



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-003231

First-tier Tribunal No: EA/10761/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:

On 28th of November 2023

Before

UPPER TRIBUNAL JUDGE KEITH
DEPUTY UPPER TRIBUNAL JUDGE CHANA

Between

The Secretary of State for the Home Department

Appellant

And

Frank Onome Overare
(NO ANONYMITY ORDER MADE)

Respondent

Representation:

For the Appellant: Mr E Terrell, Senior Home Office Presenting Officer

For the Respondent: The Respondent did not attend and was not represented

Heard at Field House on 31 October 2023

DECISION AND REASONS

1. These written reasons reflect the full oral decision which we gave at the end of this hearing. To avoid confusion, because this is the Secretary of State's appeal, we will refer to the parties as the claimant and the Secretary of State for the remainder of the reasons.

The claimant's non-attendance and whether we should proceed

2. We first considered whether it was appropriate that we proceed with the hearing in the absence of the claimant. We checked the correspondence file and confirmed that a notice of hearing had been sent to the address on record for the claimant. There has been no application nor indication by the claimant that he is unable to attend. We are satisfied, as per the authority of Nwagwe (adjournment: fairness) [2014] UKUT 00418 (IAC), that the claimant has had the opportunity to participate in a fair hearing and that it is therefore appropriate to

proceed, both with the error-of-law hearing; and because the parties were warned that in their absence that we might nevertheless proceed, with remaking the decision, which we set out later in these reasons.

Background

3. We turn to the background of the appeal and the decision of First-tier Tribunal Beg ('the Judge'), promulgated on 15th March 2023. We pause to observe that there are a number of inaccuracies in the Judge's decision, not least his record of the fact that the claimant had applied for leave to remain before the end of the transition period, namely 31st December 2020 (§9 of the Judge's decision). In fact, the certificate of application within the Secretary of State's bundle at page [B1], (hereinafter, we refer to the bundle as 'RB'), confirms that there was a receipt by 30th June 2021 of a valid application under the EU Settlement Scheme and the claimant signed and dated his application, as 30th June 2021 (page [68]/RB). It is also important to note, contrary to what the Judge's reasons might be read as suggesting at §2, that the Secretary of State did not refuse the claimant's application under the Immigration (EEA) Regulations 2016 (the 'Regulations') or, for example, Regulation 16 of the Regulations as a Zambrano carer, (see Ruiz Zambrano v Office national de l'emploi (Case C-34/09) [2012] QB 265) but instead under Appendix EU, in the impugned decision dated 20th September 2022. In those reasons, the Secretary of State considered the best interest of the claimant's child under Section 55 of the Borders, Citizenship and Immigration Act 2009. The Secretary of State considered that the claimant had applied for leave to remain on the basis that he was the primary carer of a British citizen and there is no substantive dispute as to his relationship with his child. Nevertheless, the Secretary of State pointed out that there were three key elements, which must be met:

- (1) that the claimant must meet the requirements of that definition throughout the continuous qualifying period in the UK in which he relies on being or having been a person with a Zambrano right to reside;
- (2) the claimant's continuous qualifying period in the UK must have begun before the 'specified date' i.e. by 23:00 hours GMT on 31st December 2020, unless the claimant fell within a relevant exception; and
- (3) that the claimant's continuous qualifying period must be continuing at the date of his application, i.e. on 30th June 2021.

In her impugned decision, the Secretary of State concluded, in rejecting the application, that the claimant did not satisfy the first element. While he claimed to have met the requirements from 1st January 2014 and 1 July 2021, the claimant could not rely upon any period in which he held leave other than under Appendix EU. The Secretary of State's records showed that the claimant had been granted leave to remain from 11th October 2017 until 14th April 2020 and then again from 13th January 2021 until 12th July 2023. In those circumstances, the claimant could not, for that reason alone, meet the requirements under Appendix EU, as he had another form of leave for part of the qualifying period. The Secretary of State's decision was then the subject of an administrative review application, which in turn maintained the impugned decision. The claimant then appealed to the First-tier Tribunal.

The Judge's judgment

4. In his decision, the Judge considered the claimant's immigration history and his periods of leave. The Judge set out the Secretary of State's contention that to succeed under Appendix EU, the 'Zambrano' right must be continuing at the date of the application and it was not, as the claimant had leave other than under Appendix EU.
5. The Judge considered evidence from the claimant, which we do not rehearse and then reached his decision at §7 onwards. The Judge cited Regulation 16 of the Regulations and noted that the application was made before the UK left on 31st December 2020, which is not correct. At §14, the Judge considered two cases relied on by the claimant, Patel v SSHD [2017] EWCA Civ 2028 and KA v Belgium (Case C-82/16) [2018] as authority for the proposition that he could not be penalised for not having applied for leave under the Immigration Rules or outside the Rules under Article 8 ECHR. At §15, he considered the Court of Appeal's decision in Akinsanya [2022] EWCA Civ 37, as authority for the proposition that having limited leave to remain did not preclude a Zambrano right under Regulation 16.
6. The Judge found at §16 that the claimant's British national child was cared for primarily by his mother. While the mother claimed to have medical issues, there was no medical evidence before the Judge. The Judge nevertheless found, for reasons which are unclear, that the Secretary of State had previously accepted the claimant's Zambrano rights. We do not read that as the Secretary of State making a formal concession to that effect and this issue is at the heart of the dispute in the impugned decision.
7. At §18, the Judge recorded, inconsistently with his earlier remarks about the date of the claimant's application, that the application had been made on 6th July 2021. At §19 is the paragraph with which the Secretary of State take particular issue:

"I find that the appellant's immigration history shows that he had leave to remain under Appendix FM until from [sic] 13 January 2021 to 12 July 2023. He therefore had leave to remain at the date of application on 6 July 2021. Although he did not have a continuous qualifying period in the United Kingdom as a person with a Zambrano right to reside at the specified date, Akinsanyo makes it clear that having limited leave to remain in the United Kingdom does not extinguish a Zambrano right of residence."
8. On that basis the judge concluded that the claimant met the requirements of Appendix EU.

The Secretary of State's appeal and the grant of permission

9. The Secretary of State appealed the decision on 28th May 2023. First, the Judge had misdirected himself on the immigration history. The application for leave to remain was not made or refused under the Regulations, but under Appendix EU. Having set off in the wrong direction, the Judge had then moved beyond the only available ground of appeal, namely that it was not in accordance with the Immigration Rules, and instead had created a hybridised test based on a conflation of Rules and Regulations whereas the application under the Rules was

defeated by a single factual matter, namely continuous leave for the relevant period. The Judge had instead sought to construe the Akinsanya decision as permitting a re-writing of the Rules, which Akinsanya did not indicate. Permission was granted by Judge Saffer of the First-tier Tribunal on 19th June 2023. The grant of permission was not limited in its scope.

The Rule 24 reply and the Secretary of State's submissions

10. We have considered a Rule 24 reply dated 20th August 2023, in the claimant's absence. Very broadly speaking it submits that the Judge correctly considered Regulation 16; and the Judge had been correct to rely upon the case of Akinsanya.
11. For the Secretary of State, in clear and structured submissions, Mr Terrell argued that while the appeal was of crucial importance to the claimant, the Rules relating to his application were simple, and there was only one answer, which was that he could not meet them. He had to have Zambrano rights continuously from 30th December 2020 until the date of his application, 30th June 2021. This was because of three definitions. The first, in Annex 1 of Appendix EU, is of a "continuous qualifying period," which "began before the specified date" (para (a)). Second, the relevant definition of "specified date" is 23:00 GMT on 31st December 2020. Third, Annex 1 defines "a person with a Zambrano right to reside," as being:

"a person who has satisfied the Secretary of State by evidence provided that they are (and for the relevant period have been) or (as the case may be) for the relevant period they were:

 - (a) resident for a continuous qualifying period in the UK which began before the specified date and throughout which the following criteria are met:....
 - (iv) they do not have leave to enter or remain in the UK, unless..."
12. There then follow a series of exceptions (Appendix EU leave, Section 3C leave or under Appendix EU(FP)), none of which the claimant met.
13. In simple terms, the claimant's Zambrano rights ceased to crystallise, once he obtained leave under Appendix FM, which meant that he did not meet sub-para (iv). The Judge had misunderstood the Court of Appeal's decision in Akinsanya. First, it resulted in a declaration that the Secretary of State had misunderstood the effect of Regulation 16 of the Regulations, but the Court of Appeal did not re-write Appendix EU. Second, the Court confirmed that any Zambrano rights waited in the wings and did not crystallise where there was existing leave. In those circumstances, what the Judge had erred in doing, when he reached his decision, was that instead of noting the lack of continuous Zambrano rights and stopping there, he had gone on to consider, in particular in §19, Akinsanya as authority to re-write Appendix EU.

Our conclusions

14. We accept Mr Terrell's submissions that because the claimant had applied under Appendix EU and not under the Regulations, and was refused on the same basis, the Judge had erred in failing to stop in his analysis that the claimant did not

meet the Zambrano requirements, as defined in Annex 1, and instead proceeded to re-write the Rules. In the circumstances, the Judge erred in law. The Judge's reasons are therefore not safe and cannot stand.

Whether to remit or remake the appeal decision

15. We have heard the submissions from Mr Terrell as to how we should dispose of the appeal and whether to remit matters back to the First-tier Tribunal or to retain remaking in this Tribunal, noting §7.2 of the Senior President's Practice Statement and in particular the Court of Appeal's authority in AEB v SSHD [2022] EWCA Civ 1512. This is not a case where the effect of the error has been to deprive a party before the First-tier Tribunal of a fair hearing or other opportunity for that party's case to be put to and considered by the Judge. The nature or extent of any judicial fact finding which is necessary for the decision to be re-made is not such that, having regard to the overriding objective in rule 2, it is appropriate to remit the case to the First-tier Tribunal. There is no dispute as to the aspects in which the claimant does not meet Appendix EU. It is appropriate that we retain remaking in this Tribunal.
16. For the reasons set out above, we remake the claimant's appeal by dismissing it. The Secretary of State's decision dated 20th September 2022, to refuse the claimant's application, is upheld.

Notice of decision

The Secretary of State's appeal against the Judge's decision promulgated on 15th March 2023 is upheld. The Judge erred in his decision, which we set aside.

We remake the decision by dismissing the claimant's appeal under Appendix EU.

J Keith

Judge of the Upper Tribunal
Immigration and Asylum Chamber

17th November 2023