



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

Case No: UI-2023-002628

First-tier Tribunal No: EA/00067/2023

**THE IMMIGRATION ACTS**

**Decision & Reasons Issued:**

15<sup>th</sup> September 2023

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE SKINNER**

**Between**

**SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Appellant

**and**

**SALLY MAAME EFUA ANDREWS**  
**(NO ANONYMITY ORDER MADE)**

Respondent

**Representation:**

For the Appellant: Mr E. Terrell, Senior Home Office Presenting Officer  
For the Respondent: Ms Andrews in person

**Heard at Field House on 5 September 2023**

**DECISION AND REASONS**

**Introduction**

1. By a decision promulgated on 16 May 2023 (“the Decision”), First-tier Tribunal Judge Hosie (“the Judge”) allowed an appeal brought by Ms Andrew, a citizen of Ghana, under Regulation 8 of the Immigration (Citizens’ Rights Appeals) (EU Exit) Regulations 2020, against a decision of the Secretary of State dated 31 October 2022 refusing her application for leave to remain under the EU Settlement Scheme (“the EUSS”).
2. The basis of Ms Andrews’ application is that she is the mother of two British national children, who (it is not disputed) would be required to leave the EU if she were removed to Ghana and that she is accordingly entitled to indefinite leave to remain under the EU Settlement Scheme as a Zambrano carer.

3. Ms Andrews explained to me at the hearing that she had made an application under the EUSS for indefinite leave because of the cost and stress of having to apply to extend her leave under Appendix FM every 30 months. She movingly expressed her desire to be able to spend the money she has to spend on her immigration applications on her children and to contribute to society in other, and as she would perceive it, better ways. I have no reason to doubt that the cost of applying for status in the UK is a real burden on Ms Andrews. I explained to her however that my role is to examine only whether the decision of the Judge involved the making of an error of law. It is to that question that I now turn.

### **The SSHD' refusal and the FTT's decision**

4. The basis of the Secretary of State's refusal was that *"at the specified date/ during the period set out above, you did not satisfy paragraph (b) of the definition of a 'person with a Zambrano right to reside' as, for the purposes of a continuous qualifying period in the UK as a person with a Zambrano right to reside, an applicant cannot rely on any period in which they held non-Appendix EU leave. Our records show that you were granted leave to enter or remain in the UK on 10 November 2020 valid until 06 June 2023, under appendix FM."*
5. The heart of the Judge's reasoning on appeal was set out in paragraphs 17-19 of the Decision, as follows:

"17. The Respondent claims that the Appellant does not satisfy Appendix EU11(3). Specifically, the Respondent claims that the Appellant does not meet condition (b) which is the five-year continuous qualifying period. It is not disputed that the Appellant's residence predates 31 December 2020. Nor is it disputed that the Appellant is their primary carer and resides with them in the UK with a valid residence permit which has been extended. It is not disputed that the children could not remain in the UK as British citizens without their primary carer, the Appellant. No suggestion is made that there has been a supervening event. The existence of a derivative right of residence is not disputed or the fact that she has limited leave to remain.

18. I bore in mind the cases of Akinsanya and Patel. The Appellant has limited leave to remain and is not to be regarded as an exempt person under Regulation 16 of the EEA Regulations 2016.

19. The Appellant has provided evidence in the form of P60s between 2017 and 2021; banks statements for 2022; medical appointments and letters regarding Harriet since 2016; and school reports; council tax bills and utility bills. This documentation is evidence that the Appellant's residence in the UK for a five-year period prior to her application i.e. Between 15 November 2014 and 6 April 2022. This evidence was not successfully challenged. The Respondent has not given careful examination to the documentation provided and the documentation which she must already have had on file in relation to the family. The Appellant therefore meets EU 11(3) and her appeal is allowed."
6. Thus the Judge appears to have considered the Secretary of State's decision to have been based on a non-acceptance that Ms Andrews had been in the UK for the relevant 5-year period of time.

## Appeal to the Upper Tribunal

### Grounds, permission, and documents filed in response

7. The Secretary of State's grounds of appeal contend, in summary, that the Judge failed to apply the rule that a person seeking leave under the EUSS as a Zambrano carer cannot have leave to remain in another capacity at the relevant time(s). She also contended that the Judge had had regard to legally irrelevant considerations and/or re-written the EUSS and/or sought to read into the EUSS the Court of Appeal's decision in Akinsanya v SSHD [2022] EWCA Civ 37.
8. Permission to appeal was granted by Judge Cartin on 12 June 2023. She considered that "In view of the fact that the ground of appeal open to the Appellant is that the decision is not in accordance with the EUSS rules and those rules define a 'Zambrano carer' as not including a person who has limited leave to remain, the Judge arguably erred in law in finding that the Appellant met the rules."
9. In preparation for the hearing Ms Andrews filed a skeleton argument, a witness statement, various documents related to her children and in particular their health, as well as two legal authorities. As the underlying facts are not in dispute, I need not refer to the witness statement or documents relating to her children.

### The Legal Framework

10. The version of Appendix EU in force at the time of the Secretary of State's refusal provided as follows.
11. So far as relevant paragraph EU11 of Appendix EU to the Immigration Rules provides:

EU11. The Applicant meets the eligibility requirements for indefinite leave to enter or remain as... a **person with a Zambrano right to reside**... where the Secretary of State is satisfied... that, at the date of application and in an application made by the **required date**, one of conditions 1 to 7 set out in the following table is met:

| <b>Condition</b> | <b>Is met where:</b> |
|------------------|----------------------|
|------------------|----------------------|

- |   |                       |
|---|-----------------------|
| <p>3. (a) The applicant:</p> <p style="margin-left: 40px;">(v) is a person with a Zambrano right to reside; or</p> <p style="margin-left: 40px;">(vi) is a <b>person who had a derivative or Zambrano right to reside</b>; and</p> <p>(b) The applicant has completed a <b>continuous qualifying period</b> of five years in any (or any combination) of those categories; and</p> <p>(c) Since then no supervening event has occurred in respect of the applicant.</p> | <p>...</p> <p>...</p> |
|---|-----------------------|

12. The requirement for limited leave to remain under EU14 similarly require the applicant to be "a person with a Zambrano right to reside".

13. It is a particular feature of Appendix EU that the words which are emboldened within the main provisions are the subject of a definition in Annex 1 to Appendix EU (“Annex 1”). Paragraph EU7(1) provides that “[a]nnex 1 sets out definitions which apply to this Appendix” and that “[a]ny provision made elsewhere in the Immigration Rules for those terms, or for other matters for which this Appendix makes provision, does not apply to an application made under this Appendix”.
14. The important definition in Annex 1 for the purposes of this appeal is that of a person with a Zambrano right to reside. At the relevant time it read as follows:
- “a person who has satisfied the Secretary of State by evidence ...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]; or ...and ...
- (b) without leave to enter or remain in the UK, unless this was granted under this Appendix.” [underlining added]
15. This definition has since been amended, permitting an applicant to have certain other types of leave, but not in any relevant way for the purposes of this appeal.

#### Error of law

16. From the above, it is clear that a person who seeks indefinite leave to remain or leave to remain must be, among other things, “without leave to enter or remain in the UK, unless this was granted under this Appendix.” It is worth noting that a person who had a right to reside in the UK by virtue of their status as a Zambrano when the UK was a member of the EU did not have leave to enter or remain. Rather they had a Residence Card and were exempt from immigration control. Such a person would therefore meet this aspect of the definition.
17. In the Judge’s decision there is no consideration of whether Ms Andrews’ leave to remain (which the Judge refers to at the end of para.17) was “granted under this Appendix” or not. The Judge has in my judgment overlooked, and therefore not applied, this aspect of the rules. I therefore agree with the Secretary of State that the Judge erred in law in this respect.
18. Ms Andrews sought to persuade me that there was in fact no bar on someone with Appendix FM leave from being granted leave as a Zambrano carer under the EUSS, at least when she applied for it. If that were right, the Judge’s failure to consider the point would not be material. I therefore asked her what the basis for

her understanding of this was and she explained that it was based on the fact that she had been sent the EUSS forms by the Home Office and told to apply using them, which, she inferred, meant that she was eligible. The requirements of the EUSS are however set out in EUSS. They are exceptionally poorly drafted (even in the context of the immigration rules) and are difficult to understand, even, I would venture to suggest, for Home Office officials who deal with them day in, day out. I cannot set any store by the fact that Ms Andrews was told by a Home Office official that she could apply under the EUSS in interpreting what it requires.

19. As to the Secretary of State's other contentions, it is not clear to me that the Judge did commit the error suggested, as it is not clear what the Judge meant by the fact that she "bore in mind the cases of *Akinsanya* and *Patel*". *Akinsanya* concerned the disparity between the Secretary of State's understanding of the 2016 Regulations and the effect of Appendix EU, insofar as each concerned Zambrano carers holding some form of existing, non-EUSS leave to remain. It was not therefore a case concerned with the EUSS. To the extent that the Judge did consider that the Secretary of State's misunderstanding, identified in *Akinsanya*, meant that the strict requirements of the EUSS should be disregarded, that too was an error. The grounds of appeal under Regulation 8 of the 2020 Regulations extend (in summary) only to inconsistency with the Withdrawal Agreement and inconsistency with the EUSS. Zambrano carers are not within the scope of the Withdrawal Agreement and so the only question for the Judge was whether the terms of the EUSS were met, which *Akinsanya* did not quash or otherwise alter.
20. The first of these errors at least is material and accordingly requires the Decision to be set aside so that question which the Judge omitted to consider, namely whether Ms Andrews' leave was granted under the EUSS, can be addressed. I heard submissions on this question and am accordingly in a position to re-make the decision without a further hearing.

### Re-making

21. In Ms Andrews' skeleton argument, she submitted that: (a) she and her children are related and her children are British citizens; (b) her residence pre-dates 31 December 2020; (c) she is her children's primary carer and lives with them in the UK with a leave to remain, which has been extended; (d) the children could not remain in the UK without her; (e) there has been no supervening event; and (f) she meets the requirements of Regulation 16(5) of the 2016 Regulations. None of that is, so far as I understood Mr Terrell, controversial. To the extent that it is not accepted, I assume for present purposes that it is true. None of those submissions however address the point in dispute, namely the type of leave to remain that Ms Andrew holds. The skeleton goes on to quote from *Akinsanya*, cited above, and *Patel v SSHD* [2019] UKSC 59. Both cases however concern the 2016 Regulations, not the EUSS definition of a person with a Zambrano right to reside.
22. The Secretary of State's refusal letter records that she "was granted leave to enter or remain in the UK on 10 November 2020 valid until 06 June 2023, under Appendix FM" [underlining added]. The Secretary of State's decision letters constitute some evidence of the truth of their contents: *R v Secretary of State for the Home Department ex p Abdi* [1996] 1 WLR 298, 315E per Lord Lloyd.
23. In contrast, there was no evidence to the contrary. Ms Andrews did not produce any sort of visa or EU Residence Card. Instead she sought to persuade me orally

that she had been granted Zambrano leave previously. She explained that she was granted leave by the Home Office because of her British citizen children. While I have no doubt that Ms Andrews' children are the basis of her leave to be here, that does not mean that her leave was not granted under Appendix FM. Leave provided to a parent of a British citizen child where it is unreasonable for the child to leave the UK is provided under Appendix FM. That is, in some ways, quite close to (though not the same as) the substantive requirements of a Zambrano carer to a British citizen child, and I can accordingly understand why Ms Andrews would not have appreciated the difference. However, I am not able to give any weight to Ms Andrews' view of the leave she had.

24. I was told by Mr Terrell that Ms Andrews had in fact made a further application for leave under Appendix FM on 2 June 2023 (which is not affected by this appeal or application). Ms Andrews did not dispute this. I note that this application was made shortly before the expiry of the leave she is recorded in the refusal letter as most recently having obtained, which further indicates that the leave she had at the relevant dates was granted under Appendix FM.
25. The burden of proof in an EUSS appeal is on the appellant – that is, for the purpose of this re-making, Ms Andrews. However, I do not consider that she has shown that she was without leave to enter or remain in the UK, or that any leave she had at the relevant dates was granted under the EUSS, as required. Her leave was, I find on the balance of probabilities, leave granted under Appendix FM. Accordingly, she fails to meet the requirements of the relevant provisions of Appendix EU set out above, and her appeal necessarily fails.

### **Notice of Decision**

The decision of First-tier Tribunal Judge Hosie promulgated on 16 May 2023 involved the making of an error of law and is set aside.

I re-make the Ms Andrews' appeal by dismissing it.

**Paul Skinner**

Deputy Judge of the Upper Tribunal  
Immigration and Asylum Chamber

8 September 2023