



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER
Hybrid hearing

Case No: UI-2023-003024

First-tier Tribunal No: EA/12121/2022

THE IMMIGRATION ACTS

**Decision & Reasons Issued:
On 13 December 2023**

Before

**UPPER TRIBUNAL JUDGE STEPHEN SMITH
UPPER TRIBUNAL JUDGE SHERIDAN**

Between

Secretary of State for the Home Department

Appellant

and

**Georgina Lebene Serwonu
(NO ANONYMITY DIRECTION MADE)**

Respondent

Representation:

For the Appellant: Mr E. Tufan, Senior Home Office Presenting Officer
For the Respondent: In person

Heard at Field House on 28 September 2023

DECISION AND REASONS

1. By a decision dated 17 June 2023, First-tier Tribunal Judge Norris (“the judge”) allowed an appeal brought by the appellant, a citizen of Ghana, against a decision of the Secretary of State dated 27 October 2021 to refuse her application for pre-settled status under the EU Settlement Scheme (“the EUSS”). The judge heard the appeal under the Immigration (Citizens' Rights Appeals) (EU Exit) Regulations 2020 (“the 2020 Regulations”).
2. The Secretary of State now appeals against the decision of the judge with the permission of First-tier Tribunal Judge Monaghan.
3. For ease of reference, we will refer to the appellant before the First-tier Tribunal as “the appellant” in this decision.

Procedural issues

4. The appellant appeared before us as a litigant in person. She had asked for the appeal to be determined on the papers, for childcare reasons. However, since this is an appeal of the Secretary of State, we did not consider that it would be appropriate, taking into account the overriding objective to decide cases fairly and justly, to exclude the Secretary of State's participation in the oral hearing. The approach we adopted in order to secure the participation of the appellant was to list the matter as a hybrid hearing, to facilitate the appellant's attendance over the video link, at a pre-arranged time in order to fit with her childcare and employment arrangements. We also provided the appellant with the assistance appropriate to her as a litigant in person.
5. Several days before the hearing, the Secretary of State applied to rely on the unreported case of *Sonkor v Secretary of State for the Home Department* UI-2022-001129. The Secretary of State sent a copy of the application and the decision to the appellant. We determined the application at the beginning of the hearing. We accepted the Secretary of State's submission that *Sonkor* dealt with the central point under consideration in these proceedings, and that there was no reported authority addressing that point. The central point in both *Sonkor* and these proceedings, as set out below, is the impact of holding non-EUSS leave on an EUSS applicant's ability to meet the definition of a "person with a Zambrano right to reside". We granted the application. Since the hearing of this appeal but before the promulgation of this decision, *Sonkor* has been reported as *Sonkor (Zambrano and non-EUSS leave)* [2023] UKUT 276 (IAC). We will return to the decision below.
6. We informed the parties that the Secretary of State's appeal would be allowed, and that we would remake the decision by dismissing the appeal, with full written reasons to follow, which we now give.

Factual background

7. The appellant was born in 1971. Since 2013, she has been the primary carer for two British children. She has not been in contact with their father since at least 2011. She has held leave to remain under Appendix FM of the Immigration Rules in that capacity on a number of occasions. One such grant of leave was on 4 June 2019 until 11 December 2021. By that grant of leave, the Secretary of State accepted that it would not be reasonable to expect the appellant's British children to leave the UK.
8. On 27 October 2021, before the expiry of the above grant of leave, the appellant submitted an application for leave to remain as a "person with a Zambrano right to reside" under the EUSS. It appears that the appellant may have been advised to do so by the EUSS helpline and by Citizens Advice; she has been self-represented throughout.
9. "Zambrano right to reside" means a person who, before the United Kingdom's withdrawal from the EU, was granted a right to reside under EU law in order to prevent a Union citizen from having to leave the territory of the EU.
10. The appellant's EUSS application was refused on 20 September 2022 because she did not meet the definition of "a person with a Zambrano right to reside" in Appendix EU of the Immigration Rules. Paragraph (b) of that definition says that an applicant for leave to remain in that capacity must be "without leave to enter or remain in the UK, unless this was granted under this Appendix." At the "specified date" of 31 December 2020 at 11.00PM (that is, when the transitional period following the UK's departure from the EU came to an end), the appellant held leave under Appendix FM in respect of her two British children, as set out

above. The Secretary of State concluded that that meant the appellant could not satisfy the definition of being a “person with a Zambrano right to reside”.

11. Meanwhile, the appellant’s leave under Appendix FM continued. While the appeal proceedings were still pending, the appellant applied for a further grant of leave to remain under Appendix FM. On 27 April 2023 the appellant was granted further leave to remain, until 27 October 2025, in that capacity. (The 2020 Regulations do not require this appeal to be treated as abandoned in light of that grant of leave; only grants of EUSS leave have that effect: see regulation 13(3)).
12. The appellant appealed to the First-tier Tribunal. At the appellant’s request, the judge heard the appeal on the papers. The judge allowed the appeal on the basis that the appellant met the definition of a “person with a Zambrano right to reside”. The definition, noted the judge, cross-referred to the Immigration (European Economic Area) Regulations 2016 (“the 2016 Regulations”). The 2016 Regulations have been revoked following Brexit, but when they were in force, they dealt with most of the UK’s EU free movement of persons obligations. Regulation 16(5) made provision for Zambrano carers to enjoy a right to reside. Regulation 16(1) said that an “exempt person” would not be entitled to a right to reside under that regulation. The term “exempt person” was defined at regulation 16(7). As the judge noted, an exempt person would be a person with *indefinite* leave to remain, but there was no mention of a person who, like the appellant, had limited leave to remain (see para. 8).
13. The judge considered *R (Akinsanya) v Secretary of State for the Home Department* [2022] 2 WLR 681, [2022] EWCA Civ 37, in which the Court of Appeal addressed the extent to which the ability of a prospective EUSS Zambrano applicant to secure leave to remain in another capacity was a relevant consideration when considering applications under the EUSS. At para. 9, the judge noted that (at para. 66) Underhill LJ held that the definition of “exempt person” did *not* include those – such as this appellant – who held *limited* leave to remain.
14. The judge found that the appellant met all the requirements of Appendix EU relating to Zambrano carers and allowed the appeal.

Issues on appeal to the Upper Tribunal

15. The Secretary of State pursues essentially a single ground of appeal to the Upper Tribunal, on the basis that it was not open to the judge to allow the appeal under the 2020 Regulations, since the appellant was, by definition, incapable of being a “person with a Zambrano right to reside”. That was because, contrary to the requirement at para. (b) of the definition of that term in Appendix EU, the appellant held non-EUSS leave at the specified date, namely leave under Appendix FM.
16. First-tier Tribunal Judge Monaghan also considered that it was arguable that “the judge failed to consider whether the British citizen child could remain in the United Kingdom if the application made by the Appellant was refused. It is arguable that the Judge failed to make a finding on this matter.” We pause here to observe that the grounds of appeal did not criticise the decision of the judge on that basis, and the Secretary of State had not sought permission to appeal on that ground. As held in *AZ (error of law: jurisdiction; PTA practice) Iran* [2018] UKUT 245 (IAC), permission to appeal should not be granted on a basis not sought by a party unless there is a strong prospect of success for the original party or the Secretary of State, where the ground relates to a decision which, if undisturbed, would breach the United Kingdom’s international Treaty obligations. Neither of

those criteria are met here. Mr Tufan rightly did not pursue this additional “ground”, which is without merit. We need say no more about it.

Relevant legal principles

17. At the time of the Secretary of State’s decision, the definition of “person with a Zambrano right to reside” in Appendix EU provided:

<p>person with a Zambrano right to reside</p>	<p>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:</p> <p>(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:</p> <p>(i) the criterion in paragraph (1)(a) of that regulation; and</p> <p>(ii) the criteria in:</p> <p>(aa) paragraph (5) of regulation 16 of the EEA Regulations; or</p> <p>(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</p> <p>(b) without leave to enter or remain in the UK, unless this was granted under this Appendix</p>
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18. The judicial headnote to *Sonkor*, which reflects the substantive content of the decision, provides:

“1. The EU Settlement Scheme (“EUSS”) makes limited provision for certain *Ruiz Zambrano v Office National de l'Emploi* [2011] Imm AR 521 carers to be entitled to leave to remain, as a matter of domestic law.

2. A Zambrano applicant under the EUSS who holds non-EUSS limited or indefinite leave to remain at the relevant date is incapable of being a “person with a Zambrano right to reside”, pursuant to the definition of that term in Annex 1 to Appendix EU of the Immigration Rules.

3. Nothing in *R (Akinsanya) v Secretary of State for the Home Department* [2022] 2 WLR 681, [2022] EWCA Civ 37 calls for a different approach.”

Appellant not a “person with a Zambrano right to reside”

19. While the judge was quite right to conclude that the appellant met all requirements under the 2016 Regulations for a right to reside under regulation 16(5), we respectfully consider that she fell into error by not addressing subparagraph (b) of the definition of “person with a Zambrano right to reside”. Since the appellant held non-EUSS leave at the specified date, she was unable to meet the definition of the term in the Immigration Rules, and the appeal was incapable of being allowed.
20. As held in *Sokor*, nothing in *Akinsanya* calls for a different approach: see para. 13.
21. For these reasons, we find that the decision of the judge involved the making of an error of law and set it aside.

Remaking the decision

22. Pursuant to para. 7.2(b) of the Practice Statements of the Immigration and Asylum Chambers of the First-tier Tribunal and the Upper Tribunal, we conclude that the appeal should be remade in the Upper Tribunal, acting under section 12(2)(b)(ii) of the Tribunals, Courts and Enforcement Act 2007. There are no issues of fact to be redetermined. None of the other criteria for remitting the appeal to the First-tier Tribunal are met.
23. The definition of “person with a Zambrano right to reside”, applied to the facts of this case, admits of only one conclusion: the appellant is not such a person. We remake the decision, dismissing the appeal.

Postscript

24. The appellant maintained before us that she has now accrued ten years’ continuous lawful residence. If that is right, that may be an immigration milestone of some significance for the appellant. However, as we explained at the hearing, it is not a matter for us; it does not relate to the substance of the decision appealed against, and the Secretary of State has not provided her consent for this additional matter to be considered in these proceedings.
25. Nothing in this decision undermines or otherwise affects the appellant’s grant of leave under Appendix FM, which remains in force. Similarly, nothing in this decision prevents her from making an application for indefinite leave to remain, if she considers that she now meets the eligibility requirements.

Notice of Decision

The decision of Judge Norris involved the making of an error of law and is set aside.

We remake the decision, dismissing the appeal.

Stephen H Smith

Judge of the Upper Tribunal
Immigration and Asylum Chamber

6 December 2023