

Residence Permits for Third-Country National Parents of Maltese Children

Information Note, February 2023



A. Legal Background

The right of a dependent minor child who is a citizen of one of the Member States of the European Union (EU) to have his or her third-country national (TCN) parent residing and working in that EU country of nationality has become part of EU law, and consequently Maltese law. This has been recognised by the jurisprudence of the Courts of Justice of the European Union in a number of key cases since 2011: *Case C-34/09, Gerardo Ruiz Zambrano v. Office national de l'emploi (ONEM)*^[1], and subsequent cases *CS, Rendón Marín & Chavez-Vilchez*^[2].

This principle has rightly been applied in Maltese courts that have confirmed the above jurisprudence and have stated that *"Irrespective of whether the respondent has a right to apply for a single permit for residence and work in terms of Subsidiary Legislation 217.17 or some other permit in terms of the law it is an undisputed fact that the European Court of Justice has acknowledged that parents from a third country have a right to reside and work in the Member State of residence and nationality of their child"*^[3].

1. Legal Consideration: Would the child be compelled to leave the EU, Malta?

The right to a Zambrano residence permit is based Article 20 of the Treaty on the Functioning of the European Union^[4]. This article lays down the rights of the nationals of Member States, include Maltese nationals, as citizens of the Union to enjoy the freedom to live, move and reside across the territory of the Union.

^[1] Case C-34/09, Gerardo Ruiz Zambrano v. Office national de l'emploi (ONEM), <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62009CJ0034>;

^[2] Case C-304/14 Secretary of State for the Home Department v CS <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=ecli%3AECLI%3AEU%3AC%3A2016%3A674>; Case C-165/14 Alfredo Rendón Marín v Administración del Estado <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=ecli%3AECLI%3AEU%3AC%3A2016%3A675>, Case C-133/15, H.C. Chavez-Vilchez and Others v Raad van bestuur van de Sociale verzekeringsbank and Others, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62015CJ0133>.

^[3] Tanya Mihedova vs Director of Department for Citizenship, Civil Court of Appeal, App No: 39/2017, 19th February 2018.

^[4] Consolidated version of the Treaty on the Functioning of the European Union: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A12012E%2FTXT>.

These means that Article 20 does not allow any national laws or policies, including decisions refusing a right of residence to the family members of an EU child, which would have the effect of depriving such EU child of the genuine enjoyment of their the rights as an EU citizen.

In other words, the first consideration that a national authority has to undertake when processing Zambrano applications is whether an EU citizen, i.e. a Maltese child, would be compelled to leave the EU if the TCN parent had to leave.

2. Legal Consideration: Dependency

The Courts have held that for the Zambrano permit to be issued the Maltese child needs to be in a situation of dependency on the TCN parent. However, it was also established that such dependency can be both financial and also emotional. In *Chavez-Vilchez* the Court held that the fact that the other parent, who is a EU citizen, would be able and willing to assume sole responsibility for the primary day-to-day care of the child is a relevant factor, but it is **not in itself a sufficient ground for a conclusion** that there is not, between the TCN parent and the child, such a relationship of dependency that the child would be so compelled to leave were there to be such a refusal of a right of residence. Of course, if dependency would only be considered to be financial, then stay-at-home parents who are not Maltese would be at a grave disadvantage in relation to their rights under *Zambrano*.

3. Legal Consideration: Best Interests of the Child

In making any assessment, the authorities must take into account, in the best interests of the child concerned, all the specific circumstances, including the age of the child, the child's physical and emotional development, the extent of his emotional ties both to the Maltese parent and to the TCN parent, and the risks which separation from the latter might entail for the child's equilibrium. The best interests of the child is specifically referred to in Zambrano jurisprudence, however the overarching obligation emanates from the Convention on the Rights of the Children (CRC) and obliges States to **take the best interests of the child as a primary consideration** in all actions concerning children.

This is reiterated in Article 24(2) of the Charter of Fundamental Rights as a positive obligation on all Member State that *“In all actions relating to children, whether taken by public authorities or private institutions, the child’s best interests must be a primary consideration”*. Furthermore, the Charter includes the additional obligation that every child shall have the right to maintain on a regular basis a personal relationship and direct contact with both his or her parents. In addition, Article 8 of the European Convention of Human Rights (ECHR) obliges States to respect the right of children to preserve their identity, including family relations without unlawful interference.

Lastly, it should also be highlighted that in both the Charter and the ECHR there is a general prohibition against discrimination and children with TCN parents cannot be discriminated against simply on the basis of their parent’s migration status.



B. Practical Implementation of Zambrano

It follows that Identity Malta is legally obliged to process applications for a residence permit from Third Country Nationals who are parents of dependent EU citizens. Such application should then be assessed in light of the above-mentioned principles and the so-called Zambrano-type residence permit issued in the format required by *Council Regulation (EC) No 1030/2002*^[5] cannot be denied if it is established that the child is dependent on the applicant. However, TCNs have been facing a number of problems in accessing this right of residence.

1. Lack of formal legislation and policy

There is no national written law regulating the issuance or withdrawals of Zambrano permits under the Immigration Act (CAP 217) or its subsidiary legislation. Identity Malta makes assessments when processing Zambrano-type permits for TCN parents of Maltese children based on an unwritten policy or based on a policy that is not publicly available. There are no publicly available guidelines on who is eligible for the permit. The only guidelines are found in the checklist on Page 4 of Form 0 used for temporary permits^[6]

Zambrano applicants have to fulfil the general conditions, including lease agreement and bank statements, and also additional conditions under section H of the checklist.

Due to the lack of clarity, and procedural guarantees, applicants face months of uncertainty with applications coming back and forth for amendments or clarification. At times applications remain pending for months on end. During this time period, applicants are often not allowed to work and they face severe difficulties in caring for and maintaining their dependent children. This is especially so for those who are legally obliged by Maltese Courts to pay maintenance for their children, and shared custody arrangements. The same difficulty is faced by TCN parents who are victims of domestic violence at the hands of their Maltese partner, and who would have sole custody of their Maltese child.

^[5] Council Regulation (EC) No 1030/2002 of 13 June 2002 laying down a uniform format for residence permits for third-country nationals, <https://eur-lex.europa.eu/legal-content/en/ALL/?uri=CELEX%3A32002R1030>.

^[6] <https://www.identitymalta.com/wp-content/uploads/2019/10/CEA-Form-O-1.pdf>.

Recommendations:

Formalise the issuance of the Zambrano-permits through an amendment to the Immigration Act or through a legal notice under the Immigration Act. Such legislation should include provisions relating to eligibility and any evidence that would need to be submitted. Furthermore, legislation should include a period within which the authority should take a decision, the right to work pending a decision and an effective method of challenging negative decisions.

Draft and publish guidelines for the issuance of Zambrano-permits, including eligibility, documentary and supporting evidence that would be required and also the rights attached to such status.

Ensure that at all stages during the processing of the application that the best interests of the child are paramount in any decision-making, as opposed to immigration control.

2. Regularisation

Identity Malta refuses to process any Zambrano-type permit application if the applicant is in an irregular situation. In such cases, if the applicant is an undocumented or an irregular TCN^[7], they would receive an automated message from Identity Malta's online system stating that *"Kindly regularize yourself with the Principle Immigration Officer as your card was expired in xxxx and applied now for a residence card/submit the last flight ticket to Malta/entry stamp not older than 3 months"*, or *"Please note that unless he is legally staying in Malta, his application for a residence permit cannot be considered"*.

This standard practice has been being implemented over the past year. Since the beginning of 2022, Zambrano applicants have had their application sent back for regularisation by the Principal Immigration Officer (PIO)^[8] if they were in an irregular situation. No guidance is given to the applicant on how to contact the PIO and what documents to provide to the PIO for this purpose.

^[7] We refer to irregular migrant as those TCNs whose residence permit or visa has expired (e.g. those who were on a single work permit, or an exempted permit or tourist visa that has expired or been withdrawn). Undocumented migrants are those whose SRA has been withdrawn or who have had their asylum-application finally rejected.

^[8] The Commissioner of Police is assigned the duties of the PIO under the Immigration Act and the Police Immigration Section carries out the duties on behalf of the Commissioner of Police as designated PIO.

It should be noted that in almost all cases, Zambrano-type applicants are in an irregular situation or otherwise undocumented.

Any applicant who requires regularisation would need to email the PIO requesting such regularisation and stating why it is needed. If the request is accepted, the PIO would send an email to the legal representative or the applicant stating that the *"immigration position is being regularised for the sole purpose of allowing xxx to apply for a residence permit"*.

No identity or residence papers are given to the applicant by the PIO. This email does not entitle the applicant to work. However, it has been increasingly difficult to receive such regularisation, with applicants known have been waiting for regularisation for a substantial amount of months. It is also not clear what criteria the PIO assesses in order to determine whether or not to accede to the request, and there are no procedural guarantees for the applicant.

Recommendation:

There is nothing to suggest in law or in the EU jurisprudence that there is need for the PIO to issue any form of regularisation in order for Identity Malta to issue a Zambrano-type permit. Prior regularisation should therefore not be a requirement.

2. Asylum-seekers & Asylum-seekers whose applications have been finally rejected

More recently during a sitting relating to an appeal from a rejection of a Zambrano-type permit by a failed asylum-seeker, Identity Malta stated that according to Article 9 of Chapter 258 of the identity Card and other Identity Documents Act^[9] asylum-seekers and failed asylum-seekers are not entitled to a residence permit. Identity Malta held that failed asylum-seekers are only entitled to a right of residence and that the authority that grants this right of residence is the PIO. They contended that this right of residence was enough to satisfy the Zambrano requirements. However, as noted above the PIO is not

^[9] Chapter 258 of the identity Card and other Identity Documents Act <https://legislation.mt/eli/cap/258/eng/pdf>.

entrusted with issuing residence permits and only allows regularisation, if and when a decision is taken, for the purpose of applying for a proper residence permit in terms of *Council Regulation (EC) No 1030/2002*.

The PIO issues what is informally known as a "yellow book" which is a document that, in most cases, allows a person to work pending deportation. This document is issued only to failed asylum-seekers who have arrived in Malta by boat irregularly. It is not given to failed asylum-seekers who arrived regularly and then became irregular. This document is not considered to be a residence document, nor is it considered to be regularisation. It is generally renewed every three months and entitles the holder to work in that period pending removal.

In relation to the above assertion by Identity Malta in relation to Article 9 of Chapter 258, it should be highlighted that *lex specialis derogat legi generali* and that the special rules relating to Zambrano permit repeal the general principle in Chapter 258.

Furthermore, it is a basic principle under European Union law that Member States are to apply European Union law and to set aside any conflicting national law in accordance with the principle of supremacy. The disapplication of the Zambrano rules to asylum-seekers whose applications for asylum have been finally rejected is discriminatory and contrary to European Union law.

Recommendation:

Eliminate the distinction in relation to the right to Zambrano-type permits between TCNs would have entered Malta regularly and asylum-seekers and those whose application for asylum have been rejected.

C. Examples of Zambrano Families:

Although we have not encountered large amounts of families in this situation^[10], nevertheless the variety of issues and situations deserves to be highlighted. A few examples of the different types of cohorts can be found below:

- I. Third-country national ex-spouse of a Maltese national. On de facto separation John, the TCN spouse, loses his exempt person status once Identity Malta is aware of the separation. Once the exempt status is withdrawn, John falls into an irregular situation. In the meantime, the Maltese civil courts would have decided on custody and maintenance issues for his 3 Maltese children. John next applies for a Zambrano-permit which is left pending for 9 months, during which Identity Malta requires regularisation from the PIO. The PIO has been reminded 5 times and is non-responsive 6 months on. John cannot work and cannot pay maintenance. He has his children over at the weekends but can barely pay rent and food for them. He wants to work but cannot since the application is pending. John is at a real risk of being sent to prison for non-payment of maintenance. If he is returned, he will be issued with a Schengen Ban which would not allow him to see his children for a number of years. If his application is denied John will be removable.

- II. A failed asylum-seeker has a relationship with a Maltese woman. After Taleb's two children are born, his wife abandons the household due to severe mental health issues. Taleb is given sole care and custody of his Maltese children. His Zambrano permit application was pending for 9 months. Although it was not formally rejected, his legal representatives forced an appeal at the Immigration Appeals Board. During a sitting Identity Malta stated that failed-asylum seekers are not entitled to a residence card. Taleb currently removable and will remain so until he is issued with proper documentation.

^[10] A rough estimation would be around 12 clients in the past 6 years

- III. A mother came to Malta on a tourist visa with her Maltese child in order to visit his father. The couple reunited and started to cohabit again. The Maltese partner became violent and Julia had to leave the house with the child and find alternate accommodation. She applied for Zambrano-permit before her visa expired. Julia was requested time and again by Identity Malta to prove that the child is Maltese, although the child's Maltese father was on the birth certificate. Identity Malta keeps sending back Julia's application for further documentation, such as rental agreement, bank statements and the like. It was extremely difficult in her situation to get the documents due to the vulnerability that she and her child are facing as victims of domestic violence. Her application is still pending 7 months on. Needless to say, Julia cannot work and her violent ex-partner does not give her maintenance.



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