of residence to TCN family members of an EU citizen *"provided that such Union citizen satisfies the conditions referred to in paragraph 1(a), (b) or (c)"* and Article 14 clarifies the rights of residence under Article 7 are retained as long as the conditions set out in that Article[9] are met.

12. Although many EU national children will come to the UK accompanying a parent or carer who is exercising freedom of movement as a worker, it is worth noting that Article 7(1)(c) specifically provides for **freedom of movement for educational purposes**. Thus, EU national children can attend UK schools in the exercise of their own EU law free movement rights, quite independently of any rights as family members (see *Schwarz v Germany*[10] [**90**]). Whilst I have been unable to find any Government statistics for the total number of children in this category, according to the Independent Schools Council, there are some 14,000 EEA national children currently attending ISC schools in the UK, and a significant proportion of those children have parents who remain overseas[11]. Given the complexity of the Tier 4 system under

[9] i.e. Art 7

[10] [2007] ECR I-6849

[11] https://www.isc.co.uk/media/3179/isc_census_2016_final.pdf, fig 19

which non-EEA national children have to apply for leave to enter as a student[12], there are very significant practical advantages for EEA national children and their families who benefit from the EU principle precluding administrative barriers to freedom of movement, including for the purpose of study.

13. Articles 8-11 provide for administrative matters such as registration and the issue of residence cards, and Articles 12-14 provide for retained residence rights, which will be addressed separately below. Article 15 provides certain procedural safeguards.

14. For present purposes, the next key provision is Article 16 which confers a **right of permanent residence** on Union citizens and their family members[13]. Article 16 provides:

"1. Union citizens who have resided legally for a continuous period of five years in the host Member State shall have the right of permanent residence there. This right shall not be subject to the conditions provided for in Chapter III.

2. Paragraph 1 shall apply also to family members who are not nationals of a Member State and have legally resided with the Union citizen in the host Member State for a continuous period of five years.

3. Continuity of residence shall not be affected by temporary absences not exceeding a total of six months a year, or by absences of a longer duration for compulsory military service, or by one absence of a maximum of twelve consecutive months for important reasons such as pregnancy and childbirth, serious illness, study or vocational training, or a posting in another Member State or a third country.

4. Once acquired, the right of permanent residence shall be lost only through absence from the host Member State for a period exceeding two consecutive years."

Article 20(1) of the Directive provides that Member States shall issue family members who are entitled to permanent residence ("PR") under Article 16 with a "*permanent residence card*", renewable automatically every 10 years. Under Article 20(3), an *"[i]nterruption in residence not exceeding two consecutive years shall not affect the validity of the permanent residence*

[1212] The guidance is some 95 pages long and can be found at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/591777/T4_Migrant_Guidance_February_2017.pdf

[13] In light of the caselaw discussed below (such as the *Chen* line of cases – see para 30 et seq) it seems clear that a child who meets the conditions in Article 16 acquires his or her own right of permanent residence, independently of the parent or carer.

card". Such a card evidences the right to PR, rather than conferring it – i.e. the right is obtained automatically, by operation of law, and is not dependant on the card being issued[14]. However, possession of a permanent residence card is necessary if a holder of PR wishes to apply for British citizenship (for which they will be eligible 1 year after obtaining permanent residence)[15] and may be useful in a variety of situations if the person wishes to prove that they hold PR. So, for example, it may be helpful in establishing that a child born in the UK to an EU national is a British citizen[16]. However, the fact that such cards are not issued systematically may mean that some children who have, in fact, acquired permanent residence rights by operation of law will have difficulty in proving it. Whilst that has not given rise to widespread problems to date, as the UK gives effect to EU freedom of movement rights with minimal formalities (as EU law envisages), it may be more problematic following Brexit, if EU citizens are required to prove they have established an entitlement to PR.

Retained Rights under the Citizens' Rights Directive

15. As mentioned above, Articles 12-14 of Directive 2004/38/EC provide for what are termed "retained rights".

16. Article 12 governs the rights of family members following the death or departure of the EU citizen, and provides that the EU citizen's death or departure from the host Member State shall not affect the right of residence of EU national family members, although before qualifying for permanent residence they must meet the conditions in Article 7(1) (a), (b), (c) or (d).

17. It also provides for retained rights, albeit to a lesser degree, for family members who are TCNs:

"the Union citizen's death shall not entail loss of the right of residence of his/her family members who are not nationals of a Member State and who have been residing in the host Member State as family members for at least one year before the Union citizen's death.

Before acquiring the right of permanent residence, the right of residence of the persons concerned shall remain subject to the requirement that they are able to show that they are

[14] See *Ojo* [2015] EWCA Civ 1301
[15] https://www.gov.uk/eea-registration-certificate/permanent-residence
[16] See para 55

workers or self-employed persons or that they have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State during their period of residence and have comprehensive sickness insurance cover in the host Member State, or that they are members of the family, already constituted in the host Member State, of a person satisfying these requirements."

18. Article 12(3), which is of particular relevance to children's rights, provides that the EU citizen's death or departure:

"*shall not entail loss of the right of residence of his/her children or of the parent who has actual custody of the children, irrespective of nationality, if the children reside in the host Member State and are enrolled at an educational establishment, for the purpose of studying there, until the completion of their studies.*".

In ***Shabani***[17] the Secretary of State conceded (and the Upper Tribunal accepted) that this principle applies as soon as a child is enrolled in a reception class.

19. Article 13 provides for a retained right of residence for family members following divorce, annulment of marriage, or termination of a civil partnership. Again, the provisions are more generous to family members who are themselves EU nationals. Their rights of residence are not affected, although before qualifying for permanent residence they must meet the conditions in Article 7(1) (a), (b), (c) or (d). TCN family members retain their rights of residence subject to certain conditions, namely:

a. the marriage or partnership lasted at least 3 years, including 1 year in the host Member State; or
b. the TCN spouse/partner has custody of the EU citizen's children; or
c. retained rights are "*warranted by particularly difficult circumstances*" such as domestic violence; or
d. the TCN spouse/partner has rights of contact with a minor child, which a Court has ruled must take place in the host Member State.

The acquisition of a permanent right of residence by TCN family members is subject to the same conditions as it would be following death or departure of the EU citizen[18].

[17] [2013] UKUT 315 (IAC)
[18] See para 18 above.

20. By Article 14 the rights in Articles 12 and 13 are retained as long as they conditions set out in those provisions are met.

21. It is well established that it is not only nationals of other EU Member States who are entitled to rely on these provisions, but also British citizens who have been exercising treaty rights in another Member State, and wish to return to the UK, accompanied by TCN family members.

22. That principle was first enunciated by the CJEU in *R v IAT and Surinder Singh ex parte Secretary of State for the Home Department*[19]. The Court concluded at [23]:
"*when a Community national who availed himself or herself of those (Treaty) rights returns to his or her country of origin, his or her spouse must enjoy at least the same rights of entry and residence as would be granted to him or her under Community law if his or her spouse chose to enter and reside in another Member State*."

23. The same principle applies to TCN children. In the case of *Eind*[20] the Court applied the *Surinder Singh* principle in concluding that a Dutch worker who had resided in the United Kingdom as a worker and had there been joined by his daughter a national of Surinam, had the right to secure his daughter's admission to the Netherlands under the provisions of Community law. The Dutch government had argued that there would be no deterrence against the exercise of Treaty rights if the daughter of the worker were to be denied residence in the Netherlands because she had not resided with the Dutch national there before he moved to the United Kingdom. The Grand Chamber did not agree. It said at [**35**]-[**37**]:
"*A national of a Member State could be deterred from leaving that Member State in order to pursue gainful employment in the territory of another Member State if he does not have the certainty of being able to return to his Member State of origin, irrespective of whether he is going to engage in economic activity in the latter State.*
That deterrent effect would also derive simply from the prospect, for that same national, of not being able, on returning to his Member State of origin, to continue living together with close relatives, a way of life which may have come into being in the host Member State as a result of marriage or family reunification.
Barriers to family reunification are therefore liable to undermine the right to free movement which the nationals of the Member States have under Community law, as the right of a

[19] (Case C 370/90) 7 July 1992; [1992] Imm AR 565
[20] (C-291/05) December 2007

Community worker to return to the Member State of which he is a national cannot be considered to be a purely internal matter."

B. Regulation (EU) No 492/2011 and the Retained Right to Education

24. By article 10 of Parliament and Council Regulation (EU) No 492/2011 of 5 April 2011[21]: "*The children of a national of a Member State who is or has been employed in the territory of another Member State shall be admitted to that State's general educational, apprenticeship and vocational training courses under the same conditions as the nationals of that State, if such children are residing in its territory*".

25. In a series of decisions, the Court of Justice has interpreted the right in article 10 (and its predecessor, article 12 of Regulation 1612/68) as giving the child an independent "retained" right when the relevant parent ceases to be a worker in the host State. In *Baumbast v Secretary of State for the Home Department*[22] the Court of Justice held that the purpose of the provision was to "*ensure that children of a worker who is a national of a member state can, even if he has ceased to be employed in the host member state, undertake and, where appropriate, complete their education in the latter member state*" [**69**]. The child's rights survive, even if the parents separate and the EU national parent stops exercising treaty rights and leaves the host State. The children are entitled to remain and continue with their education, and the parent with whom they reside is entitled to remain with them, even if that parent is not an EU national. It is notable that the judgment repeatedly refers to the rights in question being those of the child, notwithstanding the fact that they originally derived from the parent's status as a worker exercising treaty rights.

26. The Court provided further clarification in *Teixeira v Lambeth LBC (Secretary of State for the Home Department intervening)*[23]confirming that Article 12 as interpreted in *Baumbast* "*allows a child to have an independent right of residence in connection with the right of access to education*" and holding that t**he child and primary carer could claim a right of residence in that state on the sole basis of article 12 of Regulation No 1612/68, without having to satisfy the conditions laid down in Directive 2004/38**: the right of residence was not conditional on that parent or the child having sufficient resources so as not to become a burden on the social

[21] on freedom of movement for workers within the Union (OJ 2011 L141 , p 1)), formerly Art 12 of Council Regulation (EEC) No 1612/68
[22] (Case C-413/99) [2002] 3 C.M.L.R. 23
[23] (Case C-480/08) [2010] ICR 1118; [2010] ECR I-1107

assistance and national health systems of the host member state during the period of residence, and the parent's right of residence lasted until the child reached the age of majority, or even longer if the child continued to need the presence and care of that parent in order to be able to pursue and complete his or her education.

27. Most recently, in *Secretary of State for the Home Department v A* (sub nom *NA (Pakistan)*)[24] the CJEU considered the position of children who had been born in the UK to a non-EU national mother and a German father exercising rights as an EU worker. The father returned to Germany when the children were very small, the parents divorced and the mother remained in the UK with the children, who subsequently started school here. The Court held that the children were entitled to continue to reside in the UK in order to exercise their rights to education under article 12 of Regulation 1612/68, despite the fact that the father had left the UK before they started school. The mother was also entitled to reside here as their sole carer.

C. Rights under Primary Law: The Zambrano Principle

28. Even where the position is not governed by a specific Regulation or Directive, children may have immigration related rights deriving directly from their status as EU citizens. In some circumstances, they include the right of a British citizen child to retain the presence of a TCN parent or carer, who would not otherwise quality for residence in the UK, in order to secure for the child the effective enjoyment of his or her status as a citizen of the EU.

29. The relevant principles have been expounded by the Court of Justice in a series of cases. The first to consider is the 2004 decision in *Garcia Avello v Etat Belge*[25]. Whilst the case did not concern free movement rights, it establishes the applicability of EU law on the basis of citizenship rights. The Court was considering the position of two children who were dual Belgian and Spanish nationals. They were born in Belgium and had acquired Spanish nationality by descent through their Spanish national father. The dispute concerned the registration of the children's names and is not material for present purposes[26]. The primary significance of the case is that the Court rejected the argument that EU law did not apply, because the children had never exercised free movement rights, having always resided in Belgium. The Court held that the children were both citizens of the EU, and that whilst

[24] Case C-115/15 [2017] QB 109
[25] Case C-148/02 [2004] 1 CMLR 1
[26] Under Spanish law they were entitled to have both maternal and paternal surnames, under Belgian law children were registered with their father's surname.

citizenship of the EU was not intended to extend the scope of EU law to internal situations which have no link to Community law, a sufficient link to EU law exists in the case of nationals of one Member State lawfully resident in the territory of another Member State, including dual nationals who hold citizenship of both [**22-29**].

30. Later the same year, the Court of Justice relied upon its decision in *Garcia Avello* in the context of the free movement and residence rights of children in *Chen v Secretary of State for the Home Department*[27]. Mrs. Chen was a Chinese national who came to the UK whilst pregnant. She travelled to Belfast to give birth, and her daughter thereby acquired Irish citizenship[28]. The family then took up residence in Cardiff, and Mrs. Chen asserted a right to reside under EU law as the parent of an Irish citizen exercising treaty rights. Her application was refused and resulted in a reference to the Court of Justice. Most materially for present purposes, the Court held that the benefit of Community law on free movement was not precluded by the fact that the person concerned was a minor:

    "***The capacity of a national of a member state to be the holder of rights guaranteed by the Treaty and by secondary law on the free movement of persons cannot be made conditional on the attainment by the person concerned of the age prescribed for the acquisition of legal capacity to exercise those rights personally****…Moreover, as the Advocate General made clear in paras 47-52 of his opinion,* ***it does not follow either from the terms of, or from the aims pursued by, articles 18 and 49 EC and Directives 73/148 and 90/364, that the enjoyment of the rights with which those provisions are concerned should be made conditional on the attainment of a minimum age****.*" [**20**].

    "As regards the right to reside in the territory of the member states provided for in article 18(1) EC , it must be observed that that right is granted directly to every citizen of the Union by a clear and precise provision of the Treaty. Purely as a national of a member state, and therefore as a citizen of the Union **[the child]** ***is entitled to rely on article 18(1) EC."*** [**26**].

31. The UK Government pointed out that the exercise of the rights in question was not absolute. Article 1(1) of Directive 90/364 provided that Member States may require that nationals of another Member State who wish to reside in their territory have sufficient resources to avoid becoming a burden on their social assistance system. The Government argued that the child did not possess those resources personally. The Court rejected that argument as unfounded:

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[27] EU:C:2004:639; [2005] Q.B. 325

[28] Pursuant to an Irish law whereby any person born on the island of Ireland was entitled to citizenship

it was sufficient if the resources were to be provided by another family member (in this case the parents). The Directive did not specify any particular source or origin for the resources in question and the Government's objection "*would constitute a disproportionate interference with the exercise of the fundamental right of freedom of movement and of residence upheld by article 18 EC*" [**27-33**].

32. It is worth noting that the passage from the Advocate-General's Opinion referred to by the Court ([**47-52**] – see paragraph 31 above) forms part of a section of the Opinion headed: *"Can a minor be vested with rights of movement and residence?*" which concludes that: "***there is no reason to deprive a minor of a right conferred in general terms on all Community citizens by a fundamental provision of Community law****, such as article 18 EC. Thus, if the conditions laid down by the Directive are satisfied,* ***even a minor can claim the right to reside freely, as an economically non-active person, in a member state other than the one whose nationality he possesses***" [**52**].

33. The next important case to consider is the landmark decision of the Court of Justice (Grand Chamber) in 2011in *Ruiz Zambrano v Office National de l'Emploi (ONEm)*[29]. The case concerned two children, who were born in Belgium to non-EU nationals. The parents had unsuccessfully claimed asylum in Belgium. The father had been working without a valid work permit, and when he lost his job he was refused unemployment benefit. However, the children had acquired Belgian nationality under Belgian national law, and the father challenged the decision in reliance upon the children's EU treaty rights. Belgium sought a preliminary ruling as to whether the provisions of the TFEU conferred a right of residence and exemption from the obligation to hold a work permit on the father solely by virtue of his status as the parent of dependent children who were EU nationals [**31-33**]. The Court defined the issue as being:

"*whether the provisions of the Treaty on the Functioning of the European Union on European Union citizenship are to be interpreted as meaning that they confer on a relative in the ascending line who is a third country national, on whom his minor children, who are European Union citizens, are dependent, a right of residence in the member state of which they are nationals and in which they reside, and also exempt him from having to obtain a work permit in that member state*" [**36**].

[29] EU: Case C-34/09; [2012] QB 265

34. The significance of the issue was such that a number of other EU Member States submitted Observations[30], as did the European Commission. They all argued that the EU rights of freedom of movement and residence had no application, because the Zambrano children had never left the State of which they were nationals [**37**]. To clarify - the argument appears to have been that *Garcia Avello* and *Chen* were distinguishable: *Garcia Avello* concerned dual citizenship, and *Chen* concerned a child born in one Member State but wishing to reside in another – therefore both cases had a cross border element engaging EU law. The Governments and Commission argued that rights of freedom of movement and residence were not engaged in a purely internal context (cf *Garcia Avello* [**26-27**]).

35. The Grand Chamber disagreed. It took as its starting point the proposition that, following *Garcia Avello* and *Chen*, the Zambrano children "*undeniably*" held the status of citizenship of the EU [**40**]. EU citizenship was "*intended to be the fundamental status of nationals of the member states*" [**41**]. Article 20 TFEU precludes measures that deprive EU citizens of "*the genuine enjoyment of the substance of the rights*" conferred by that status [**42**]. The Court was prepared to assume that the refusal to grant residence rights and a work permit to a person such as Mr. Zambrano would be likely to lead to a situation where he and his family would have to leave the EU, thus depriving the children of the genuine enjoyment of their rights as EU citizens [**43-44**]. Thus, the Court answered the question posed to it as follows:
"*…article 20 of the FEU Treaty is to be interpreted as meaning that it precludes a member state from refusing a third country national on 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***." [**45**].

36. In short, as the Court of Appeal observed in *Harrison v SSHD* [2012] EWCA Civ 1736 "*In practice the most exiguous cross-border link will suffice to engage EU law, as is demonstrated by the decision in Zhu and Chen v Secretary of State for the Home Department…Zambrano removed the requirement for even an exiguous cross-border link*" [**11-12**].

37. Although *Zambrano* removed the requirement for a cross border link, it has been interpreted relatively restrictively in some other respects. ***Firstly***, it applies only where the EU citizen

[30] Austria, Denmark, Germany, Greece, Ireland, the Netherlands, and Poland.

family member (in the present context, the child) would, in practical terms, also be obliged to leave – i.e. it does not prevent the refusal of residence rights to a non-EU citizen simply because that would disrupt family life. ***Secondly***, it applies only where the EU citizen child would be obliged to leave the territory of the EU as a whole – not where the consequence would be limited to relocation from one Member State to another (see *McCarthy v Secretary of State for the Home Department* [31]; *Dereci & Others v Bundesministerum für Inners* [32]; *Harrison v SSHD*[33]). Therefore, the *Zambrano* principle will not prevent the removal of a parent who is not the child's only or principal carer, nor will it prevent the removal of a parent or carer to another EU Member State, even if that would mean that the child would have to go too. But it does preclude a decision that would effectively – i.e. in practical terms - mean that a child with EU citizenship has to leave the EU.

38. Nonetheless, there are likely to be several thousand children in the UK whose practical exercise of the right to remain here is dependent on the *Zambrano* principle, as recognised by the Government in the explanatory note to the Social Security (Habitual Residence) (Amendment) Regulations 2012[34] which notes:

"*Since the CJEU ruling 692 people (in 619 separate families) have applied for a Zambrano right to reside which contain [sic] a non-EEA national primary carer of a British child and appear to meet the criteria which would give them this right. The Home Office estimate that around 700 people a year could claim a Zambrano right to reside but this may increase given the historically high levels of migration in recent years and increased knowledge of the Zambrano ruling over time*".

Notably, the explanatory note is referring to the number of carers – not the number of children. However, even presuming that each carer only had one child, on the Home Office estimate of 700 families each year relying on rights under the *Zambrano* principle since the beginning of 2012, that would suggest that there are some 3,500 children currently in the UK who would – in practice - be required to leave the country (and, indeed, the EU) along with their parent/principal carer were it not for the applicability of *Zambrano*.

39. Finally, under this head, I should draw attention to two very recent decisions of the CJEU on the scope of the *Zambrano* principle:

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[31] [2011] All ER (EC) 729
[32] [2012] All ER (EC) 373
[33] [2012] EWCA Civ 1736
[34] SI 2012 No. 2587

First, in *Secretary of State for the Home Department v CS*[35] the UK Government argued that *Zambrano* did not apply where a parent or carer was subject to deportation on grounds of criminality. The CJEU (Grand Chamber) disagreed, but accepted the alternative submission that the principle applied in a modified form. It held that the child's right to benefit from its status an EU citizen precludes the expulsion of a parent or carer, if the practical consequence of expulsion would be that the child would have to leave the EU - except in "*exceptional circumstances*" where the parent or carer poses "*a genuine, present and sufficiently serious threat adversely affecting one of the fundamental interests of the society of that member state*" and the decision is subject to the usual proportionality principles, such that the national Court must duly take into account the interests of the child.

Secondly, the Court of Justice has recently clarified that the *Zambrano* principle arises where there is no applicable provision of secondary EU law. In *Secretary of State for the Home Department v A (NA (Pakistan)*[36] the CJEU explained that: "*The criterion relating to deprivation of the substance of the rights conferred by citizenship of the Union is specific in character in as much as it relates to situations in which, although secondary law on the right of residence of third-country nationals is not applicable, a right of residence may not, exceptionally, be refused to a third-country national, who is a family member of a Union citizen, since the effectiveness of Union citizenship enjoyed by that Union citizen would otherwise be undermined*".

Consequential Rights

40. It may be important to recognise that the *Zambrano* principle extends beyond "pure" immigration decisions, and impacts on areas such as social security benefits and housing that are likely to have a significant impact on the welfare of an affected child. As we have seen, *Zambrano* itself was concerned with the father's work permit and unemployment benefit entitlement. The Court of Appeal decision in *Pryce v Southwark LBC*[37] concerned eligibility for homelessness assistance under the Housing Act 1996. Mrs. Pryce ("P") was a Jamaican national with young twins who were British (and thus EU) citizens, for whom she was the sole carer. P applied to Southwark for homelessness assistance, but was refused on the basis that she was excluded from eligibility as a person subject to immigration control within the meaning of the Homelessness Regulations 2006. Before the Court of Appeal all parties (including the Secretary of State, who intervened) agreed that, on the basis of Southwark's

[35] Case C-3404-14
[36] Case C-115/15 [2017] QB 109
[37] [2013] 1 W.L.R. 996

acceptance that P met all the requirements for a valid *Zambrano* claim, she was not a person subject to immigration control and the family was eligible for homelessness assistance. The Court was told that the Government was amending the Immigration (European Economic Area) Regulations 2006 to make the position clear.

41. Similarly, in *Sanneh v Secretary of State for Work and Pensions*[38] the Court of Appeal held that if the EU citizenship right of an EU citizen child cared for by a *Zambrano* carer was to be effective, Member States had to make social assistance available to the carer to enable them to support themselves in order to care for the child within the EU – although there was no requirement that such a carer be paid the same amount as an EU citizen exercising treaty rights.

42. All of the rights identified above will apply equally to British citizen children resident in other EU Member States.

Rights of Turkish nationals and their family members under EU law

43. I should also mention that EU law (as currently binding on and implemented by the UK) confers immigration rights on Turkish nationals, by virtue of the Ankara Agreement (EU-Turkey Association Agreement).

44. Article 7 of the Decision No.1/80 of the EC-Turkey Association Council provides:
'The members of the family of a Turkish worker duly registered as belonging to the labour force of a Member State, who have been authorised to join him:
– *shall be entitled – subject to the priority to be given to workers of Member States of the Community – to respond to any offer of employment after they have been legally resident for at least three years in that Member State;*
– *shall enjoy free access to any paid employment of their choice provided they have been legally resident there for at least five years.*
Children of Turkish workers who have completed a course of vocational training in the host country may respond to any offer of employment there, irrespective of the length of time they have been resident in that Member State, provided one of their parents has been legally employed in the Member State concerned for at least three years.'

[38] [2016] QB 455

45. In *Bekleyen v Land Berlin*[39] [2010] it was held that the last sentence of this provision applied to a person who had been born in Germany to Turkish parents, and who then moved back to Turkey with her family when she was aged 14, but returned to Germany alone to study at university. The fact that a parent was at the time no longer living or working in Germany was held not to preclude the application of this provision.

46. The Ankara agreement has also been interpreted as conferring rights on TCN family members of Turkish citizens. In *Dülger v Wetteraukreis*[40] it was held that a member of the family of a Turkish worker, who is a national of a third country other than Turkey, may invoke, in the host Member State, the rights arising from that provision, where all the other conditions laid down by the provision have been fulfilled.

EU Law Rights of other TCN Children

47. It is also relevant to note that the UK has a number of obligations under EU law to TCN children who are neither EU/EEA citizens nor family members, such as asylum seeking children. So, for example, unaccompanied minors benefit from the provisions of the Reception Directive[41], under para 19(3) of which '*Member States, protecting the unaccompanied minor's best interests, shall endeavour to trace the members of his or her family as soon as possible…*". That has been implemented in regulation 6 of the Asylum Seekers (Reception Conditions) Regulations 2005. But, as with a number of other provisions, it remains to be seen whether it will survive the outcome of the "Brexit" process.

Q.2: Immigration rights of EU national children in the UK under British law

48. The Immigration (European Economic Area) Regulations 2016 ('the 2016 Regulations') revoked and replaced the Immigration (European Economic Area) Regulation 2006 ("the 2006 Regulations"). As the explanatory memorandum sets out, the 2016 Regulations: "*consolidate the transposition into domestic law of Council Directive 2004/38/EC of the 29th April 2004 on the right of citizens of the Union and their family members to move and reside freely within*

[39] [2010] 2 C.M.L.R. 35
[40] [2012] 3 C.M.L.R. 50
[41] Council Directive 2003/9/EC

the territory of the Member States" (i.e. the Citizens' Rights Directive – see paragraphs 4-21 above).

49. Notably, the 2016 Regulations also "*make changes to give effect to certain judgments of the Court of Justice of the European Union ('CJEU') and address issues concerning the practical application of the Directive within the UK*", specifically taking into account the decisions in *Shabani*[42] *Surinder Singh*[43], *Eind*[44], and *NA (Pakistan)*[45] [46]. The 2006 Regulations had already been amended to give effect to previous caselaw, including *Chen*[47], *Teixeira*[48] and *Zambrano*[49].

50. While, of course, there may, in individual cases, be arguments as to how accurately the 2016 Regulations reflect the relevant caselaw, for present purposes we can proceed on the basis that the Citizens' Rights Directive, and the caselaw of the CJEU as to the interpretation of that Directive, are currently applicable as a matter of domestic law.

51. Other legislation has also been enacted or amended from time to time to give effect to judgments of the CJEU and domestic Courts relevant to the immigration rights of EU national children (see for example paragraph 9 of Schedule 12 to the Immigration Act 2016 which brings 'Zambrano carers' into the scope of the new scheme in England under paragraph 10A of Schedule 3 to the Nationality, Immigration and Asylum Act 2002 for local authority accommodation and subsistence support for destitute families[50]).

52. In short, EU national children (and children who are nationals of the non-EU EEA States and Switzerland)[51] currently benefit from all the rights conferred under EU law as a matter of UK domestic law. Indeed, the explanatory memorandum to the 2016 regulations expressly reflects the Government's stated position that:

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[42] See para 19 above
[43] See para 23 above
[44] See para 24 above
[45] See para 38 above
[46] Explanatory Memorandum 7.3 and 7.15
[47] By SI 2012 1547 – see para 4.2 of the Explanatory memorandum to that instrument
[48] ibid
[49] By SI 2012 2560 – see para 2.2 of the Explanatory memorandum to that instrument
[50] See explanatory note to the 2016 Act para 558
[51] See para 5 above

"*Until exit negotiations are concluded, the UK remains a full member of the European Union and all the rights and obligations of EU membership remain in force. During this period the Government will continue to negotiate, implement and apply EU legislation*".

53. This system is parallel to, and separate from, the ordinary immigration scheme whereby persons who are not British citizens and do not have a right of abode under the Immigration Act 1971 require leave to enter or remain in the UK. This is recognised by section 7 of the Immigration Act 1988 which provides that: "*A person shall not under the principal Act require leave to enter or remain in the United Kingdom in any case in which he is entitled to do so by virtue of an enforceable EU right or of any provision made under section 2(2) of the European Communities Act* 1972". Since the implementation of the Citizens' Rights Directive by the 2006 Regulations, concepts such as leave to enter or remain (whether limited or indefinite) have very limited practical application to EU nationals, including children[52]. Their rights to enter and reside in the UK are governed by EU law, as given effect domestically by the 2016 Regulations and the relevant caselaw.

54. EU national children do, however, benefit from various provisions of domestic legislation and case law applicable to children generally, such as the Secretary of State's duty to ensure that immigration functions are carried out with due regard to "the need to safeguard and promote the welfare of children who are in the United Kingdom" (section 55 of the Borders, Citizenship and Immigration Act 2009).

55. They also benefit from Article 8 of the European Convention on Human Rights ("ECHR"), which applies to all children within the jurisdiction for the purposes of Article 1 ECHR, and will continue to apply domestically by virtue of the Human Rights Act 1998, as well as conferring a right of recourse, ultimately, to the European Court of Human Rights in Strasbourg. However, the rights under Article 8 are significantly different to the EU rights discussed above. Article 8 is a "qualified" right, and permits "interference" with private and family life so long as the conditions in Article 8(2) are satisfied – essentially that the interference serves a "legitimate aim", is in accordance with the law and is proportionate. It is well established that the maintenance of immigration control is, in principle, a legitimate aim. The Government could withdraw or reduce EU rights of residence, including those of people already here, following Brexit (and has so far declined to guarantee that it will not do so). So the

[52] Theoretically, there could be an application for limited leave or ILR by an EEA national who is not exercising treaty rights, but I have never come across such a case.

interference would be "in accordance with law". Thus, an appeal, including to Strasbourg, could only succeed if the refusal to extend residence rights following Brexit was, either generally or on the facts of a specific case held to be disproportionate. I would expect the Government to argue strongly against that proposition and the outcome of any case would turn on its specific facts. Article 8 ECHR does not provide the sort of specific rights conferred by EU law and considered above, such as (for example) the right of TCN children to remain for the purposes of continuing in education even when the parent who was lawfully present has left the host Member State[53] or the right to reside in the UK available to a child (and its TCN parent) under EU law in the circumstances of the *Chen* case[54]. In short, Article 8 does not provide any guarantee that children's current rights under EU law will be unaffected by Brexit.

56. As to nationality law, by Section 1(1)(b) of the British Nationality Act 1981 ("the 1981 Act") a child born in the UK after commencement (1 January 1983) to a parent settled here is automatically a British citizen. In respect of children born in the UK after 30 April 2006[55,] that will include a child born in the UK to a parent with PR. However, because of changes in the law prior to that date, the position is more complicated for children born earlier. In broad terms[56], a child born in the United Kingdom before 2 October 2000 to an EEA national parent will be a British citizen if the parent was exercising EC Treaty rights at the time of birth. A child born in the United Kingdom between 2 October 2000 and 30 April 2006 to an EEA national parent will only be a British citizen if the parent had indefinite leave to remain in the UK at the time of the birth[57].

57. By section 1(3) of the 1981 Act, a person is entitle to be registered as a British citizen if born in the UK to a parent who becomes settled here while the child is a minor. However, the act also provides that the application for registration must also be made while the child is a minor. Section 1(4) is less likely to be of practical significance in the present context, but possibly applicable in some cases. It confers a right to be registered as a British citizen upon a child who is born in the UK, lives here to the age of 10, and is not absent for more than 90 days in

[53] Cf para 18 above
[54] See para 30 above.
[55] When the Immigration (EEA) Regulations 2006 came into force
[56] As explained at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/583385/MN1_Guide_January_2017.pdf

[57] ILR was relevant at the time, because the Citizens' Rights Directive had not been transposed into domestic law by 2006 Regulations

each of those years. It might, for example, be applicable to a child born in the UK to an EU national parent where that parent dies or leaves the UK before acquiring PR, and the child remains in the UK exercising retained rights.

58. In my experience, these rights and entitlements under British nationality law, which may be increasingly important in the light of Brexit, are not widely known and understood by EU national families.

Q.3: Rights of EU national children in State Care in the UK

59. Neither the making of a care order under section 31 of the Children Act 1989 nor the fact that a child is being "looked after" by a local authority under S.20 of that Act have any automatic effect on the child's nationality or immigration status.

60. However, a child's immigration status may have an impact on his or her rights to local authority support, including the entitlement to a range of services, and will affect the right to a variety of social welfare benefits. Thus, the more extensive immigration rights conferred by EU law (see the analysis under Qs1 and 4) provide a significantly higher level of protection to children and young people, including in terms of their eligibility for local authority and social welfare support.

61. The advantages of EU citizenship in this regard are demonstrated by the recent decision the Inner House of the Court of Session in in the case of *Slezak*[58], observing that: "*it is consistent with the principles of non-discrimination and equality of treatment which are fundamental to EU law that* ***children of EEA citizens who are estranged from their parents and left in the United Kingdom should be treated in the same way as British children would be treated in the same circumstances***". The Court held that an EEA national child who had been abandoned by her parents in the UK was entitled to welfare benefits (specifically income support) in order to remain in education here.

62. Children who are subject to immigration control may face restrictions on their eligibility for support and services in a variety of respects[59]. So, for example, the Immigration Act 2016

[58] [2017] CSIH 4

[59] The entitlement of migrant children to education and health care in various EU States is discussed in a 2015 Paper in the European Human Rights Law Review: E.H.R.L.R. 604

places restrictions on the provision of "leaving care" support to young people without immigration status. A detailed analysis of the implications of immigration status on the leaving care scheme is beyond the scope of this advice, and would add disproportionately to its length, particularly given what the Court of Appeal has described as "*the impenetrable nature of the legislation*" in this area[60]. However, the greater immigration rights currently accorded to EU national children means they are significantly less likely to find themselves without immigration status, and thus subject to restrictions on their entitlement to support at the end of their time in local authority care.

Q.4: The Potential Impact of Brexit on the Rights Considered in Qs 1-3

63. As explained above, EU law confers rights on children who are nationals of other EU Member States residing in the UK. Many of those children will be residing here with an EU parent or carer, but others may be children whose EU citizen family member has died, or who have been abandoned here by an EU citizen parent or carer, or who are receiving education here whilst their parents or carer remain abroad. Many of those children will be exercising retained rights, and some will be on the path to an independent right to permanent settlement, so long as their residence in the UK remains lawful and such a right is still being recognised by the time their 5 years of lawful residence has been achieved.

64. Moreover, EU law also confers rights on:
    - Children from non-EU EEA States and Switzerland, pursuant to the EEA and Switzerland Agreements [**5** above];
    - Third Country National ("TCN") children who are family members of an EU citizen exercising rights under the Citizens' Rights Directive in the UK [**6** et seq above];
    - TCN children of British citizens who have exercised treaty rights abroad – *Surinder Singh* and *Eind* [**24 et seq** above];
    - Turkish national Children under the Ankara Agreement [**44 et seq** above];
    - British citizen children whose ability to remain in the UK is, in practical terms, dependent on the presence of a TCN parent or carer - the *Zambrano* principle [**34** et seq above];
    - Other TCN children, such as unaccompanied minors under the Reception Directive [**48**].

[60] *R (ota O) v Barking and Dagenham* [2011] 1 WLR 1283 at [**3**]

65. Those rights extend far beyond "pure" immigration rights, and impact the rights to housing, education in the UK and social welfare benefits as well as the right to effectively enjoy the benefits of British citizenship for children whose foreign parent or carer is only able to remain here with them because of the ***Zambrano*** principle. As explained above, they are different in nature and extent to the qualified rights conferred by Article 8 ECHR .

66. The EU rights considered above are currently protected under domestic law, and most have been incorporated into domestic legislation. However, one might anticipate that it is the Government's intention to review and possibly to repeal or substantially amend the relevant legislation following Brexit. Some commentators have suggested that a visa system for EEA nationals is unlikely[61], but given the focus on "regaining control of our borders" during the Referendum campaign it seems inevitable that there will be significant changes to the current system. For the moment, there is no way of knowing precisely what the eventual outcome will look like.

67. What is, however, clear, is that EU law, as currently incorporated into our domestic legal order, provides a significant degree of protection for many children, including British citizen children with a TCN parent or carer, unaccompanied migrants and other TCN children, as well as children who are nationals of other EU/EEA Member States. Careful consideration will need to be given to the potential impact of any proposed changes if the welfare and security of these children are to be properly safeguarded and protected.

[61] "Immigration After Brexit" National Institute Economic Review, Volume 238, Issue 1 2016

SUMMARY

EU law confers a number of specific rights upon a wide range of children in the UK, including:

- Children who are citizens of other EU Member States and are residing in the UK with a parent or other family member who is exercising rights here under the Citizens' Directive [**5-11 & 14** above];
- Children who are citizens of other EU Member States and are residing in the UK retained rights following the death or departure of a parent [**15-20**], or in the exercise of independent rights, such as freedom of movement for education [**12**] and/or in local authority care [**61-62**] ;
- Children from non-EU EEA States and Switzerland, pursuant to the EEA and Switzerland Agreements [**5** above];
- Third Country National ("TCN") children who are family members of an EU citizen exercising rights under the Citizens' Rights Directive in the UK [**6** et seq above];
- TCN children of British citizens who have exercised treaty rights abroad – *Surinder Singh* and *Eind* [**24 et seq** above];
- Turkish national Children under the Ankara Agreement [**44 et seq** above];
- British citizen children whose ability to remain in the UK is, in practical terms, dependent on the presence of a TCN parent or carer - the *Zambrano* principle [**34** et seq above];
- Other TCN children, such as unaccompanied minors under the Reception Directive [**48**].
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Some of those children will have acquired a right of permanent residence under EU law, or be some way towards acquiring such a right, due to their period of lawful residence [14]. I have been unable to find any reliable statistics in this regard, but the numbers are likely to be substantial. To date, they have been able to exercise those rights with minimal formality, and there has been no requirement to apply for a permanent residence card. Thus, some of those children (and/or their families) may find it difficult to prove their length of lawful residence so as to demonstrate their entitlement to PR.

EU law also confers the ancillary rights required to secure effective enjoyment of EU citizenship and freedom of movement and residence. Thus, EU law has an impact on children's rights in areas such as education, housing and social welfare payments [**24, 40, 41, & 61**].

Under domestic law, EU rights have been given effect by way of a scheme that is separate from and parallel to ordinary immigration control – currently centred on the Immigration (EEA) Regulations 2016 [**48-52**]**. Thus, the vast majority of children in the UK who are nationals of other EU Member States will not have been granted leave to enter or remain (in particular, they will not have been granted indefinite leave to remain) because they did not need leave if they were exercising EU rights** [**53**]. Given that the 2016 Regulations essentially transpose the EU Citizens' Rights Directive, it seems axiomatic that those Regulations cannot survive Brexit in their current form. In determining what will replace them, very careful thought will need to be given to the welfare of the substantial numbers of children whose rights will be at stake.

The EU rights in question are different to, and in a number of respects more extensive than, the rights under Article 8 ECHR [**55**]. In short, Article 8 ECHR cannot be assumed to be a guarantor of the rights currently enjoyed by children under EU law.

An unquantifiable number of children born in the UK to an EU national parent will be British citizens by operation of law [**56**] **or will be entitled to become British citizens by registration** [**57**]. However, experience and anecdotal evidence suggests that these rights may not be widely understood by those entitled to benefit.

I hope that this Opinion addresses the questions posed by my instructions in sufficient detail and to assist the Commissioner in her consideration of the issues. Those instructing me should not hesitate to contact me if any clarification is required.

Lisa Giovannetti QC

29 March 2017