



**IN THE UPPER TRIBUNAL**  
**IMMIGRATION AND ASYLUM**  
**CHAMBER**

Case No: UI-2022-003822

First-tier Tribunal No:  
EA/01970/2022

**THE IMMIGRATION ACTS**

**Decision & Reasons Issued:  
On 4 August 2023**

**Before**

**UPPER TRIBUNAL JUDGE SMITH**

**Between**

**OLUWABUSAYO ADEBOLA ONIYILO  
(NO ANONYMITY DIRECTION MADE)**

Appellant

**and**

**SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellant: Ms Oniyilo appeared in person

For the Respondent: Mr T Lindsay, Senior Home Office Presenting Officer

**Heard at Field House on Wednesday 26 July 2023**

**DECISION AND REASONS**

1. By a decision promulgated on 20 January 2023 (“the Error of Law Decision”) (re-sent on 27 June 2023), following the Secretary of State’s appeal, I found an error of law in the decision of First-tier Tribunal Judge Galloway itself promulgated on 22 June 2022 allowing the Appellant’s appeal against the Respondent’s decision dated 10 February 2022 refusing her application under the EU Settlement Scheme (“EUSS”) as a person with a “Zambrano” right to reside. The Error of Law Decision is appended hereto for ease of reference.
2. In consequence of the error of law found, I set aside Judge Galloway’s decision and gave directions for a re-hearing of the appeal. However, I

also stayed the re-hearing pending the outcome of this Tribunal's consideration of similar cases which were intended to give guidance on the law in this area. As it was, the two cases were de-linked and only one of those cases has so far been heard. That resulted in a decision of myself sitting with Upper Tribunal Judge Stephen Smith issued on 20 April 2023 in the case of Secretary of State for the Home Department v Ms Sylvia Sonkor (case number: UI-2022-001129) ("Sonkor"). Although the decision in Sonkor was not ultimately reported, given the relevance of it to this case as anticipated by the directions given in this appeal, I permitted the Respondent's reliance on that decision at the hearing of this appeal. I provided the Appellant with a copy at the hearing.

3. Mr Lindsay submitted that this case was on all fours with the case of Sonkor and therefore that the Appellant's appeal should be dismissed. The Appellant argued that the Respondent had raised in her decision under appeal only an issue about whether her children would be required to leave the United Kingdom if she left as her partner is in the UK with settled status. She submitted that, as that issue had been found in her favour (a finding which I preserved on the Respondent's concession in the Error of Law Decision), she ought to succeed.
4. As I pointed out to the Appellant, however, I could only determine the appeal in her favour if she were able to show that the Respondent's decision to refuse her application under the EUSS were contrary to the immigration rules which apply to that scheme or contrary to the agreement between the UK and EU which followed the UK's exit from the EU ("the Withdrawal Agreement"). Those are the only two grounds which are available to her. If she cannot succeed on those grounds, I cannot allow her appeal.
5. As I also pointed out to the Appellant, whether or not she might have been entitled to a "Zambrano" right to reside under the previous regime (that is to say the Immigration (European Economic Area) Regulations 2016 - "the EEA Regulations") on the facts of her case is not relevant. Her application was under the EUSS. The EEA Regulations were revoked subject to transitional provisions on 31 December 2020.
6. The EUSS rules and regulation 16 of the EEA Regulations ("Regulation 16") which has some relevance to the EUSS rules are set out at [11] and [12] of the Error of Law Decision and I do not repeat what is there said. The issue is not whether the Appellant could have satisfied Regulation 16 had she made an application prior to 31 December 2020 but whether she could satisfy the EUSS rules when she made her application in May 2021.
7. Under Regulation 16, the Appellant would have been precluded from claiming a "Zambrano" right to reside only if she had indefinite leave to remain which she did not have. However, under Appendix EU to the immigration rules, she was precluded from claiming a "Zambrano" right to reside if she had any leave to remain unless that were granted under Appendix EU.

8. That distinction was, as I pointed out at [15] to [18] of the Error of Law Decision not without “legal controversy” because of that changed position. However, as I indicated at [18] of the Error of Law Decision, the Respondent confirmed following the Court of Appeal’s judgment in Secretary of State for the Home Department v Akinsanya [2022] EWCA Civ 37 (“Akinsanya”), that she had intended to change the position so that any leave to remain would be sufficient to preclude an applicant from obtaining a derivative “Zambrano” right to reside. That confirmation is and was fatal to the Appellant’s case.
9. The facts in Sonkor were, as I pointed out to the Appellant, essentially on all fours with her case. The application was made under the EUSS, albeit that Ms Sonkor could at the relevant time also have made an application under the EEA Regulations. Ms Sonkor had leave to remain in the past albeit her leave to remain had expired by the time of the Respondent’s refusal (unlike the present case where at all times the Appellant has had leave to remain under Appendix FM).
10. The Appellant faintly prayed in aid a reliance on the Withdrawal Agreement. I sought to explain to her that the Withdrawal Agreement does not provide rights to “Zambrano” carers. Such persons are not in personal scope of that agreement (see Article 10 of the Withdrawal Agreement). That is confirmed at [7] of the decision in Sonkor. As was said by the Court of Appeal in Akinsanya, the CJEU “does not regard Zambrano rights as arising as long as domestic law accords to Zambrano carers the necessary right to reside”. Provided an individual has a domestic law right to remain, therefore, there is no EU law right which could be protected by the Withdrawal Agreement.
11. The decision in Sonkor also confirms what I say above concerning the Appellant’s inability to meet the rules in Appendix EU. The decision in Sonkor is not binding on me, particularly since it is an unreported decision. However, I concur with the reasoning in that decision (understandably since I was on the panel which decided it). Rather than provided a further unduly lengthy expose of the legal position, in reliance on what is said in that decision as well as for the reasons given in the Error of Law Decision and my summary of the position above, I dismiss the Appellant’s appeal.

### **Notice of Decision**

**The Respondent’s decision under appeal is in accordance with Appendix EU to the immigration rules and is not contrary to the Withdrawal Agreement. The Appellant’s appeal is therefore dismissed.**

L K Smith

**Upper Tribunal Judge Smith**

Judge of the Upper Tribunal  
Immigration and Asylum Chamber

**27 July 2023**

**APPENDIX: ERROR OF LAW DECISION**



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

Appeal Number: UI-2022-003822  
[EA/01970/2022]

**THE IMMIGRATION ACTS**

**Heard at Field House, London**

**Determination  
promulgated**

**On Friday 2 December 2022**

**...20  
2023.....**

**January**

**Before  
UPPER TRIBUNAL JUDGE SMITH**

**Between**

**SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Appellant

**and**

**OLUWABUSAYO ADEBOLA ONIYILO**

Respondent

**Representation:**

For the Appellant: Mr C Avery, Senior Home Office Presenting Officer  
For the Respondent: Ms Oluwabusayo appeared in person

**DECISION AND DIRECTIONS**

1. This is an appeal by the Secretary of State. For ease of reference, I refer to the parties as they were in the First-tier Tribunal. The Respondent appeals against the decision of First-tier Tribunal Judge Galloway promulgated on 22 June 2022 (“the Decision”) allowing the Appellant’s appeal against the Respondent’s decision dated 10 February 2022 refusing her application under the EU Settlement Scheme (“EUSS”) as a person with a “Zambrano” right to reside.
2. The Appellant is a national of Nigeria. She came to the UK as a visitor with leave which expired in February 2018. She made an application to remain relying on her family life in November 2019. She was granted thirty months’ leave to remain on 26 March 2020 due to her

relationship with her British citizen partner and children. On 12 May 2021, she made the application which was refused by the decision under appeal.

3. The Respondent did not in her decision accept that the Appellant is the primary carer of a British citizen child because she shares care with her partner. That point is no longer pursued. However, the Respondent also refused the application because the Appellant has and had both at the time of the Respondent's decision, the hearing before Judge Galloway and the Decision leave to remain in the UK based on her Article 8 rights. She would not therefore be compelled to leave the UK. Moreover, the Respondent contends that the Appellant cannot succeed under the immigration rules which apply (Appendix EU).
4. Judge Galloway correctly set out the Respondent's position at [5] of the Decision. As she there noted, the point taken in relation to whether the Appellant could be a primary carer where she shares care with the other parent arises from regulation 16(5) of the Immigration (European Economic Area) Regulations 2016 ("the EEA Regulations"). As she also noted, however, the Respondent also refused the application because the Appellant could not meet paragraph EU11 of Appendix EU.
5. Thereafter, Judge Galloway considered the position under regulation 16(5) of the EEA Regulations ("Regulation 16") and came to a conclusion in that regard at [16] of the Decision. However, she did not refer again to Appendix EU. She allowed the appeal under the EEA Regulations. The right of appeal however arose under regulation 3 of the Immigration (Citizens' Rights Appeals) (EU Exit) Regulations 2020 ("the 2020 Regulations"). The EEA Regulations had been revoked by the time of the Appellant's application and the Respondent's decision (subject only to savings for applications made prior to 31 December 2020). The only grounds of appeal available to the Appellant are set out in regulation 8 of the 2020 Regulations. Those are that the Respondent's decision is not in accordance with the immigration rules under which it was made (therefore Appendix EU) or is not in accordance with the agreement between the UK and EU relating to the UK's withdrawal from the EU ("the Withdrawal Agreement").
6. The Respondent appeals the Decision on the basis that the Judge failed to consider the relevant grounds, specifically whether the decision breached the rules under EUSS (Appendix EU). Since the Respondent's decision did not engage any rights under the Withdrawal Agreement, the Respondent contends that the only relevant ground was whether the decision was in accordance with Appendix EU.
7. Permission to appeal was granted by First-tier Tribunal Judge Seelhoff on 9 August 2022 in the following terms so far as relevant:

“..2. The grounds assert that the Judge erred in that he considered and allowed the appeal under the EEA Regulations when the underlying application was made under Appendix EU of the Immigration Rules and the grounds of appeal are limited to those under the Immigration (Citizens’ Rights Appeals) (EU Exit) Regulations 2020.

3. The grounds disclose an arguable error of law and permission is granted.”

8. The matter comes before me to decide whether the Decision contains a material error of law. If I find it does, I then have to decide whether to set aside the Decision. If I do so, it is then necessary to consider whether to re-make the decision in this Tribunal or remit the appeal to the First-tier Tribunal for that purpose.
9. I had before me a core bundle of documents relating to the appeal as well as the Respondent’s and Appellant’s bundle before the First-tier Tribunal. I do not need to refer to the documents as the issue is one of pure law. Mr Avery updated the factual position in relation to the Appellant’s leave to remain. That has been extended to May 2025 based on the Appellant’s Article 8 rights.
10. The Appellant appeared in person. This is, as I explained to her, a complex and novel area of law. I did not therefore expect her to make oral submissions in response to the Secretary of State’s arguments. I indicated however that if I were to find in the Secretary of State’s favour in relation to error of law, I would explain in writing in detail why that was so to enable her to take legal advice about her options before going on to reconsider the appeal. Having heard submissions from Mr Avery, I indicated that I would reserve my decision and issue that in writing which I now turn to do.

## **DISCUSSION AND CONCLUSIONS**

11. I begin with the provisions of Appendix EU. The Respondent refused the Appellant’s application, inter alia, because she did not meet the definition of a “person with a Zambrano right to reside” in Annex 1 to Appendix EU. That definition paragraph reads as follows so far as relevant:

“a person who has satisfied the Secretary of State..., 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  
...; and

(b) without leave to enter or remain in the UK, unless this was granted under this Appendix.”

12. Regulation 16 reads as follows so far as relevant to my consideration:

“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).

(2) ...

(3) ...

(4) ...

(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.

(6) ...

(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;

(iii) to whom section 8 of the 1971 Act, or an order made under subsection (2) of that section, applies; or

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

(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; or

(ii) shares equally the responsibility for AP’s care with one other person who is not an exempt person.”

13. Paragraph (a) of the definition in Annex 1 to Appendix EU turns largely on Regulation 16. The Respondent does not contend that the Decision so far as it concerns Regulation 16(5) is in error. It is for that reason that the Respondent says in her grounds of appeal (as the Appellant pointed out) that “the Judge dealt in an open and properly reasoned way with the issue raised in the reasons for refusal letter, that the presence of the father meant that the British child would not have to leave the UK if the appellant did”. In other words, the Respondent now accepts that the Appellant can satisfy the definition of a primary carer notwithstanding that she shares care with her partner and the children’s father.

14. As the Respondent goes on to point out, however, that is not the end of the matter because of what is said at (b) of the definition. The Appellant is not “without leave to ...remain in the UK”. She has been granted leave other than under Appendix EU. On the face of it, therefore, she cannot meet the definition in Annex 1 to Appendix EU.



15. In fairness to the Appellant, however, I should point out that the definition in Annex 1 to Appendix EU has not been without some legal controversy. Mr Avery addressed me briefly in this regard and I set out below what that controversy has been and how it has moved on.
16. I begin with the case of Akinsanya v Secretary of State for the Home Department (“Akinsanya”). In the Administrative Court ([2021] EWHC 1535 (Admin), Mostyn J held that, when including within the definition of “a person with a Zambrano right to reside” in Appendix EU the requirement that a person should not have leave to enter or remain in the UK, the Secretary of State had erred both under EU law and in her understanding of Regulation 16. The Judge concluded that both EU law and Regulation 16 would only act as a barrier to a Zambrano right to reside where an individual had indefinite leave to remain.
17. The Secretary of State appealed Mostyn J’s judgment which came before the Court of Appeal on 7 December 2021. By its judgment dated 25 January 2022 ([2022] EWCA Civ 37) the Court allowed the Secretary of State’s appeal so far as that concerned the position under EU law ([57] of the judgment). However, the Court went on to point out that, when framing the definition in Annex 1 to Appendix EU, the Secretary of State may have intended to reflect the pre-existing position under Regulation 16. Accordingly, the Court went on to consider what was the pre-existing position under Regulation 16. This argument turned on the distinction between the reference to “indefinite leave” in the definition under Regulation 16(7) and the reference to “leave to enter or remain” in the Annex 1 definition. As the Court pointed out, it was always open to the Secretary of State to go beyond what EU law requires when formulating the position in domestic law. If that is what she had intended when drafting Regulation 16(7) then the definition in Appendix EU would not reflect the pre-existing position. The Court concluded at [66] of the judgment that “whatever the contextual considerations, the language of regulation 16(7)(c)(iv) is simply too clear to allow it to be construed as covering persons with limited leave to remain”. The conclusion in Akinsanya therefore turned on the Court’s interpretation of Regulation 16(7).
18. Broadly, the outcome of Akinsanya was that the Secretary of State agreed to reconsider the relevant provisions of Appendix EU. According to the Respondent’s grounds of appeal in this case, the review of the provisions was completed and announced on 13 June 2022 immediately prior to the hearing of this appeal. The Secretary of State confirmed that she intended to continue with the definition as set out in Annex 1 to Appendix EU. In other words, if an applicant had leave to remain in the UK granted other than under Appendix EU, that would be a barrier to a right to remain under Appendix EU.

19. As I have already pointed out, the Judge could only allow the appeal on the basis that the Respondent's decision was not in accordance with Appendix EU or not in accordance with the Withdrawal Agreement. The Withdrawal Agreement was not mentioned and therefore the Judge could only have allowed the appeal on the basis that it was not in accordance with Appendix EU. It was not open to her to allow the appeal on the basis that the Respondent's decision was not in accordance with the EEA Regulations (which were revoked prior to the Appellant's application and the Respondent's decision). The Appellant confirmed when I asked that she had never made an application under the EEA Regulations.
20. The Judge therefore allowed the appeal on an incorrect basis and one which was not open to her. Moreover, on the face of the definition in Annex 1 to Appendix EU, the Respondent's decision was in accordance with that definition. The Court of Appeal in Akinsanya decided that the definition in Annex 1 to Appendix EU was (or might be) unlawful only because the Secretary of State may have misinterpreted the position under Regulation 16(7) of the EEA Regulations. The Secretary of State has now indicated that she is maintaining her position and the definition in Appendix EU. Although I set aside in consequence the Decision so far as it concerns compliance with Appendix EU, I preserve the findings made that the Appellant satisfies Regulation 16(5) as the primary carer of an EU citizen (British national child).
21. I do not go on to re-make the decision. I indicated to the Appellant that I would give her the opportunity to consider her position before any re-hearing of the appeal. I have given directions for a further hearing for that purpose. However, I have for the time being stayed this case pending hearings in two other appeals which have been conjoined for hearing before a panel to consider the "Akinsanya" issue following the Respondent's review of her position. Particularly since the Appellant in this case is in person, she may wish to see what the Tribunal has to say having considered those two cases. If not, it is open to her to apply for an earlier hearing. I emphasise as I did at the hearing that there is currently no prejudice to the Appellant in relation to an adverse (or delayed) determination of her appeal under Appendix EU as her leave to remain continues until May 2025 and will be unaffected by the outcome of this appeal.

## **DECISION**

**The Decision of First-tier Tribunal Judge Galloway promulgated on 22 June 2022 involves the making of errors of law. I therefore set aside the Decision. I preserve the finding that the Appellant meets the definition of a primary carer under regulation 16(5) of the Immigration (European Economic Area) Regulations 2016. I make the following directions for a resumed hearing.**

**DIRECTIONS**

- 1. The appeal is to be listed for a re-making hearing before me (on a face-to-face basis) on the first available date after the promulgation of the Tribunal's decision in SONKOR and AYoola (appeal references - UI-2022-001129 and UI-2022-003001). Time estimate ½ day. No interpreter required.**
- 2. If the Appellant seeks a hearing prior to the determination of those appeals, she may apply to the Tribunal.**

Signed: L K Smith  
Upper Tribunal Judge Smith

Dated: 5 December 2022