



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-005765

First-tier Tribunal No:
EA/07720/2021

THE IMMIGRATION ACTS

**Decision & Reasons Issued:
On 6 June 2023**

Before

UPPER TRIBUNAL JUDGE RINTOUL

Between

The Secretary of State for the Home Department

Appellant

and

**Alexander Osinubi
(NO ANONYMITY ORDER MADE)**

Respondent

Representation:

For the Appellant: Mr Terrell, Senior Home Office Presenting Officer
For the Respondent: Mr S Cox, Bail for Immigration Detainees

Heard at Field House on 28 April 2023

DECISION AND REASONS

1. The Secretary of State appeals with permission against the decision of First-tier Tribunal Judge Atreya, promulgated on 16 May 2022, allowing Mr Osinubi's appeal against the decision of the Secretary of State made on 20 May 2021, refusing his application for indefinite leave to remain in the United Kingdom under Appendix EU of the Immigration Rules.

2. The respondent is a citizen of Nigeria born 2 June 1969. He is the primary carer for his four children, all of whom are under 18, and who are all British citizens. His wife, and mother of the children, Ms Osinubi is also a British citizen.
3. The respondent was granted discretionary leave to remain for three years on 17 March 2011. An application for an extension of that leave was refused without a right of appeal on 14 March 2014.
4. On 17 July 2014, the appellant was convicted of various offences and sentenced to 30 months' imprisonment. Subsequent to that, on 28 August 2016, the respondent made a deportation order but not under the EEA Regulations. Materially, on 19 March 2021 Mr Osinubi applied for settled status under Appendix EU, a decision which was refused the following day.
5. The Secretary of State's case, as set out in the refusal letter, is that the respondent had not shown that he was an "person with a Zambrano right to reside" as he did not meet the relevant requirements set out in the Immigration (European Economic Area) Regulations 2016 because he had not demonstrated that one of his children, would be unable to remain in the United Kingdom if he left. That, in turn was because he could only be considered as a person with a Zambrano right to reside where that child would be unable to reside in the United Kingdom or the EEA if he were required to leave to United Kingdom for an indefinite period and, that in order to demonstrate that, as he would have to show that he would be required to leave the United Kingdom as he had no other means to remain lawfully in the United Kingdom as his primary carer. She concluded that that was so as a Zambrano right to reside would be refused where there is a realistic prospect that an application for leave to remain under Appendix FM to the Immigration Rules or otherwise relying on Article 8 of the Human Rights Convention would succeed.
6. It was also noted in that letter that the respondent has had three children who are now British citizens and thus an application under Appendix FM or Article 8 stands a realistic prospect of an application or claim which succeeds. No mention is made of the extant deportation order.

The Hearing Before the First-tier Tribunal

7. The Secretary of State was not represented before the First-tier Tribunal. She had, however, provided a review in response to Mr Osinubi's ASA in which it was submitted that the decision of the High Court in Akinsanya was wrongly decided and that a derivative right arises only where an applicant has no other means to remain lawfully in the United Kingdom.
8. Subsequent to that, the Court of Appeal gave its handed down decision in SSHD v Akinsanya [2022] EWCA Civ 37. The judge concluded [30] that Mr Osinubi had not had leave for the past five years and was in a different position to the appellant in Akinsanya. She concluded that the possibility of being granted leave did not bring to an end to a "Zambrano" right and that he had met the criteria in Regulation 16(5) of the EEA Regulations on

31 December 2020 and for a continuous period of five years was a Zambrano carer. She observed also [38] that the Secretary of State had not argued that the historic deportation order fell within the special definition of deportation order in Appendix EU and that the Secretary of State had not contended the respondent had leave to remain during the relevant continuous qualifying period.

9. The Secretary of State sought permission to appeal on the grounds that:

The Judge of the First-tier Tribunal has made a material error of law in the Determination. No statutory basis has been identified under which this appeal could have been allowed by reference to an available ground of appeal; the judge misconstrues the practical effect of the decision of the Court of Appeal in Akinsanya; and misunderstands the effect of a pending deportation order made under section 32(5) of the 2007 Act, the revocation of which has not been sought and which alone would invalidate any leave to remain granted while it remains in force.

GROUND ONE: NO STATUTORY BASIS TO ALLOW APPEAL

The appeal lay against a refusal to grant leave to remain under the EU Settlement Scheme and could be advanced on two grounds – that the decision was not in accordance with Scheme rules or that rights were breached under the Withdrawal Agreements. Neither applies here. Although the net effect of the proceedings in Akinsanya is that a review is underway of the EU Settlement Scheme rules as they affect derivative rights of residence under regulation 16, the rules were not quashed and remain in place. Both the realistic prospect of obtaining leave on another basis and the fact of an existing deportation order act against the application (and consequently the appeal) succeeding “under the rules”. No Withdrawal Agreement rights exist to be breached.

GROUND TWO: LACK OF PROPER REGARD TO THE EFFECT OF AN EXISTING DEPORTATION ORDER

The Judge holds that the existing DO, made under section 32(5) of the 2007 Act, does not fall within the definition of “deportation order” in Appendix EU as it concerns conduct before the specified date and has not had regard to public policy considerations. Whereas this may on careful reading rule out reliance on it for mandatory refusal under paragraph EU15, (which was not done) it does not alter the fact that no leave can be granted until the DO is revoked and no application for this was made.

The Secretary of State seeks the setting aside of the determination for remaking. The situation will be kept under review in the light of the emerging new policy following Akinsanya.

10. As reformulated by Mr Terrell, the grounds put forward two propositions:-

- (i) though the judge had, in concluding that the respondent fell within the terms of Regulation 16(5) of the EEA Regulations, given the possibility that he would obtain leave; and

- (ii) that the judge could not allow the appeal given that Section 5 of the Immigration Act 1971 prevented the Secretary of State from granting leave to someone in respect of whom a deportation order was in place; and, the leave granted when such an order was in place, was invalid. Further, the Secretary of State was under a duty imposed by Section 32(5) to make a deportation order in respect of the respondent.

The Law

11. As at the date of decision, Appendix EU defined “a person with a Zambrano right to reside materially as follows:

“a person who has satisfied the Secretary of State . . . that, by the specified date [i.e. 31 December 2020 at 11 pm], they are (and for the relevant period have been) . . . :

(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 (l)(a) of that regulation; and

(ii) the criteria in:

(aa) paragraph (5) of regulation 16 of the EE A Regulations;

. . . and

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

12. The effect of Regulation 3 of the Citizens’ Rights (Application Deadline and Temporary Protection) (EU Exit) Regulations 2020 (“the Transitional Protection Regulations”) continued the EEA Regulations in force until 30 June 2021 in relation to persons lawfully resident in under the EEA Regulations as at 31 December 2020 unless that person had been granted leave to remain under Appendix EU. Further, Regulation 4 of the Transitional Protection Regulations continued the EEA Regulations in force further for any person with a pending application under Appendix EU made prior to 30 June 2021 until that application was granted or, if refused, any appeal rights were exhausted.

13. It therefore follows that under Appendix EU the question of whether a person met paragraph (a) of the definition of “person with a Zambrano right to reside” is to be determined according to the EEA Regulations as they had effect as at 31 December 2020, which is as follows:

16 Derivative right to reside

(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 an EEA State if the person left the United Kingdom for an indefinite period.

14. The sole basis on which it was put to the judge that the respondent, Mr Osinubi, did not meet the requirements of Regulation 16(5) were related to the possibility of him obtaining leave in the future. It was not, for example, said elsewhere in the refusal letter that this was prevented by the extant deportation order or, for example, that he did not meet the definition of primary carer, nor were those points put to Judge Atreya
15. Given the observations of the Court of Appeal in Akinsanya at [56] relying on the decision of Elias LJ in Sanneh v SSWP [2015] EWCA Civ 49 at [169]. It follows that the Zambrano right had indeed crystallised and that accordingly, requirements for Regulation 16(5) were met. It follows further from the decision in Akinsanya that the Secretary of State’s interpretation of being required to leave as set out in Regulation 16(5) is simply wrong.
16. I note, as an aside, at this point that it is also the Secretary of State’s case that she is compelled to remove the respondent by the existence of a deportation order and that she cannot grant leave to the respondent until that deportation order is revoked. That, in turn, is at odds with her argument with what is said in the refusal letter, that is, that there is a realistic prospect of Mr Osinubi being granted leave to stay.

Ground 2

17. Section 5 of the Immigration Act 1971 provides, so far as is relevant, as follows:

Procedure for, and further provisions as to, deportation.

(1)Where a person is under section 3(5) or (6) above liable to deportation, then subject to the following provisions of this Act the Secretary of State may make a deportation order against him, that is to say an order requiring him to leave and prohibiting him from entering the United Kingdom; and a deportation order against a person shall invalidate any leave to enter or remain in the United Kingdom given him before the order is made or while it is in force.

(2)A deportation order against a person may at any time be revoked by a further order of the Secretary of State, and shall cease to have effect if he becomes a British citizen.

18. It is of note that in Appendix EU the definition of “deportation order” is specifically and carefully drafted. It provides as follows:

Deportation order [means]:

as the case may be:

(a) an order made under section 5(1) of the Immigration Act 1971 by virtue of regulation 32(3) of the EEA Regulations; or

(b) an order made under section 5(1) of the Immigration Act 1971 by virtue of section 3(5) or section 3(6) of that Act in respect of:

(i) conduct committed after the specified date; or

(ii) conduct committed by the person before the specified date, where the Secretary of State has decided that the deportation order is justified on the grounds of public policy, public security or public health in accordance with regulation 27 of the EEA

Regulations, irrespective of whether the EEA Regulations apply to the person (except that in regulation 27 for “with a right of permanent residence under regulation 15” and “has a right of permanent residence under regulation 15” read “who meets the requirements of paragraph EU11, EU11A or EU12 of Appendix EU to the Immigration Rules”; and for “an EEA decision” read “a deportation decision”); or

(c) an order made under section 5(1) of the Immigration Act 1971 by virtue of regulation 15(1)(b) of the Citizens’ Rights (Frontier Workers) (EU Exit) Regulations 2020 in addition, for the avoidance of doubt, (b) includes a deportation order made under the Immigration Act 1971 in accordance with section 32 of the UK Borders Act 2007

19. It is evident from this, given the structure of this definition, and the provision that a “domestic” deportation order will only meet this definition if it was made under, in effect EU powers, it must necessarily follow the Secretary of State was allowing for the possibility that a person against whom there was an extant deportation order, could meet the requirements to be granted leave under Appendix EU. That position is reinforced by the disapplication at the beginning of Appendix EU of all the other definitions in the Immigration Rules, which includes, the type of suitability requirements set out in Appendix FM which would prevent Mr Osinubi from obtaining leave to remain under Appendix FM.

20. The Secretary of State can, of course, conclude that an individual’s Article 8 rights are such that they formed Exception 1 in Section 33 of the UK Borders Act. It is also open to her, of own volition, to revoke a deportation order. Whilst that is a step necessary to a grant of leave, there appears to be no proper basis in which it could be said that that is a requirement for somebody to meet the requirements of Appendix EU. Given the observations set out above, the Secretary of State must have been aware that this could arise and that a deportation order would have to be revoked before granting leave under Appendix EU. Further, the ground of appeal as set out in the Immigration (Citizens’ Rights Appeals) (EU Exit) Regulations 2020 provides, as far as it relates to this case, this:

8.—(1) An appeal under these Regulations must be brought on one or both of the following two grounds.

(2) The first ground of appeal is that the decision breaches any right which the appellant has by virtue of—

(a) Chapter 1, or Article 24(2) or 25(2) of Chapter 2, of Title II of Part 2 of the withdrawal agreement,

...

(3) The second ground of appeal is that—

(a) where the decision is mentioned in regulation 3(1)(a) or (b) or 5, it is not in accordance with the provision of the immigration rules by virtue of which it was made;

(b) where the decision is mentioned in regulation 3(1)(c) or (d), it is not in accordance with residence scheme immigration rules;

...

(4) But this is subject to regulation 9.

21. There is simply a reference to the relevant Rules; no other considerations are permitted. The ground of appeal is relatively narrow but, there is no realistic way in which it could be concluded that this is subject to a proviso that an appeal can only be allowed if the Secretary of State does not have to take some further step.
22. It is inevitable that when an appeal is allowed on the basis that the decision was not in accordance with the Immigration Rules that further steps have to be taken in order to issue leave to enter or remain. These may include the revocation of a deportation order. But the effect of a decision that the decision is not in accordance with the Immigration Rules does not result in a requirement to grant leave. How and in what manner that is done is a matter for the Secretary of State.
23. Accordingly, for these reasons, I find the decision of the First-tier Tribunal did not involve the making of an error of law. Further, and regrettably, it is difficult to see how the grounds as drafted gave rise, even arguably, to an error of law, even when reformulated by Mr Terrell.

Notice of Decision

The decision of the First-tier Tribunal did not involve the making of an error of law and I uphold it.

Signed

Date:

19 May 2023

Jeremy K H Rintoul
Judge of the Upper Tribunal
Immigration and Asylum Chamber

