



Neutral Citation Number: [2021] EWHC 1535 (Admin)

Case No: CO/4877/2020

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 09/06/2021

Before :

Mr Justice Mostyn

Between :

The Queen on the application of
Olorunfunmilayo Oluwaseun Akinsanya

Claimant

- and -

Secretary of State for the Home Department

Defendant

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

Colin Thomann and Julia Smyth (instructed by **GLD**) for the **Defendant**

Hearing date: 20 May 2021

APPROVED JUDGMENT

Mr Justice Mostyn:

1. The claimant’s principal application is for an order quashing the decision made by the defendant Secretary of State on 29 September 2020 refusing her application under the EU Settlement Scheme (“EUSS”) as a ‘*person with a Zambrano right to reside*’. She also seeks other declaratory and quashing relief.
2. Essentially I have to decide whether the Secretary of State (then the Rt. Hon. Sajid Javid MP), in promulgating Appendix EU to the Immigration Rules on 7 March 2019, erred in law in his understanding of the scope of:
 - i) The *Zambrano* jurisprudence; and
 - ii) Regulation 16 of the Immigration (European Economic Area) Regulations 2016 (SI 2016/1052) (“Regulation 16”).
3. If the answer is yes then it is agreed that the following relief should be awarded:
 - i) An order quashing the decision of 29 September 2020;
 - ii) A declaration that the Secretary of State erred in law when framing in Annex 1 to Appendix EU to the Immigration Rules the definition of a “person with a *Zambrano* right to reside” under paragraph (b) as “a person without leave to enter or remain in the UK, unless this was granted under this Appendix” (“para (b)”)*;
 - iii) A declaration that the Guidance issued by the Secretary of State “Free Movement Rights: derivative rights of residence” (version 5.0 of 2 May 2019) and “EU Settlement Scheme: person with a *Zambrano* right to reside” (version 4.0 of 27 April 2021) are legally erroneous insofar as they state that a *Zambrano* right to reside is not available to a person if he/she has limited leave to enter or remain in the UK; and
 - iv) An order fixing a further hearing 21 days after the date of this judgment for the court to consider any further quashing relief.

* To be exact, para (b) is presented in Annex 1 thus:

Term	Definition
...	...
person with a <i>Zambrano</i> right to reside	a person who has satisfied the Secretary of State, including (where applicable) by the required evidence of family relationship, that, by the specified date, they are (and for the relevant period have been), or (as the case may be) for the relevant period in which they rely on having been a person with a <i>Zambrano</i> right to reside (before they then became a person who had a derivative or <i>Zambrano</i> right to reside) they were: (b) without leave to enter or remain in the UK, unless this was granted under this Appendix

The facts

4. The claimant is a Nigerian national, but has been in the UK since 2006. She is 39 years old and has four children, one of whom, A (aged 10), is a British national. She is the sole carer of A.
5. The claimant first came to the UK on a six-month visitor visa, which expired on 19 July 2006, and on 12 September 2006 she was granted a two-year family visit visa, which expired on 12 September 2008.
6. On 5 November 2012, when A was one year old, the claimant applied for a derivative residence card as a ‘*Zambrano* carer’ of A. Initially the application was refused by the Secretary of State, but the claimant then appealed that decision to the First-tier Tribunal, which allowed the appeal. Consequently, the Secretary of State (then the Rt. Hon. Theresa May MP) agreed to reconsider her decision, and on 15 September 2014, the claimant was issued with a derivative residence card as a *Zambrano* carer. This card was valid until 15 September 2019.
7. In 2017, the claimant could not work due to ill health. She had been hospitalised following a collapse while she was pregnant with her third child and had to cease work as a result of high blood pressure. In January 2018, the claimant’s landlord began eviction proceedings against her, and on 26 January 2018 the claimant applied for the ‘no recourse to public funds’ condition on her right to reside to be lifted on the basis of destitution.
8. On 12 February 2018, the Secretary of State refused the application on the basis that *Zambrano* carers are not eligible to receive public funds. The Secretary of State told the claimant that any such application would have to be made by way of an application for leave to remain in the UK under Appendix FM to the Immigration Rules.
9. On 4 April 2019, the claimant duly applied for leave to remain under Appendix FM, on the basis of the family/private life 10-year route. On 12 July 2019, the Secretary of State granted the claimant and her children 30 months’ limited leave to remain under Appendix FM until 11 January 2022, with no condition preventing recourse to public funds.
10. On 30 March 2019, applications for the EUSS in advance of the UK’s departure from the EU had opened. On 29 January 2020, the claimant applied to the EU Settlement Scheme for indefinite leave to remain under Appendix EU of the Immigration Rules, on the basis that she was a *Zambrano* carer with five years’ continuous residence.
11. However, as mentioned above, on 29 September 2020 the Secretary of State decided that the claimant was not eligible for the EUSS because she had already been granted limited leave to remain, and so was barred by paragraph (b) of the definition of ‘person with a *Zambrano* right to reside’ in Appendix EU. That is the decision which is challenged before me.
12. The claimant’s claim for judicial review of that decision was issued on 31 December 2020, and permission was originally refused on the papers by Calver J. However, Philip Mott QC (sitting as a deputy High Court judge) granted permission at an oral hearing on 14 April 2021.

The scope of the *Zambrano* jurisprudence

13. *Ruiz Zambrano v Office National de l'Emploi* (C-34/09), [2012] QB 265 was decided by the Court of Justice of the European Union (“CJEU”) on 8 March 2011. The applicant, Ruiz Zambrano, and his wife were both Colombian nationals who found their way to Belgium, where they claimed asylum on 14 April 1999. This was refused by the Commissariat-General for Refugees and Stateless Persons on 11 September 2000. However, the refusal order included a non-refoulement clause stating that they should not be sent back to Colombia in view of the civil war in that country. On 2 October 2001 Mr Zambrano entered into an employment contract in Belgium for an unlimited period of time. In September 2003 the couple’s second child, Diego, was born in Belgium, followed by their third child, Jessica, born in August 2005. Because they were born in Belgium, both of these children acquired Belgian nationality.
14. On 9 April 2004 Mr and Mrs Zambrano applied for permanent residence under Belgian law, relying on Article 3 of the Fourth Protocol to the European Convention on Human Rights, which prevents a child from being required to leave the territory of the state of which he or she is a national. That application was rejected on 8 November 2005, and Mrs Zambrano’s identical application was rejected on 26 January 2006. Mr and Mrs Zambrano challenged these rejections.
15. Meanwhile, Mr Zambrano lost his job and applied for unemployment benefit. That was turned down. The decision was challenged. In the course of that challenge the Office des Étrangers confirmed that:

“The applicant and his wife cannot pursue any employment, but no expulsion measure can be taken against them because their application for legalising their situation is still under consideration.”
16. Although the precise details are somewhat convoluted, the essential challenges by Mr and Mrs Zambrano were, first, to the rejection of their applications for permanent residence made on 9 April 2004, and, second, to the rejection of Mr Zambrano’s application for unemployment benefit. The question that was decided by the CJEU was referred to it by the court considering the challenge to the refusal of unemployment benefit.
17. Since 30 April 2009 Mr Zambrano had been given a provisional and renewable residence permit and was entitled to a “Type C” work permit. Such a permit is valid for one year, but is renewable. It allows the worker to work for multiple employers. It is usually issued to temporary migrant agricultural or domestic workers, or to those whose length of stay in Belgium is unconfirmed, such as asylum seekers.
18. The Belgian court referred three questions to the CJEU. In its judgment at [36] the court distilled the questions as follows:

“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.”

19. The case was heard on 26 January 2010. By that date, as explained above, Mr Zambrano had been given a limited residence permit and a work permit. That limited entitlement did not have the effect of rendering the questions posed moot or academic. Indeed no one even suggested this.

20. In his skeleton argument for the Secretary of State Mr Thomann wrote:

“27. In the *Zambrano* case, there was no question as to the effect of refusing a right of residence to the parents: both were third-country nationals with no other lawful basis to stay, and so their children would be obliged to accompany them if a right of residence were not granted.

28. It has, in other words, been a fundamental condition for the application of the *Zambrano* principle from its inception that there be compulsion to leave the EU if the right of residence is not granted. And, in practice, the CJEU’s jurisprudence has imposed a high threshold for compulsion, to be demonstrated clearly.”

I do not think this is correct. As I have explained above, the family could not be deported because of the non-refoulement order and Mr Zambrano holding a limited, renewable residence permit and being entitled to a limited work permit. So there was no question of Mr and Mrs Zambrano being compelled to leave if they were not granted this novel right. On the contrary, the non-refoulement order, bolstered by the residence and work permits granted to Mr Zambrano, meant that the family was lawfully present in Belgium and could not be compelled to leave.

21. At [42] – [45] the judgment states:

“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 European Union, would have to leave the territory of the European 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 European Union, having to leave the territory of the European Union. In those circumstances, those citizens of the European 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 European Union.

45. Accordingly, the answer to the questions referred is that 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.”

22. Now, it seems to me obvious that the court was talking about the grant of a long-term right of residence and a long-term right to work, at least while the children were minors. Had the court intended to convey that the right of residence, and the right to work, would be satisfied by the grant of a mere temporary, limited, residence permit and a mere temporary, limited, work permit, then it would have said so, and on the facts of that case would have pointed out that Mr and Mrs Zambrano already had everything they were entitled to. But it did not. Plainly, it decided that the parents of those EU citizens were entitled to a long-term right of residence and a long term right to work to facilitate genuine enjoyment by the children of their substantive rights as EU citizens.
23. My reading of the judgment certainly does not yield a conclusion that the court was advancing this new right as a “fall back principle of last resort”, as Mr Thomann put it. If it had intended that to be the case it would have said so, and would certainly have gone on to point out that the principle was not applicable in the case before them because of the protection and rights already granted to Mr and Mrs Zambrano.
24. It is my clear reading of the judgment that a claim for a *Zambrano* derivative right of residence is not extinguished by the existence of a current limited right to remain and work awarded under national law. By contrast, I accept the implication in the judgment that if a person had been granted under national law indefinite leave to remain (with recourse to public funds) then that would, at any rate in theory, be a knock-out blow to a claim for a *Zambrano* derivative right of residence. This is because the rights claimed would be congruent with the rights already granted. I say “at any rate in theory” because it would be completely pointless to make a *Zambrano* claim in such circumstances.
25. Certainly, that was the clear view of the UK government at the time. I will deal in greater detail below, when I turn to the second issue, with the origin and meaning of Regulation 16. Its predecessor was introduced on 11 October 2012 by the Immigration (European Economic Area) (Amendment) (No. 2) Regulations 2012 (SI 2012/2560). The accompanying explanatory memorandum stated:

“2.1 These Regulations amend the Immigration (European Economic Area) Regulations 2006 (‘the 2006 Regulations’) which transpose into UK law Directive 2004/38/EC (‘the Directive’) on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States.

2.2 These Regulations give effect to the judgments delivered by the Court of Justice of the European Union (‘the ECJ’) in the cases of C-83/11 Rahman and C34/09 Ruiz Zambrano; and make a number of other amendments to address some transposition issues and to provide clarity and consistency in the 2006 Regulations.”

The amending Regulation gave effect to the then recent *Zambrano* decision by introducing a new Regulation 15A into the 2006 Regulations. The amendments took effect on 8 November 2012.

26. On 12 December 2012 the Home Office issued Guidance to UK Border Agency staff who were considering applications from persons claiming a derivative right of residence as either the primary carer of a British citizen residing in the UK or as the dependant of such a primary carer (“the 2012 Guidance”). Paras 8 - 10 of that Guidance states:

“8. As a *Zambrano* right need only be conferred where a refusal to grant would force the primary carer to leave the UK (and thereby deprive the British citizen of their rights under EU law) certain “exempt persons” cannot acquire a *Zambrano* right of residence.

9. A person is an “exempt person” if they are a person:

a. who has a right to reside in the United Kingdom as a result of any other provision of these Regulations;

b. who has a right of abode in the United Kingdom by virtue of section 2 of the 1971 Act;

c. to whom section 8 of the 1971 Act, or any order made under subsection (2) of that provision, applies; or

d. who has indefinite leave to enter or remain in the United Kingdom.

10. 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.”

27. As will be seen, the amended Regulation 15A explicitly provided that a person holding indefinite leave to remain would be “exempt”. An exempt person was debarred from acquiring a *Zambrano* right of residence. But a person holding a mere limited leave to

remain was not exempt. Therefore para 10 of the 2012 Guidance correctly stated the effect of Regulation 15A. That Guidance remained effective right up to 2 May 2019, when the Secretary of State (then the Rt. Hon. Sajid Javid MP) appeared to change his mind and issued one of the Guidance documents under challenge namely “*Free Movement Rights: derivative rights of residence*” (version 5.0). This asserted a completely different interpretation of the (identical) successor to Regulation 15A.

28. It will be seen, however, that Regulation 15A was reiterated in 2016 without alteration and that it was also amended in 2019 to deal with leave granted under the EUSS. However, neither of those amendments altered its categorisation of indefinite and limited leave, which has remained intact since it was first issued in 2012.
29. There has been, inevitably, case law about the *Zambrano* derivative right of residence both in the CJEU and domestically.
30. In *Secretary of State for the Home Department v A* (C-115/15), [2017] QB 109 the applicant, a Pakistani national, married a German citizen and the couple moved to the UK where the husband worked. The couple had two children who were born in the UK but had German nationality. The applicant was the victim of domestic violence and she divorced the husband, but the divorce proceedings were not commenced until after he had left the UK. The applicant was given sole care of their children, who attended schools in the UK. The Secretary of State refused the applicant a permanent right of residence in the UK. The ensuing challenge travelled through the First-tier Tribunal, the Upper Tribunal and ended up in the Court of Appeal, which made a referral to the CJEU for a preliminary ruling. The questions referred were whether the applicant already had a right of residence in the UK under article 13(2)(c) of Directive 2004/38/EC (which provides that divorce does not entail the loss of the right of residence of a Union citizen's family who were not nationals of the host member state “where this is warranted by particularly difficult circumstances, such as having been a victim of domestic violence while the marriage ... was subsisting”) and/or under article 12 of Council Regulation (EEC) No 1612/68 2, whereby the children of a national of a member state who had been employed in another member state were to be admitted to the host state's educational system, if those children resided in that state.
31. It should be noted that the Upper Tribunal allowed the applicant's alternative appeal under the Human Rights Act 1998 and ordered that she and the children be granted a right of residence under that provision. That decision was not appealed by the Secretary of State.
32. Before the CJEU the UK government submitted that the questions referred by the Court of Appeal were hypothetical and irrelevant since the applicant and the children had already been granted a right of residence in the UK under the Human Rights Act. At [29] -[30] the Advocate-General wrote:
 - “29. In the present case, it is not manifestly apparent that the issue which has prompted the questions referred is purely hypothetical.
 30. After all, it is not inconceivable that the court's answers to the various questions put to it will determine whether the applicant is eligible for certain social security benefits and

special non-contributory benefits which she is currently denied because of the restriction of the rights conferred by a right of residence based on article 8 of the Human Rights Convention : see the written observations lodged by the applicant, para 7. A right of residence based directly on European Union (“EU”) law would at the very least be such as to afford the applicant an increased level of legal certainty: see the written observations lodged by Aire Centre, para 3.”

The court plainly accepted that the questions were not hypothetical. The existence of the leave granted under the Human Rights Act 1998, which I assume was limited, did not have the effect of knocking out the *Zambrano* claim. Again, this clearly signifies that the CJEU does not regard the existence of a current limited leave to remain as extinguishing the claim for a *Zambrano* derivative right of residence.

33. The CJEU therefore addressed the specific questions and held that the applicant could not rely on article 13(2)(c) of Directive 2004/38/EC in circumstances where the commencement of divorce proceedings post-dated the departure of the EU citizen spouse from the UK. However, both she and the children qualified for a right of residence under article 12 of Council Regulation (EEC) No 1612/68. Accordingly, that right of residence having been established under secondary EU law, the applicant did not gain an additional right of residence under the *Zambrano* principle. The court stated at [81]:

“Article 20 FEU must be interpreted as meaning that it does not confer a right of residence in the host member state either on a minor Union citizen, who has resided since birth in that member state but is not a national of that state, or on a parent who is a third-country national and who has sole custody of that minor, where they qualify for a right of residence in that member state under a provision of secondary EU law.”

34. In his skeleton argument at [31] Mr Thomann wrote:

“There is, contrary to the Claimant’s submission, no basis for confining this observation to the situation where the person concerned already qualifies for a right of residence under the EU secondary law, as opposed to national law. The source of alternative rights is not material: the point is that there is no compulsion to leave if there is an alternative means of lawful residence.”

35. I disagree. EU secondary law rendering a claim for a *Zambrano* right of residence redundant is perfectly understandable. The right of residence being granted under EU secondary law is long-term, lasting at least as long as the minority of the children. Being granted under EU secondary law, it applies uniformly and equally throughout the Union. A limited leave to remain granted by a particular country under its national law is a different thing altogether. As the Advocate-General observed, it affords far less legal certainty than a residence right granted under EU secondary law. Under UK national law, limited leave to remain is inherently precarious and tenuous. It is always granted in the first instance subject to a no-recourse-to-public-funds condition. The

leave must be reapplied for every 30 months and the process for that is complicated. Under the 10-year route fees are chargeable periodically totalling £11,104 (although these can be waived).

36. I disagree that the only consideration is whether, absent the grant of a *Zambrano* right, the applicant would be compelled to leave. I have given my reasons for that conclusion above. I disagree that the source of the alternative right is not material. On the contrary, I think that it is critically material and that accordingly the CJEU was very careful to confine the alternative residence rights only to those arising under secondary EU law. Had the court intended a national law granting a limited residence right to be a *Zambrano* extinguishing factor, then it would no doubt have said so. But it did not.
37. In my judgment a proper analysis of the EU cases clearly demonstrates that the court did not consider a limited leave to remain under national law to be a *Zambrano* extinguishing factor. Similarly, the domestic cases do not, when properly analysed, support the general extinguishment theory advanced on behalf of the Secretary of State.
38. The issue in *Sanneh v Secretary of State for Work and Pensions* [2016] QB 455 was whether the claimants in that case, all of whom had *Zambrano* rights of residence, were caught by statutory instruments which had been passed disqualifying *Zambrano* residents from accessing social security benefits after a specified date. This required a finding to be made as to when the *Zambrano* right of residence arose. The issue in that case therefore is not the same as the question I have to decide. However, it is clear from the judgment of Arden LJ at [61] that she accepted that a right to reside deriving from a limited leave to remain, would coexist with a right to reside deriving from *Zambrano*, and that therefore, inferentially, the former did not extinguish the latter.
39. In his judgment at [166]–[170] Elias LJ set out in robust terms his understanding of the nature and extent of the *Zambrano* right of residence, which I do not apologise for repeating at some length:

“166. This appeal raises questions about the full implications of *Ruiz Zambrano v Office national de l'emploi* (Case C-34/09) [2012] QB 265 as a matter of EU law. The Secretary of State submits that they are extremely limited. Indeed, on his analysis here 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 rights” conferred by virtue of the child's status as an EU citizen, to use the language in para 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 third-country national, in practical terms it is necessarily and always meaningless. At the very same moment as the state takes steps to exercise that right, 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.

170. The right to reside conferred by EU law takes effect automatically in domestic law. It follows that where under domestic law an entitlement to social benefits depends on lawful residence, or habitual residence, a *Zambrano* carer will qualify for them. ...”

40. This very clear analysis shows that:

- i) a *Zambrano* right is a substantive right, and not merely a procedural defence to deportation;
 - ii) a *Zambrano* right confers “at all times” a right to stay, which I take to mean, at a minimum, a right to stay while the children are in their minority; and
 - iii) where under domestic law an entitlement to social benefits depends on lawful or habitual residence, then a *Zambrano* carer will qualify for them.
41. These aspects of the residence right afforded to a *Zambrano* carer far exceed the entitlements granted to someone with limited leave to remain. Therefore, it is a fallacy to suggest that the grant of limited leave to remain has the effect of extinguishing a claim to *Zambrano* rights. I would not go so far as Elias LJ to describe the argument as incoherent, but it is certainly illogical.
42. I turn to the decision of the Supreme Court in the linked cases of *Patel v Secretary of State for the Home Department* and *Shah v Secretary of State for the Home Department* [2020] 1 WLR 228. Mr Patel was an Indian national who claimed a *Zambrano* right of residence based on his care of his parents, both of whom were British citizens and were in ill health (his father had end-stage kidney disease, and his mother was also ill and immobile). Mr Shah was a Pakistani national who claimed a *Zambrano* right of residence based on his primary care of his infant son, a British citizen. Mr Shah lived together with his wife, a British national, and his son, but his wife worked full-time to earn an income for the family and so it was Mr Shah who looked after his son during the day.
43. Mr Patel had failed in a claim for residence made under the Human Rights Act 1998. There was therefore no concurrent limited leave to remain and so the question I have to decide simply was not at large. The First-tier Tribunal had found as a matter of fact that Mr Patel’s father would not be compelled to leave the UK if Mr Patel were required to leave. Therefore, Mr Patel was not entitled to a *Zambrano* right of residence. This decision was upheld by the Supreme Court.
44. Likewise, Mr Shah did not have any concurrent limited leave to remain, so again, the question that I have to answer was not at large. In Mr Shah’s case the First-tier Tribunal found, as a matter of fact, that if Mr Shah were required to leave the UK, his infant British son would in the real world be compelled to accompany him. That finding was upheld in the Upper Tribunal but overturned in the Court of Appeal, which held that Mr Shah’s wife would be able to step in and look after the child were Mr Shah to be required to leave. That decision was overturned by the Supreme Court. The theoretical possibility of the mother choosing to remain in the UK and stepping into the parenting breach should not have been brought into the assessment of compulsion, which was a practical test to be applied to the actual facts, and therefore the finding of the First-tier Tribunal would be restored.
45. The decisions of the Supreme Court in these cases do not answer the question before me, which is, I repeat, whether the existence of a limited leave to remain of itself acts to extinguish a *Zambrano* claim. The decisions address the scenario, which is not this case, where the *Zambrano* applicant does not have limited leave to remain of any nature. In that circumstance I can well understand why the focus is on the question of

whether, for reasons of practical reality, the cared-for British citizen would also have to leave if his carer were expelled.

46. Mr Thomann cites Lady Arden at [16], where she stated:

“The CJEU explained that in very specific situations a TCN (third country national) may have a right of residence if the Union citizen would otherwise be obliged to leave Union territory. Those limits are very important in considering these appeals because Charter rights are not engaged unless an EU law right is triggered. As stated, the TCN’s derived right of residence is only given in order that the Union citizen’s rights should be effective. That would be the limit of the entitlement under EU law of the TCN to reside in the Union.”

This, he argues, points up the *sui generis* nature of this creation of EU law. That is true, but so what? I do not doubt that this creation by the CJEU is unique. Its uniqueness does not tell me anything about the question I have to decide, namely whether it is automatically extinguished if there is, at the time that it is claimed, a concurrent limited leave to remain.

47. In his decision in the Court of Appeal in the same case Irwin LJ recorded the Secretary of State’s submission at [68]:

“In Patel’s case, the claimant has already failed in an article 8 claim. Had he succeeded, the result would have been a grant of leave to remain which would obviate the need for leave under the Ruiz Zambrano principle.”

I do not agree with this submission, for the reasons I have set out above. It is not consistent with the governing EU jurisprudence.

48. The Home Office Guidance mentioned above, “EU Settlement Scheme: person with a *Zambrano* right to reside” (version 4.0 of 27 April 2021), states at page 13:

“A *Zambrano* right to reside is only available to a person who has no other means to remain lawfully in the UK as the primary carer of a dependent British citizen, or as a dependant of that primary carer.

As set out in sub-paragraph (b) of the definition of a ‘person with a *Zambrano* right to reside’ in Annex 1 to Appendix EU, an applicant cannot meet that definition if they have (or, as the case may be, for the relevant period had) leave to enter or remain in the UK, unless this was granted under Appendix EU.

An applicant cannot therefore meet that definition if they have (or, as the case may be, for the relevant period had) leave to enter or remain granted under another part of the Immigration Rules (such as Appendix FM) or on a discretionary basis outside the Rules.

In the case of *Patel v SSHD* [2017] EWCA Civ 2028 (13 December 2017), the Court of Appeal noted that a person with leave to remain under domestic law cannot benefit from a derivative right to reside on the basis of *Zambrano*. The Court of Appeal also noted that *Zambrano* is a (sic) not a back-door route to residence for those who have a British citizen child without having or acquiring leave to remain.

In its judgment in that case (*Patel v SSHD* [2019] UKSC 59, 16 December 2019), the Supreme Court was not required to rule on the implications of leave to remain under domestic law for the scope to benefit from a derivative right to reside on the basis of *Zambrano*, but it confirmed (at paragraph 22 of the judgment) that the test to be met to benefit from that right is one of compulsion: “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 third country national, with whom the Union citizen has a relationship of dependency, is removed.”

49. I do not disagree with the fifth paragraph, although I think it would have been more objective were it to have been made clear that not only was the Supreme Court not required to rule on the significance of the existence of a concurrent limited leave to remain, but also that it chose not to address the topic at all. I am troubled by the fourth paragraph. The Court of Appeal did not as part of its *ratio decidendi* state that a person with existing leave to remain cannot benefit from *Zambrano*. The fact that it noted the Secretary of State’s submissions without making any decision on them is of minimal relevance. The second sentence derives from [76], where Irwin LJ stated:

“Those who marry a British citizen and have children, without having (or acquiring) leave to remain, do so at the risk that they may be compelled to leave the country, facing the real quandary that arises for these families. The *Ruiz Zambrano* principle cannot be regarded as a back-door route to residence by such non-EU citizen parents.”

The *Zambrano* principle is simple and clear. An EU citizen, who happens to be a small child, is entitled to enjoy the full benefits of EU citizenship, of which the principal one is living in EU territory. If her primary carer were to be expelled from EU territory, and if in the real world the EU citizen would have to accompany the carer, then the EU citizen is denied the benefits of her citizenship. Therefore, her carer has to be granted residence in the relevant EU state. True, that grant of residence is derivative and is not obtained by passing through the front door. Therefore, it is a route to residence via the back door, although to describe it in such pejorative terms perhaps risks missing the true point.

50. My principal objection to these paragraphs is not so much with their internal content, but with their citation as juridical support for the propositions in the first three paragraphs. Here I consider that their use has been misleading. The *ratio decidendi* of the Court of Appeal did not, on any analysis, state in the categorical way suggested in this Guidance that the existence of limited leave to remain automatically leads to the

refusal of an application under *Zambrano*. That decision just does not say that and if it were to, it would clash with the governing jurisprudence from the CJEU.

51. My conclusion is that nothing decided in the CJEU or domestically since the decision in *Zambrano* supports the theory that the existence of a concurrent limited leave to remain of itself automatically extinguishes a claim for *Zambrano* residence. On the contrary, it is clear to me from the facts of *Zambrano* itself that the CJEU tacitly acknowledged that a limited national leave to remain, and a wider *Zambrano* right to remain, in many cases can and will coexist.
52. It is sometimes said that the validity of a proposition is best tested by applying to it extreme facts. The decision in this case was made on 29 September 2020. When it was made the claimant had limited leave to remain, which was due to expire on 11 January 2022. Let us assume that a limited leave to remain was in fact due to expire on 30 September 2020, that is one day after the decision fell to be made. Could it seriously be said that in such circumstances the claimant's claim for a *Zambrano* right of residence was automatically extinguished? But that it could be re-submitted two days later?
53. This scenario is in fact addressed in the Home Office Guidance mentioned at para 48 above. It states at page 13:

“However, if the applicant has leave to enter or remain in the UK which is not leave granted under Appendix EU and which, at the point of decision, has less than 28 days until its expiration date, then, though you will be refusing the application, you must still move on to consider whether they meet other relevant eligibility criteria set out below for leave under the scheme as a ‘person with a *Zambrano* right to reside’ and reflect that consideration in the decision letter refusing the application.”

If I understand this correctly, it is saying that if the applicant has limited leave to remain expiring more than 28 days after the decision date, then the application will be peremptorily refused. If there are fewer than 28 days until expiration of the leave then the decision-maker will refer to stages 1 to 3 of the eligibility criteria on page 17, but nonetheless will refuse the application. How this gives effect to the principle in *Zambrano* is quite beyond me. I think that the answer to my bafflement would be that the applicant would not be prevented from making a *Zambrano* application immediately following the expiration of her limited leave to remain. This does, however, point up just how arbitrary the system is.

54. I therefore find that the Secretary of State erred in law when she formulated para (b).

Regulation 16

55. As mentioned above, Regulation 16 first emerged as the rewritten Regulation 15A of the Immigration (European Economic Area) Regulations 2006 (SI 2006/1003) as inserted by the Immigration (European Economic Area) (Amendment) (No. 2) Regulations 2012 (SI 2012/2560), Schedule para 3. The recast Regulation 15A provided, so far as is material to this case:

“Derivative right of residence

15A (1) A person (“P”) who is not an exempt person and who satisfies the criteria in paragraph (2), (3), (4), (4A) or (5) of this Regulation is entitled to a derivative right to reside in the United Kingdom for as long as P satisfies the relevant criteria.

...

(4A) P satisfies the criteria in this paragraph if -

(a) P is the primary carer of a British citizen (“the relevant British citizen”);

(b) the relevant British citizen is residing in the United Kingdom; and

(c) the relevant British citizen would be unable to reside in the UK or in another EEA State if P were required to leave.

...

(6) For the purpose of this Regulation -

...

(c) “an exempt person” is a person

...

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

56. It is my judgment that these Regulations were impeccably drafted and accurately reflected the true legal scope of the decision in *Zambrano*, namely that holding indefinite leave to remain in the UK, and nothing but such indefinite leave, would automatically debar an application from being made for a *Zambrano* derivative right of residence under Regulation 15A. Regulation 15A, as well as the Guidance issued at that time (see above), accurately stated (expressly in the Guidance, inferentially in Regulation 15A) that a person with limited leave would be entitled to apply for a *Zambrano* derivative right of residence. For this reason such a person was not designated as “exempt”.
57. The 2006 Regulations as amended were replaced by the Immigration (European Economic Area) Regulations 2016 (SI 2016/1052). These were made on 2 November 2016 and the relevant parts came into force on 1 February 2017. They were therefore made and took effect after the Brexit referendum on 23 June 2016. Regulation 15A of the 2006 Regulations became Regulation 16 of the 2016 Regulations. The parts material to this case were unchanged: Regulation 16(7)(c)(iv) of the 2016 Regulations is the same as Regulation 15A(6)(c)(iv) of the 2006 Regulations. However, the Secretary of State (then the Rt. Hon. Amber Rudd MP), who made these 2016 Regulations, did think it desirable to include in Regulation 2 (general interpretation) a definition of “indefinite leave”, in contrast to the 2006 Regulations where there was no such definition. Regulation 2 now provided:

“*indefinite leave*” , “*immigration laws*” and “*immigration rules*” have the meanings given in section 33(1) of the Immigration Act 1971¹

¹ Section 33(1) of the Immigration Act 1971 states: “limited leave” and “indefinite leave” means respectively leave under this Act to enter or remain in the United Kingdom which is, and one which is not, limited as to duration.

58. The significance of this is that the Secretary of State specifically pondered the question of leave when making the 2016 Regulations. She decided to maintain in Regulation 16(7)(c)(iv) only indefinite leave as the criterion for an exempt person; there is no hint that at that point she considered that the definition of exempt person should be expanded to catch all those with limited leave to remain.
59. As mentioned above, on 7 March 2019 Secretary of State (then the Rt. Hon. Sajid Javid MP) promulgated the EUSS. He laid before Parliament on that same day the Immigration (European Economic Area Nationals) (EU Exit) Regulations (SI 2019/468), which came into force three weeks later on 28 March 2019. These made amendments to the 2016 Regulations. Specifically, a new Regulation 16(7A) was added which stated:
- “(7A) Leave to enter, or remain in, the United Kingdom under the 1971 Act which has been granted by virtue of Appendix EU to the immigration rules is not to be treated as leave for the purposes of paragraph (6)(b) or (7)(c)(iv)”
60. As stated above, Regulation 16(7)(c)(iv) specifies that a person who has indefinite leave to enter, or remain in, the UK is an exempt person. Therefore, it can be seen that on 7 March 2019 the Secretary of State modified the definition of an exempt person to exclude someone who has been granted leave to remain in the UK under the EUSS.
61. The significance of this cannot be overstated. The Secretary of State modified the definition of leave to allow someone granted leave under the EUSS nonetheless to apply for a *Zambrano* derivative right to reside. Yet he chose not to modify any other aspect of the regime governing leave. If by then he had reached the conclusion that a person with non-EUSS limited leave to remain should be an exempt person for the purposes of Regulation 16, then why did he not provide for this when framing the amending 2019 Regulations? It would have been the easiest thing to do so. I put the question to Mr Thomann who very politely acknowledged that he was anticipating it; but he had no response.
62. Yet, as mentioned above at para 27, in a volte-face a few weeks later the internal Home Office Guidance “*Free movement rights: derivative rights of residence*”, Version 5.0, which took effect on 2 May 2019, stated that people with limited leave to remain could not apply for a *Zambrano* derivative right to reside. On pages 52 - 53 it said:

“A derivative right to reside is only available to an applicant who has no other means to remain lawfully in the UK as the primary carer of a dependent British citizen, or a dependent of that primary carer.

...

Where a person wishes to remain in the UK on the basis of family life with a British citizen, they should first make an application for leave to remain under Appendix FM to the Immigration Rules, not for a derivative residence card on the basis of *Zambrano*.

...

This means that a *Zambrano* application must be refused if the applicant:

- has never made an application under Appendix FM to the Immigration Rules or any other Article 8 ECHR claim, where that avenue is available
- has been refused under Appendix FM or Article 8 ECHR but their circumstances have changed since the decision was made – for example, the applicant applied on the basis of their relationship with a British spouse, but the couple now have a British child.”

63. It is troubling, to say the least, that this instruction should have been issued requiring staff to ignore the clear terms of the 2016 Regulations, and therefore to act unlawfully².
64. The argument now advanced on behalf of the Secretary of State is that I should construe the 2016 Regulations so that they conform with what she maintains to be the true scope of the *Zambrano* jurisprudence. I have already rejected the Secretary of State’s argument that the true scope of the *Zambrano* jurisprudence does not extend to people with limited leave to remain. That should be the end of the matter.
65. However, I have heard detailed submissions on the point and it may be that a higher court disagrees with that primary conclusion. What follows, therefore, is my view if I am wrong in my primary conclusion about the true scope of the *Zambrano* jurisprudence and if Mr Thomann is right that the true meaning of *Zambrano* is that any national award of limited leave to remain acts to thwart an application for a *Zambrano* derivative right to reside. In this scenario consideration has to be given to what the Secretary of State is asking me to do.
66. In effect the Secretary of State is asking me, rather than herself as rule maker and Parliament as rule approver, to write words (which I have underlined and highlighted) into Regulation 16(7)(c)(iv) and Regulation 2 so that they read:

“16

(7) For the purpose of this Regulation -

...

(c) “an exempt person” is a person -

...

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

2

“indefinite leave”, “limited leave”, “immigration laws” and “immigration rules” have the meanings given in section 33(1) of the Immigration Act 1971”

² The instruction was maintained in the Guidance documents *EU Settlement Scheme: person with a Zambrano right to reside* Version 3.0, published 13 February 2020 at page 23; version 4.0 published 27 April 2021 at page 13.

On any view, these changes would significantly reduce the size of the cohort entitled to make an application for a *Zambrano* derivative right of residence.

67. When the court is construing domestic legislation which is intended to transpose an EU directive, but which does not appear fully to do so, then the court is permitted to construe the domestic legislation in a way which is both broad and far-reaching. It is allowed in such circumstances to depart from the strict and literal application of the words which the legislature has elected to use, and it permits the implication of words necessary to comply with EU law obligations. However, the meaning thus derived must go with the grain of the legislation and must be compatible with its underlying thrust; further, the interpretation must not be inconsistent with a fundamental or cardinal feature of the legislation. See *Vodafone 2 v Revenue and Customs Commissioners* [2009] EWCA Civ 446 per Sir Andrew Morritt C at [37] – [38].
68. However, where the domestic legislation appears to go further than the EU law obligations then it does not follow that such a free-wheeling approach to statutory construction should be adopted. It would violate all the norms of statutory construction to construe a domestic statute or statutory instrument in such a way to scale back the entitlements therein to make them exactly congruent with those in the EU directive being transposed. There is no logic to such an approach. If the natural meaning of the words in the domestic measure appears to grant its users an uncovenanted bonus then the corrective remedy lies in the hands of the rule makers and Parliament, and not in the hands of the judges. In reaching this conclusion I follow Viscount Simon LC in *Barnard v. Gorman* [1941] AC 378, a case turning on the meaning of the word “offender” in s.186 of the Customs Consolidation Act 1876. He said at 384:

“Our duty in the matter is plain. We must not give the statutory words a wider meaning merely because on a narrower construction the words might leave a loophole for frauds against the revenue. If on the proper construction of the section that is the result it is not for judges to attempt to cure it. That is the business of Parliament. Our duty is to take the words as they stand and to give them their true construction, having regard to the language of the whole section, and, as far as relevant, of the whole Act, always preferring the natural meaning of the word involved, but none the less always giving the word its appropriate construction according to the context.”

69. I am of the clear view that in this latter situation the court should adopt the usual textual and contextual canons of construction. In that exercise the first port of call is to ask what the words mean. The construer only reaches for the so-called intention of the legislator if there is ambiguity as to the natural meaning of the words. Justice Holmes is attributed with this remark, which was approvingly quoted in an article on the construction of statutes by Justice Frankfurter:

“Only a day or two ago, when counsel talked of the intention of a legislature, I was indiscreet enough to say I don’t care what their intention was. I only want to know what the words mean.”³

³ The Essential Scalia, Crown Forum New York 2020 at p29

Or as Justice Scalia put it:

“A text should not be construed strictly, and it should not be construed leniently; it should be construed reasonably, to contain all that it fairly means. But while the good textualist is not a literalist, neither is he a nihilist. Words do have a limited range of meaning, and no interpretation that goes beyond that range is permissible.”⁴

70. Even if I am wrong about the juridical scope of the *Zambrano* decision, it is my judgment nonetheless that neither a textual nor a contextual construction of Regulation 16 can yield a meaning which so radically reduces its reach. To do so crosses the line identified by Lord Nicholls in *Ghaidan v Godin-Medoza* [2004] 2 AC 557 at [33]. It would amount to judicial amendment not interpretation. That Lord Hope in *R (Risk Management) v Brent LBC* [2011] 2 AC 34 implied what is known as the Teckal exemption into the Public Contracts Regulations 2006 is, to my mind, of no relevance to the construction exercise urged on me. That exemption did not feature in the wording of those 2006 Regulations, or even in the EU directive being transposed. However the exemption was a cardinal, ever-present, feature of this branch of EU law and in such circumstances a super-liberal approach to statutory construction, in order to achieve conformity of the domestic legislation with the parent EU legislation (as it would be applied), would be justified. That is a far cry from what is being suggested here, which is to add words to a domestic statutory instrument which have the effect of stripping away rights from what may be a substantial cohort of applicants.
71. It seems likely that the change of mind of May 2019 (see paras 27 and 62 above) will have led to a not insubstantial number of *Zambrano* applications being rejected. I have been informed that between 28 August 2018 and 31 March 2021 3,840 *Zambrano* applications were received, and of these 3,300 were concluded. Of these, 1,160 were granted status, and 2,090 were refused. A straight-line apportionment would suggest that around 1,550 refusals were issued between May 2019 and March 2021. It would seem likely that many of those refusals would have been based on the applicant’s existing limited leave to remain.
72. It seems to me that in seeking to imply words into Regulation 16(7)(c)(iv) and Regulation 2 which completely change the scope, and therefore the meaning, of those provisions, I am being asked to apply the same dubious method of construction which was so memorably and eloquently decried by Lord Atkin in *Liversidge v Anderson* [1942] AC 206. There the majority held that Regulation 18B of the Defence (General) Regulations 1939 should be construed so as imply into it the additional words which I have underlined and highlighted:

“If the Secretary of State **thinks that he** has reasonable cause to believe any person to be of hostile origin or associations and that by reason thereof it is necessary to exercise control over him, he may make an order against that person directing that he be detained.”

⁴ Ibid p30

The additional implied words of course totally changed the meaning of the Regulation, so that the operative condition changed from being an objective fact to a subjective belief. The consequence was that a decision made under it could only be challenged on proof of bad faith by the Minister. In what was arguably the most powerful judicial dissent ever recorded in our case law Lord Atkin was having none of it. He held at 232:

“So far, I have sought to establish that the words in question are not ambiguous, that they have only one plain and natural meaning, that with that meaning the words have been used at common law and in numerous statutes, and that whenever they are used the courts have given them the meaning I suggest, have considered that they give rise to a justiciable issue, and that as to the “subjective” meaning now contended for by the Secretary of State it has never at any time occurred to the minds of counsel or judges that the words are even capable of meaning anything so fantastic.”

In reaching that decision Lord Atkin was in truth doing no more than following Lord Mersey’s celebrated dictum in *Thompson v Goold & Co* [1910] AC 409 at 420:

“It is a strong thing to read into an Act of Parliament words which are not there, and in the absence of clear necessity it is a wrong thing to do.”

73. So here. It is my judgment that, irrespective of the true scope of the *Zambrano* jurisprudence, the natural, fair, reasonable and plain meaning of the words of Regulation 16 entitle an applicant under the 2016 Regulations for a derivative right to reside to have the application determined by reference to the prescribed eligibility criteria in that Regulation rather than being struck out peremptorily. The existing words in Regulation 16 are clear and the proposed amendments go well outside the permissible range of meaning of those words.
74. I did ask Mr Thomann why the Secretary of State was asking me to do her amending for her. Surely, I asked, if the Secretary of State was so anxious that persons with limited leave to remain should also be designated as exempt persons, it would be the easiest thing for the 2016 Regulations to be amended again. However, I was told that this would not be straightforward. The 2016 Regulations have in fact been revoked by the Immigration and Social Security Co-ordination (EU Withdrawal) Act 2020 Sch.1(1) para.2(2) with effect from 31 December 2020, but the revocation has effect subject to savings specified in two statutory instruments made pursuant to that Act namely:
- the Citizens’ Rights (Restrictions of Rights of Entry and Residence) (EU Exit) Regulations 2020 (SI 2020/1210) Regulations 2, 3, 6, and Schedule 1; and
 - the Immigration and Social Security Co-ordination (EU Withdrawal) Act 2020 (Consequential, Saving, Transitional and Transitory Provisions) (EU Exit) Regulations 2020 (SI 2020/1309) Regulations 82 - 83, Schedule 3 paras 2 - 6 and Schedule 4 paras 2 - 4.

Simply stated, the effect of the savings is to allow people in the position of the claimant whose rights had vested prior to implementation day on 31 December 2020 to make

their claim. However, it is, apparently, not straightforward to make amendments to these preserved provisions.

75. Whether or not this is the case is of no relevance to the decision that I have to make. If it is the case, then perhaps the Secretary of State should have made the amendments to the 2016 Regulations before 31 December 2020.
 76. That is my judgment.
-

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
BETWEEN:-

CO/4877/2020

The Queen (on the application of)
Olorunfunmilayo Oluwaseun Akinsanya

Claimant

-and-

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Defendant

ORDER

BEFORE THE HONOURABLE MR JUSTICE MOSTYN, handing down judgment remotely under the COVID-19 Protocol on 9 June 2021;

UPON hearing counsel for the Claimant and counsel for the Defendant;

IT IS DECLARED THAT:

1. 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."
2. The Guidance issued by the Secretary of State (1) "*Free Movement Rights: derivative rights of residence*" (version 5.0 of 2 May 2019) and (2) "*EU Settlement Scheme: person with a Zambrano right to reside*" (version 4.0 of 27 April 2021) is legally erroneous insofar as it states that a person who has limited leave to enter or remain in the UK cannot also have a derivative right to reside by virtue of regulation 16(1) of the

Immigration (European Economic Area) Regulations 2016, by satisfying the criteria in regulation 16(5) of those Regulations.

IT IS ORDERED THAT:

3. The claim for judicial review is allowed.
4. The Defendant's decision of 29 September 2020 refusing the Claimant indefinite leave to remain under Appendix EU of the Immigration Rules is quashed.
5. The Claimant's application for further relief is adjourned to Thursday 17 June 2021 at 10:30, time estimate two hours, to be heard remotely via Microsoft Teams.
6. The Defendant shall pay the Claimant's costs, to be the subject of a detailed assessment on the standard basis if not agreed. This order for costs does not cover the aforesaid application for further relief. The costs of that application shall be determined following the hearing listed by paragraph 5 above.
7. The Defendant shall by 16:00 on Tuesday 6 July 2021 make a payment on account of £25,000 towards the Claimant's costs.
8. There shall be a detailed assessment of the Claimant's publicly funded costs.
9. The Defendant's application for permission to appeal is refused the court not being satisfied that the proposed appeal has a real prospect of success or that there is some other reason why an appeal should be heard.
10. Any Notice of Appeal must include an application to the Court of Appeal for expedition of the appeal and must be filed with the Court of Appeal and served by 16:00 on Monday 21 June 2021.
11. The Defendant's application for a stay of execution of the order in para 7 above for a payment on account of costs is refused.

Dated 9 June 2021

**IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
BETWEEN:-**

CO/4877/2020

**The Queen (on the application of)
Olorunfunmilayo Oluwaseun Akinsanya**

Claimant

-and-

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Defendant

CONSENT ORDER

UPON the Court having given judgment on 9 June 2021 allowing the Claimant's claim for judicial review;

AND UPON the Court having adjourned the Claimant's application for further quashing relief and a hearing being listed to determine the application on 17 June 2021;

AND UPON the Claimant's application for an order for further relief as set out in her skeleton argument dated 16 June 2021;

AND UPON the Secretary of State confirming that:

- a. The Secretary of State is to reconsider the relevant provisions of Appendix EU of the Immigration Rules ("Appendix EU");
- b. The Secretary of State will not determine applications made under Appendix EU on the basis that the applicant is or was a person with a Zambrano right to reside

(‘Zambrano application’) and is affected by the Court’s judgment, until after she has completed her reconsideration of Appendix EU;

- c. In paragraph (a)(v) of the definition of ‘required date’ in Annex 1 to Appendix EU the reference to “limited leave to enter or remain granted under another part of these Rules or outside the Immigration Rules which has not lapsed or been cancelled, curtailed or invalidated” includes leave to enter or remain granted under another part of these Rules or outside the Immigration Rules which is extended by operation of section 3C of the Immigration Act 1971;
- d. To the extent that paragraph 34BB of the Immigration Rules applies to a Zambrano application, it will be disregarded where there is (i) an outstanding valid Zambrano application for leave to remain under Appendix EU and a valid application for leave to remain is subsequently made under Appendix FM based on the same circumstances; and (ii) an outstanding valid application for leave to remain under Appendix FM and a valid Zambrano application for leave to remain is subsequently made under Appendix EU based on the same circumstances as the Appendix FM application;
- e. The Secretary of State intends to implement and publicise a policy under which, for a reasonable period of time which she will specify, but which will be for a period of not less than six weeks after publication of the outcome of her reconsideration referred to at a. above, Zambrano applications made on or after 1 July 2021 will be deemed, under the definition of ‘required date’ in Annex 1 to Appendix EU, to have reasonable grounds for the person’s failure to make that application at the earlier date relevant under that definition;
- f. In accordance with paragraph (c) of the definition of “EEA Regulations” in Annex 1 of Appendix EU, the question of whether an applicant is a person with a Zambrano right to reside as defined in Appendix EU in respect of a period on or after 1 July 2021 is to be determined on the basis of the Immigration (European Economic Area) Regulations 2016 as they had effect immediately before they were revoked, and, where the context requires it, on the basis that they had not been revoked;
- g. Where a valid Zambrano application is made on or before 30 June 2021, the Secretary of State provides the applicant with a certificate of application confirming their

entitlement to work, study and rent a place to live, until final determination of their Zambrano application;

- h. The Secretary of State is considering the position in relation to the issue of similar certificates for applications made under Appendix EU on or after 1 July 2021, including in relation to Zambrano applications;
- i. Before expiry of the period referred to in e., above, where persons are encountered by Immigration Enforcement on or after 1 July 2021 who may be eligible for leave as potential Zambrano applicants under Appendix EU in light of the judgment, such persons will be provided with written notice giving them an opportunity to make a valid application under Appendix EU, normally within 28 days of the date of the written notice.

IT IS ORDERED BY CONSENT THAT:

1. The Claimant's application for further relief as set out in her skeleton argument dated 16 June 2021 is withdrawn.
2. The hearing listed for 17 June 2021 is vacated.
3. The Claimant's application for further quashing relief is stayed pending determination of the Defendant's application to the Court of Appeal for permission to appeal and, if permission to appeal is granted, determination of that appeal.
4. There shall be no order as to costs, save that there be a detailed assessment of the Claimant's costs for the purposes of public funding.
5. This order and the order of 9 June 2021 shall be appended to the judgment dated 9 June 2021 which shall be republished on the Bailii website.

Dated this 17th day of June 2021