IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-002959
UI-2023-002960

First-tier Tribunal No: EA/11604/2022
EA/11607/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:

27th October 2023

Before

UPPER TRIBUNAL JUDGE REEDS

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

RIFAT KHALED
MOHAMMED MORSHED UDDIN KHALED
(No anonymity direction mde)

Respondents

Representation:
For the Appellant: Ms Young, Senior Presenting Officer
For the Respondent : No appearance or representation at the hearing

Heard at (IAC) on 4 October 2023

DECISION AND REASONS

1. The Secretary of State appeals with permission against the decision of First-tier Tribunal Judge Turner (hereinafter referred to as the "FtTJ") who allowed the appeals of Mr and Mr Khaled against the decisions of the Secretary of State dated 2 November 2022 refusing their applications for leave to remain under the EU Settlement Scheme ("the EUSS") in a decision promulgated on 16 May 2023 having determined the appeals on the papers.

2. Permission to appeal the decision of the FtTJ was sought and on 28 June 2023 permission was granted by FtTJ Mills.

3. For the purposes of this decision, I refer to the Secretary of State for the Home Department as the respondent and to Mr and Mrs Khaled as the appellants, reflecting their positions before the First-tier Tribunal.

4. The First-tier Tribunal did not make an anonymity order and no grounds have been advanced on behalf of the appellant to make such an order.

5. The background to the appeal is set out in the decision of the FtTJ, the decision letter and the bundles provided. The appellants are citizens of Bangladesh. They arrived in the UK on valid visit visas in August 2006 and May 2005 respectively. Whilst in the UK they had two children born in 2007 and 2012. The oldest child is a British Citizen having been born in the UK and having resided in the UK for ten years. The younger child became a British Citizen after the appellants made their applications under the EUSS.

6. There is no dispute that the appellants and their children were granted limited leave to remain in the UK from the 16 January 2018 to 16 July 2020 under Appendix FM on the 10 year route to settlement. They were then granted an extension of their leave from 30 March 2021 which until 29 September 2023.

7. Both appellants have limited leave to remain in the UK and had such leave at the time they made applications for leave to remain under the EU Settlement Scheme (EUSS) relying on the "Zambrano" provisions of that scheme.

8. The applications were refused by the respondent as the respondent considered that they could not meet the eligibility provisions to qualify under the scheme. The decision at a state that the applications were refused because the appellants claimed to have a continuous qualifying period in the UK during which they met the definition of a "person with a Zambrano right to reside" between 14 December 2017 and 30 June 2021. However during the period above, they did not satisfy paragraph (b) of the definition of a "person with a Zambrano right to reside" as an applicant cannot rely on any period in which they held non-Appendix EU leave. The respondent set out that according to the records available, the appellants were granted leave to enter or remain in the UK from 16 January 2018 valid until 16 July 2020 and later from 30th of March 2021 until 29 September 2023.

9. The appellants appeal to those decisions to the First-tier Tribunal. Whilst the appeals were initially listed as oral appeals, they requested that the appeal shall be determined "on the papers". That being the case, the appeals were determined on the papers by Judge Turner who promulgated her decision on 16 May 2023.

10. In that decision, the FtTJ summarised the case for the appellants which had been set out in a skeleton argument provided by their legal representatives. The FtTJ noted that they placed reliance on the case of *Akinsanya R (on the application of) v SSHD (rev 3)* EWHC 1535 (Admin) (9 June 2021). In essence, it was submitted that the provisions of Regulation 16 (7) of the EEA Regulations 2016 and the exemption specified therein are so clear that they cannot be construed to cover applicants with limited leave to remain therefore they cannot be considered exempt from qualifying for Zambrano leave (see paragraph 9 of the FtTJ's' decision).

11. It was further argued that the respondent had misconstrued and misapplied the Zambrano principles by concluding that only those with no other lawful basis for remaining in the UK

could qualify for Zambrano leave (relying on paragraph 51 of Akinsanya) and that they are entitled to leave under the Zambrano principles despite having limited leave to remain.

12. The FtTJ set out the reasons given for refusing the applications at paragraph 13 of her decision. Having set out the legal framework including Regulation 16 and Annex 1 of Appendix EU, the FtTJ gave her reasons for allowing the appeal. There was no apparent dispute on the facts; no issue was taken with the claims that they are primary carers of 2 British citizen children in the UK and it was also accepted by the appellants they held limited leave to remain in the UK under Appendix FM during the relevant periods particularly when the application for leave to remain was made under EUSS. The FtTJ observed that the respondent had submitted new guidance on the application of the Zambrano principles following the decision in Akinsanya (COA decision), but the new guidance was not published until 25 July 2022, after the submission of the application. Thus the FtTJ considered that the principle set out in Akinsanya had "direct application in this appeal" and that paragraph 66 was the relevant paragraph.

13. The FtTJ stated that whilst the Court of Appeal accepted that the respondent had not intended to confer rights that went beyond those set out in Zambrano, the drafting appeared to do so. The FtTJ further stated "the Court of Appeal dismissed the appeal brought by the Secretary of State noted that there would be a reconsideration of the drafting of Annex 1 of Appendix EU thereafter." The FtTJ found that at the time of the application there had been no reconsideration of the provisions and that the guidance set out in *Akinsanya* applied and they were not excluded from applying for residence under EUSS as Zambrano carers by virtue of their limited leave to remain as set out in the "clear wording of Regulation 16 (7) of the EEA Regulations." The FtTJ therefore found that they met the eligibility requirements under EUSS and allowed the appeals.

14. The respondent sought permission to appeal, and permission was granted by FtTJ Mills on 28 June 2023 stating that "the Judge has allowed the appeal, finding that the relevant rules could not be read in that way, following *Akinsanya v Secretary of State for the Home Department* [2022] EWCA Civ 37. The respondent challenges this decision, on the basis that the relevant section of the rules was neither quashed nor amended following *Akinsanya,* and the Judge was bound to apply the rules as they are, rather than 'as he considered they ought to be'.

15. The appeal was listed for an oral hearing. The respondent was represented by Ms Young, Senior Presenting Officer. There was no appearance or representation on behalf of the appellants.

16. The appellants solicitors had written to the tribunal by way of email on 24/9/23 stating "our clients have advised us that they are not attending the hearing at the Upper Tribunal and the tribunal may proceed in their absence."

17. Prior to the hearing Ms Young had made a written application for the Upper Tribunal to consider an unreported decision of the Upper Tribunal panel comprising of Upper Tribunal Judge Smith and Upper Tribunal Judge Stephen Smith case reference UI-2022-001129 between The SSHD v Sonkor issued on 20 April 2023. Ms Young confirmed that the application was uploaded to the CE File and emailed to the appellant's legal representatives including the EA reference and also the UI reference. As a result of the lack of clarity to whether the appellants were still represented by the solicitors concerned, enquiries were made via the court administration who contacted the appellant's legal representatives by email. Ms Young received an email response from them at 11:42 am confirming that they

acted for both appellants. The following was stated : "We write to confirm that we continue to act for both of the appellants in this matter. Please find below our reply to the Tribunal confirming their inability to present at the appeal hearing and requesting that the Tribunal proceed in their absence." The reference made to "inability to present at the appeal hearing" referred to the earlier email sent to the tribunal that neither appellant would be attending the hearing and that the tribunal may proceed in their absence.

18. As a result of those enquiries and the content of the emails, Ms Young submitted that the appeal should be heard in their absence.

19. The first issue is whether the appellants are aware of the hearing by having been served with a hearing notice and whether the appeal should be heard in their absence applying Rule 38 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (as amended). Rule 38 provides for hearings in a party's absence. If a party fails to attend the hearing the Upper Tribunal may proceed with the hearing if the Upper Tribunal (a) is satisfied that the party has been notified of the hearing or the reasonable steps have been taken to notify the party of the hearing; and (b) considers that it is in the interests of justice to proceed with the hearing.

20. Applying Rule 38 in the context of the procedural history, I am satisfied that the hearing should proceed in the appellants absence as they have been notified of the hearing having been sent a notice of hearing to the last address provided (see Rule 13 (5)) and the appellants legal representatives have indicated to the tribunal that they had been advised that they were not attending the hearing and that the tribunal may proceed in their absence.

21. As to the lack of attendance by the appellants legal representatives, whilst it is stated that they still act on behalf of the appellants they have given no reasons as to why they are not attending the hearing. As Ms Young submitted the email responses demonstrate that they are clearly aware of the hearing having received notice of hearing as set out on the CE file on 24 September 2023. They have had 2 opportunities to deal with the issue of the proceedings today and have returned with the same request to proceed in their clients absence. I am therefore satisfied on the basis of the procedural history outlined above, that reasonable steps have been taken to notify the appellants of the hearing and they have stated that they do not wish to attend. As regards their legal representatives, whilst they continue to act for the appellants they have not sought to attend the hearing despite their knowledge of the hearing date. No further submissions have been made on the appellant's behalf. It is therefore in the interest of justice to proceed with the hearing.

22. The second issue relates to the application to rely upon an unreported decision of the Upper Tribunal as set out above. Ms Young provided her reasons for wishing to rely upon the unreported decision and provided a full transcript or copy of the decision. She submitted that the decision dealt with the exact point raised in the grounds relevant to this appeal concerning the application of Akinsanya, EU1 and the Zambrano grounds. She further submitted that the issue that needed to be addressed in the current appeal could not be located in any reported decision and therefore the unreported decision was of assistance in dealing with the question of material error of law arising from the decision of the FtTJ.

23. In respect of that application, whilst the application was made at a late stage, I am satisfied that a copy of the application was sent by email to the appellant's legal representatives. They have not sought to make any further submissions or representations in respect of that application or in respect of the application for permission to appeal the decision of the FtTJ. There is no rule 24 response provided in answer to those grounds of permission.

24. In the circumstances, I indicated to Ms Young that as this was an unreported decision it was not binding upon the Tribunal but as the issues identified in that decision involve the same issues as this appeal, I would take into account that decision in so far as necessary.

25. Ms Young relied upon the grounds of challenge. Thay are as follows. First-tier Tribunal Judge Turner has made a material error of law in the determination. Judge Turner has strayed beyond the statutory scope of a Citizens' Right Appeal by answering a question of whether the appellants met the requirements of Appendix EU as she considered that they ought to be based on a reading of the principles of Akinsanya at the Administrative Court and on appeal to the Court of Appeal. Whilst the judicial review challenge in Akinsanya revolved around the interpretation of regulation 16(7) of the 2016 Regulations, that led neither to the quashing of the relevant part of the definition of Person With A Zambrano Right To Reside, nor of any amendment to the provision which disqualified a person with limited leave granted on another basis.

26. Judge Turner records at paragraph [7] that the appellants held such leave at both the specified date (31 December 2020) and at the date of their applications under the EU Settlement Scheme, which was fatal to their applications and to any appeal given that regulation 8 provided only the effective ground that the decision was not in accordance with Scheme rules.

27. It submitted that any suggestion that those rules ought properly to have said something different was and is the province of a judicial review challenge and is not within the power of the First-tier Tribunal.

28. In her oral submissions, Ms Young submitted that the FtTJ fell into error by considering the facts alongside Appendix EU but on the basis of what she considered them as they ought to be rather than they are, and as stated in the grounds the judge strayed beyond the scope of what was before her to decide the issue.

29. As regards the unreported decision of UI-2023-001129, the issues and principles identified in this appeal are nearly identical to the present. In the unreported decision the applicant had made applications in August 2020 and the decisions were made by the respondent on 22 December 2021. On the facts of the present appeal, the applications were made under EUSS on 30 June 2021 and refused by the respondent on 2 November 2022. Ms Young submitted that at paragraph 13 of the unreported decision, the UT panel considered the decision in Akinsanya but that on assessment the decision 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. Whereas Regulation 16 (7) prevented a person with indefinite leave to remain for enjoying a right to reside as a Zambrano carer, paragraph (b) of the Annex 1 definition of a Zambrano carer carved out holders of limited, as well as indefinite, leave to remain from the scope of the EUSS Zambrano provisions. The UT panel held that "what Akinsanya did not do was find that paragraph (b) requirement in the Annex 1 definition of a "person with a Zambrano right to reside…) to be unlawful. The court did not quash the rule and declined to be drawn into a discussion as to whether the Secretary of State has misdirected itself in framing the EUSS that depends on what secretary of state was intending to achieve, the court held. There were any number of reasons why the Secretary of State may have wanted to adopt a different approach: see paragraph 57". She also relied on paragraph 9 where the UT panel set out the "Zambrano right to reside" as defined in Annex 1 to Appendix EU how Appendix EU definition was at the time of the application.

30. Ms Young further submitted that paragraph 14 of the unreported decision was the "key paragraph" when considering the present appeal. On the facts of the present appeal the appellants held leave granted under Appendix FM at the time of their EUSS applications. There was no dispute that both appellants continue to hold leave in that capacity as at the date of that application (and pursuant to section 3C of the 1971 Act). The submissions made by the respondent were the same as the submissions made in the present appeal, namely that the barrier to the appellant succeeding established by paragraph (b) in the Annex 1 definition. The UT panel held " We agree that paragraph (b) is dispositive of these proceedings against the appellant. Since the appellant held leave under Appendix FM at the time of application (and, extended by section 3C, at the date of the appeal for us), she is unable to be a person who meets the definition of "Zambrano right to reside". She cannot satisfy the requirement that she does not hold leave to enter or remain granted under another part of the rules. By holding another form of leave, the appellant disqualified herself from being able to succeed as a Zambrano carer under Appendix EU that is dispositive of all issues in this appeal. " Ms Young further relied upon paragraph 15 of that decision where it was stated that " nothing in Akinsanya calls for a different approach; the Court of Appeal held that the Zambrano circumstances were not engaged in relation to a person who holds existing leave to remain; see paragraph 48 (54?), and the preceding discussion."

31. In her oral submissions, Ms Young submitted that the FtTJ erred in law by failing to engage with the fact that Annex 1 (b) was not unlawful and that the judge simply made a finding that the appellants were not excluded from the guidance as set out at paragraph 26, but this was on an incorrect basis. In essence she submitted the guidance in Akinsanya did not say what the FtTJ said it meant. She submitted that the Court of Appeal did not go on to say that the regulation was unlawful but that the definition needed to be reconsidered and this linked with ground 1. Ms Young therefore invited the tribunal to find a material error of law, to set aside the decision and to dismiss the appeal as the appellants cannot succeed under Appendix EU.

Discussion:

32. Paragraph EU11 of Appendix EU, as it stood at the date of the application, was as follows:

"(a) The applicant:

(i) is a relevant EEA citizen; or

(ii) is (or, as the case may be, for the relevant period was) a family member of a relevant EEA citizen; or

(iii) is (or, as the case may be, for the relevant period was) a family member who has retained the right of residence by virtue of a relationship with a relevant EEA citizen; or

(iv) is a person with a derivative right to reside; or

(v) is a person with a Zambrano right to reside; or

(vi) is a person who had a derivative or Zambrano right to reside; and

(b) The applicant has completed a continuous qualifying period of five years in any (or any combination) of those categories; and

(c) Since then no supervening event has occurred..."

33. "Zambrano right to reside" is a defined term in Annex 1 to Appendix EU. It means:

"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 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 the criteria in:

(i) paragraph (5) of that regulation; or

(ii) 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 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 granted under another part of these Rules**." (Emphasis added).

34. At the material times, regulation 16(5) of the 2016 Regulations provided:

"(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."

35. There is no dispute as to the factual background relevant to the applications as set out in the earlier part of this decision. Critically, it was agreed between the parties that the appellants are the primary carers of two British citizen children in the UK. No issues were raised that they did not meet the "Zambrano" conditions for the relevant periods, and it was also accepted by the appellants that they held limited leave to remain in the UK under Appendix FM during the relevant periods, including when the applications were made under EUSS. The issue before the FtTJ related to the legal principles applicable and as set out in EUSS and the definition set out in Annex 1 of Appendix EU.

36. The only ground of appeal available to the appellants under The Immigration (Citizens' Rights Appeals) (EU Exit) Regulations 2020, is that the decision to refuse Indefinite Leave to

Remain "is not in accordance with residence scheme immigration rules", that is, Appendix EU of the Immigration Rules (regulation 8(3)(b) refers). The issue was whether the decisions of the respondent were in accordance with Appendix EU.

37. There have been no further submissions provided on behalf of the appellants that engaged with the grounds of challenge and the grant of permission. I proceed on the basis that they rely on the decision of the FtTJ.

38. When considering the respondent's grounds of challenge, the key provision is the definition set out in Annex 1 "a person with a Zambrano right to reside" as set out above. When applying that definition, it sets out that a person in the position of the appellants who have limited leave to remain, must be "without leave to enter or remain in the UK unless this is granted under the Appendix." Whilst the FtTJ was aware and accepted that the appellant's leave was not granted under this Appendix, I accept the submission made by Ms Young and as set out in the grounds that the FtTJ failed to consider this in her consideration of whether the appellant could succeed and as demonstrated by the FtTJ's reference to the "principles in Akinsanya" having "direct application".

39. The decision in Akinsanya was not an appeal which was concerned with the EUSS. As the panel set out (the unreported decision) at paragraph 13 the decision in 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 in judicial review proceedings. Whereas Regulation 16 (7) of the 2016 Regulations prevented a person with indefinite leave to remain from enjoying a right to reside as a Zambrano carer (thereby entitling putative Zambrano carers with limited leave to remain to be granted a right to reside on Zambrano grounds under those Regulations), paragraph (b) of the Annex 1 definition of a Zambrano carer carved out holders of limited, as well as indefinite, leave to remain from the scope of EUSS Zambrano provisions. What Akinsanya did not do was find the paragraph (b) requirement in the Annex 1 definition of a "person with a Zambrano right to reside" to be unlawful. The court did not quash the rule and declined to be drawn into a discussion as to whether the Secretary of State had misdirected itself in framing the EUSS, and that depended on what the Secretary of State was intending to achieve. The court held there were any number of reasons why the Secretary of State may have wanted to adopt a different approach.

40. As set out in the grounds the focus should have been on the only ground of appeal available to the appellants under the Immigration (Citizens Rights Appeals) (EU Exit) Regulations which is that the decision to refuse indefinite leave to remain "is not in accordance with the residence scheme immigration rules" (see regulation 8 (3) (b)). Therefore the FtTJ erred in the assessment of limb (b) of the definition and misapplying the decision in Akinsanya. The court in Akinsanya accepted the Secretary of State's submission that a Zambrano right to reside only arose where the carer had no domestic or other EU law rights to reside in the UK. It held that a person who had limited leave to remain in the UK was not entitled to a Zambrano right to reside. Whilst the court also considered Regulation 16 the court did not quash or otherwise find the immigration rules to be unlawful. Following Akinsanya the respondent confirmed 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.

41. As a result, the appellants continue to have leave under Appendix FM and paragraph (b) in the Annex 1 definition precluded the appellants from being granted leave to remain under

EUSS. The appellants cannot satisfy the requirements that they do not hold leave to enter or remain granted under another part of the rules. As the appellants held another form of leave they could not succeed as Zambrano carers under Appendix EU.

42. As set out in the submissions made by Ms Young, the facts and the decision in the unreported panel case, whilst not binding, deals with the same legal point as the present appeal and thus confirms what is set out above as to the appellants inability to meet the rules set out in Appendix EU. For those reasons the decision of the FtTJ involved the making of an error on a point of law and the decision is set aside.

43. Given the nature of the error of law, and as the appellants had limited leave to remain under Appendix FM which precluded them from meeting paragraph (b) definition of "a person with a Zambrano right to reside" in Appendix EU, the appeal cannot succeed on remaking.

Notice of Decision

The decision of the FtT involved the making of an error on appoint of law; it is set aside, and the appeals are remade as follows: the appeals are dismissed. The respondent's decision is in accordance with Appendix EU to the immigration rules

Upper Tribunal Judge Reeds
Upper Tribunal Judge Reeds

16 October 2023