



**Upper Tribunal  
(Immigration and Asylum Chamber)**

Appeal Number: UI-2022-001926  
[EA/06890/2021]

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 31 August 2022**

**Decision & Reasons Promulgated  
On 1 November 2022**

**Before**

**UPPER TRIBUNAL JUDGE McWILLIAM  
DEPUTY UPPER TRIBUNAL JUDGE METZER KC**

**Between**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Appellant

**and**

**MISS REGINA EDWINA WILLIAMS  
(ANONYMITY DIRECTION NOT MADE)**

Respondent

**Representation:**

For the Appellant: Ms S. Cunha, Home Office Presenting Officer

For the Respondent: unrepresented

**DECISION AND REASONS**

1. We shall refer to the Respondent as the Appellant as she was before the First-tier Tribunal. She is a citizen of Ghana. Her date of birth is 6 July 1948.
2. On 22 April 2022 the First-tier Tribunal (Judge S P J Buchanan) granted the SSHD permission to appeal against the decision of the First-tier Tribunal (Judge Shepherd) ("the Judge") to allow the Appellant's appeal against the decision of the SSHD dated 8 April 2021 to refuse her application under

the EU Settlement Scheme (EUSS). The application was made under the EUSS on the basis that the Appellant is a person with a “Zambrano right to reside” (Ruiz Zambrano v Office National de l'Emploi ( case C-34/09), [2012] QB 265, the decision of the Grand Chamber of the Court of Justice of the European Union (CJEU)).

3. The Judge heard evidence from the Appellant, her daughter Abena Atta Mensah and the Appellant’s granddaughter, Z. They live together in the UK. Z’s date of birth is 19 September 2004. She was aged 17 at the hearing before the First-tier Tribunal (and before us). The Judge found that the Appellant is Z’s primary carer. She stated as follows:-

“83. This is a very finely balanced situation and as above, the external evidence is extremely thin. Overall, I am just about persuaded on balance that [Z] would be unable to reside in the UK or in another EEA State if the Appellant left the UK for an indefinite period. It is in [Z’s] best interests to have continuity of care and this interest is best served by the Appellant remaining with her in the UK given I have found it would not be in [Z’s] best interests to leave the UK if the Appellant went. I accept that there are strong emotional ties between [Z] and the Appellant and that being separated will be difficult. It is a matter of choice for Ms Mensah whether she continues working in the manner which she does now and I agree that her work is not sufficient a reason for her to say that this is why [Z] would be compelled to go with the Appellant were she to leave. But this is nevertheless what she has been doing and forms the background as to why there is such a strong bond between the Appellant and [Z] and I find there is a situation of genuine dependency between the two.

84. I therefore find that [Z] would not be able to reside in the UK if the Appellant left the UK for an indefinite period, such that Regulation 16(5)(c) is not fulfilled.”

### **The Legal Background**

4. The Appellant made an application on 13 July 2020 under the EUSS (Appendix EU). The application was made on the basis that the Appellant has a Zambrano right which is recognised under the EUSS ( EU11 and EU14).

5. Annex A of Appendix EU defines a “person with a Zambrano right to reside” as follows:-

“A person who has satisfied the Secretary of State, including (where applicable) by the required evidence of a 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 Zambrano right to reside (before they then became a person who had a derivative or Zambrano right to reside) they were:

- (a) resident for a continuous qualifying period in the UK with a derivative right to reside by virtue of Regulation 16(1) of the EEA Regulations, by satisfying:

- (i) The criterion in paragraph (1)(a) of that Regulation; and
- (ii) The criteria in:
  - (aa) paragraph (5) of Regulation 16 of the EEA Regulations; or
  - (bb) paragraph (6) of that Regulation where that person's primary carer is, or (as the case may be) was, entitled to a derivative right to reside in the UK under paragraph (5), regardless (where the person was previously granted limited leave to enter or remain under paragraph EU3 of this Appendix as a person with a Zambrano right to reside and was under the age of 18 years at the date of application for that leave) of whether, in respect of the criterion in Regulation 16(6)(a) of the EEA Regulations, they are, or (as the case may be) were, under the age of 18 years; and
- (b) without leave to enter or remain in the UK, unless this was granted under this Appendix."

6. While the Immigration (European Economic Area) Regulations 2016 ("the 2016 Regulations) have been revoked, it can be seen from Annex A of Appendix EU that Reg 16 is relevant to applications and appeals under EUSS. The relevant part of Reg 16 for the purposes of this appeal read as follows:-

**"Derivative right to reside**

- 16.— (1) A person has a derivative right to reside during any period in which the person—
- (a) is not an exempt person; and
  - (b) satisfies each of the criteria in one or more of paragraphs (2) to (6).

...

- (5) The criteria in this paragraph are that—
- (a) the person is the primary carer of a British citizen ("BC");
  - (b) BC is residing in the United Kingdom; and
  - (c) BC would be unable to reside in the United Kingdom or in another EEA State if the person left the United Kingdom for an indefinite period.

...

...

- (7) In this regulation—
- (a) ...
  - (b) ...
  - (c) an "exempt person" is a person—
    - (i) who has a right to reside under another provision of these Regulations;
    - (ii) who has the right of abode under section 2 of the 1971 Act(1);

- (iii) to whom section 8 of the 1971 Act(2), or an order made under subsection (2) of that section(3), applies; or
- (iv) who has indefinite leave to enter or remain in the United Kingdom [F3(but see paragraph (7A))].

[F4(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).]

- (8) A person is the “primary carer” of another person (“AP”) if—
  - (a) the person is a direct relative or a legal guardian of AP; and
  - (b) either—
    - (i) the person has primary responsibility for AP’s care; o
    - (ii) shares equally the responsibility for AP’s care with one other person....
- (9) In paragraph (2)(b)(iii), (4)(b) or (5)(c), if the role of primary carer is shared with another person in accordance with paragraph (8)(b)(ii), the words “the person” are to be read as “both primary carers”.
- (10) Paragraph (9) does not apply if the person with whom care responsibility is shared acquired a derivative right to reside in the United Kingdom as a result of this regulation prior to the other person’s assumption of equal care responsibility.

...

- 7. The Appellant exercised her right of appeal pursuant to reg 3 of the Immigration (Citizens’ Rights Appeals) EU Exit Regulations 2020 (“the Exit Regulations 2020”). There is a ground of appeal available under Reg 8 (3) of the Exit Regulations 2020; namely that the decision was not in accordance with the Immigration Rules (IR), in this case Appendix EU.

### **The Grounds of Appeal**

- 8. The grounds of appeal drafted by Mr Deller assert that the Judge made a material error of law because she failed to:-
  - “give proper and focused consideration to the question of whether a 17 year old girl whose mother lives with her but works would in fact be compelled to leave the UK/EEA should her grandmother not be able to remain. While matters such as the best interests of children are relevant these must be approached with a more finessed approach than is present here. The Judge appears only by a fine margin to decide that the appeal succeeds and the doubts earlier expressed are not outweighed”.

### **Error of law**

- 9. There is no challenge to the finding of the Judge that the Appellant is Z’s primary carer and therefore satisfies Reg 16(5)(a) (and (16)(8)(b)(ii)) of the

2016 Regulations as required by Appendix EU (Annex A). The determinative issue for the Judge was whether Z would be *unable to remain* in the United Kingdom if the Appellant left the United Kingdom for an indefinite period, a requirement under reg 16 (5) (c). There has been much litigation concerning this requirement and what it means in the context of Zambrano carers. It is not necessary for us to grapple with because the evidence before the Judge was unequivocal: Z would remain in the United Kingdom with her mother should the Appellant leave. That was the evidence of what will happen in reality and not simply a hypothetical forecast of what could happen. The evidence did not support that the Appellant is a Zambrano carer. For this reason the decision of the Judge cannot stand. We set aside the decision.

10. We heard submissions from the parties relating to the remaking of the appeal having given an indication orally of our decision that there was a material error. The Appellant and her daughter were candid and open with the Tribunal. They did not seek to depart from their evidence before the First-tier Tribunal. Ms Mensah was keen to impress upon us the closeness of the relationship between Z and the Appellant; however, she confirmed that Z would stay in the United Kingdom with her should the Appellant have to leave. It follows that we must dismiss the appeal.
11. Ms Cunha raised a new argument at the hearing before us. She said that the Appellant was exempt with reference to 16(7)(c) of the 2016 Regulations. She accepted that it was a point not raised by Mr Deller in the grounds. She did not make an application to amend the grounds. She did not make an application to adjourn to allow the Appellant, a litigant in person, to engage with the issue. Ms Cunha relied on R (Akinsanya) v SSHD [2022] EWCA Civ 37, [2022] 2 WLR 681. The Court of Appeal found that as a matter of EU Law a Zambrano right to reside does not arise where a person holds leave to remain. We did not permit Ms Cunha to rely on the 'new' argument raised for the first time in oral submissions. We did not hear any detailed submissions on the issue. However, this Appellant does not have limited leave to remain or indefinite leave to remain. Our understanding is that she is an overstayer and therefore the issue raised by the SSHD so late in the day, has no bearing on this case. In any event, nothing turns on this, because this appeal cannot succeed for the reasons that we have given.
12. We were not impressed by the SSHD emailing the Tribunal at 7.15am seven cases, on the date of the hearing, many of which had no bearing on the case before the Tribunal and in raising, at the 11<sup>th</sup> hour, a new point which did not, in our view, have any relevance to the case before the Tribunal.
13. We had sympathy with the Appellant and her family. They have been straightforward before the Tribunal. We note that the findings of the Judge are not challenged in respect of the relationship between the Appellant and Z. The finding that the Appellant is a primary carer for Z was not challenged. The Judge accepted that the Appellant shared responsibility

for Z equally with Ms Mensah and that she provided practical care and Ms Mensah provided financial care. She accepted that the Appellant and Z have a close relationship and that it would have a detrimental impact on Z should she be separated from the Appellant for a length of time. The Judge took into account that Z had lived with both her mother and grandmother for the last six years or so and had previously lived with the Appellant in Ghana for two years when she was young. At [79] the judge stated as follows:-

“79. [Z’s] best interests require safe and effective care and stability and continuity of social and educational provision. I find these interests are best served by [Z] remaining in the UK, as otherwise it would be a severe disruption to the continuity of her social and educational provision. She was born in the UK and has not lived in Ghana since she was very young. She is of an age where she is likely to have formed her own private life in the UK outside her immediate family. As it is in her best interests to remain in the UK, it would not be in her best interests to go with the Appellant if the Appellant were removed to Ghana.”

14. The Judge was entitled to reach these findings on the evidence. However, he was not entitled to conclude that Reg 16 (5)(c ) of the 2016 Regs was satisfied when the evidence did not support this.
15. The decision to allow the Appellant’s appeal is set aside.
16. The appeal is dismissed under the Immigration Rules (Appendix EU).

Signed            Joanna McWilliam  
2022

Date    20   September

Upper Tribunal Judge McWilliam