



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

Case No: UI-2023-003912

First-tier Tribunal No: EA/08164/2022

**THE IMMIGRATION ACTS**

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

**Before**

**UPPER TRIBUNAL JUDGE STEPHEN SMITH**

**Between**

**Secretary of State for the Home Department**

Appellant

**and**

**Victor Kwasi Tsidi**  
**(ANONYMITY DIRECTION REVOKED)**

Respondent

**Representation:**

For the Appellant: Mr M. Parvar, Senior Home Office Presenting Officer  
For the Respondent: In person

**Heard at Field House on 31 October 2023**

**DECISION AND REASONS**

1. By a decision promulgated on 21 August 2023, First-tier Tribunal Judge Mill (“the judge”) allowed an appeal against a decision of the Secretary of State dated 15 August 2022 to refuse the application of the appellant, a citizen of Ghana born in December 1979, under the EU Settlement Scheme (“the EUSS”) as a “person with a Zambrano right to reside”. The judge heard the appeal under the Immigration (Citizens' Rights Appeals) (EU Exit) Regulations 2020 (“the 2020 Regulations”). The Secretary of State now appeals against the decision of the judge with the permission of First-tier Tribunal Judge Hollings-Tennant.
2. I will refer to the appellant before the First-tier Tribunal as “the appellant”.
3. The appellant appeared before me as a litigant in person. We discussed whether he wanted to apply for an adjournment, but he said that he did not. I explained that my role in those circumstances was to help him to understand what was going on at the hearing, to explain all stages of the process to him, and to assist him to present his case. I decided that it would be fair and just to continue the hearing in that manner.

4. As I explained to the appellant at the hearing, the appeal of the Secretary of State was allowed, and I remade the decision of the First-tier Tribunal by dismissing the appeal. I also explained that I would send full written reasons to him. This document sets out my reasons.

### **Anonymity order**

5. The judge made an order for anonymity “as the appeal relates to the Appellant’s two children.” In my judgment, that is not a sufficient basis to derogate from the principle of open justice. There is no need for this decision to refer to any details relating to the appellant’s children. The case turns on a point of law. Open justice is important. I therefore revoke the order for anonymity made by the judge.

### **Factual background**

6. This case concerns “Zambrano” carers. The term is taken from a case heard before the Court of Justice of the European Union, *Ruiz Zambrano v Office National de l'Emploi* [2011] Imm AR 521. In summary, a Zambrano carer is a non-EU citizen who needs to be given a right to reside in an EU Member State in order to enable an EU citizen child not to have to leave the territory of the EU. The UK, of course, is no longer an EU Member State. The EU Withdrawal Agreement grants rights to reside to certain EU citizens and their family members in the UK. It does not make provision for Zambrano carers. However, Appendix EU of the Immigration Rules does. This issues in this case concern the rules established for that purpose by Appendix EU, known as the EUSS.
7. The appellant shares parental responsibility for his two minor British children (born in 2009 and 2016) with his former partner. He held leave to remain granted for that purpose under Appendix FM of the Immigration Rules from 26 March 2019 to 26 September 2021. On 28 June 2021 – before the expiry of his leave under Appendix FM – the appellant applied for pre-settled status under the EUSS as a “Zambrano carer”.
8. The application was refused on the basis that the definition of “a person with a Zambrano right to reside” in Appendix EU of the Immigration Rules specifically excluded those, such as this appellant, who held leave to remain other than leave granted under the EUSS at the “specified date”, namely 31 December 2020 at 11PM.

### **Decision of the First-tier Tribunal**

9. The appellant appealed to the First-tier Tribunal against the decision of the Secretary of State. The judge found that the appellant enjoyed a genuine and subsisting relationship with both of his sons. The bond between the appellant and his children was such, found the judge, that if the appellant left, his elder son would feel compelled to leave with him.
10. The judge acknowledged that the appellant held limited leave to remain at the time of the EUSS application and observed that whether someone with limited leave to remain is entitled to qualify as someone with a Zambrano right to reside had been the subject of much litigation: para. 15. The judge referred to the Court of Appeal judgment in *R (Akinsanya) v Secretary of State for the Home Department* [2022] 2 WLR 681, [2022] EWCA Civ 37. The judge said that what was found by *Akinsanya* was:

“...that the appellant [in *Akinsanya*], with limited leave, such as the Appellant in this case, could still enjoy a Zambrano right to reside independently of her grant of limited leave.”

11. At para. 16, the judge said that the Secretary of State had failed conduct a respondent’s review, and that the presenting officer had only been able to rely on the Secretary of State’s refusal letter in relation to the *Akinsanya* issue. The judge noted that the presenting officer’s primary submission had concerned whether the appellant was, in fact, the primary carer of his two sons, but said that that was not an issue taken by the Secretary of State in the refusal letter, and in any event, he was satisfied that the appellant was, in practical terms, the primary carer for his elder son, and one of the two primary carers for his younger son.

12. The judge concluded para. 17:

“...the respondent’s refusal of the appellant’s application due to the existence of his limited leave is wrong in law.”

13. The judge allowed the appeal.

### **Issues on appeal to the Upper Tribunal**

14. In summary, the Secretary of State appeals on the basis of one central ground: since the appellant held limited leave to remain, granted other than under the EUSS, at the “specified date” (that is, 31 December 2020 at 11.00PM), he was incapable of satisfying the decision of “person with a Zambrano right to reside” contained in Appendix FM. Mr Parvar submitted that the definition of “person with a Zambrano right to reside” meant that it was impossible for the appellant’s appeal before the First-tier Tribunal to have been allowed. The judge was wrong to rely on *Akinsanya*, which did not justify the conclusion he reached.

15. At the hearing, I explained to the appellant what the *Akinsanya* case was about. I will attempt to summarise that explanation here, in a way which is hopefully not too complex.

16. I explained that the *Akinsanya* case was about the difference between the definition of “person with a Zambrano right to reside” in Appendix EU of the Immigration Rules, on the one hand, and regulation 16(7) of the Immigration (European Economic Area) Regulations 2016, on the other. I explained that those Regulations dealt with the rights of EU citizens and their family members before Brexit. They are no longer in force because the UK has now fully left the EU. Following Brexit, the Secretary of State made Appendix EU. There is an overlap between the 2016 Regulations and Appendix EU in relation to Zambrano carers. But there are also some significant differences. One significant difference is that the pre-Brexit Regulations allowed a person to be a Zambrano carer even if they had leave to remain, as long as it was not *indefinite* leave to remain. Appendix EU is different. Appendix EU says that a person cannot be a Zambrano carer if the person held *any* leave to remain at 31 December 2020, unless it was leave to remain granted under Appendix EU. The *Akinsanya* case was all about that difference. But significantly for this case, *Akinsanya* did not say that it was against the law for Appendix EU to say that Zambrano carers could not have leave to remain unless it was Appendix EU leave.

17. For a more detailed summary, see the case of *Sonkor (Zambrano and non-EUSS leave)* [2023] UKUT 276 (IAC) at para. 13. The case is available online, for

example at [www.bailii.org](http://www.bailii.org) > *Find by Case Citation* and then type “[2023] UKUT 276 (IAC)” in the search box.

18. In response the appellant explained his understandable frustration at the process he has been through. He said that as a lay person he had not heard about the *Akinsanya* case until his case before the First-tier Tribunal. He said that, even though he held Appendix FM leave, acting on legal advice he applied to the EUSS. He thought that his application was valid. He expressed his deep frustration at having thought he succeeded before Judge Mills, only to find out that the judge might have made a mistake.

**Appellant cannot be a “person with a Zambrano right to reside”**

19. The definition of a “person with a Zambrano right to reside” is:

“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:

(i) the criterion in paragraph (1)(a) of that regulation; and

(ii) the criteria in:

(aa) paragraph (5) of regulation 16 of the EEA Regulations; or

(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**

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

20. I have put the crucial part of the definition in bold. The definition excludes applicants, such as this appellant, who held non-Appendix EU leave on 31 December 2020.

21. I respectfully consider that the judge's reasoning concerning *Akinsanya* was incorrect. While *Akinsanya* held that a person with limited leave to remain could still have a Zambrano right to reside under the pre-Brexit 2016 Regulations, it did not reach the same conclusion about Appendix EU.
22. The judge appears to have been concerned, at para. 16, about the fact that the Secretary of State had not conducted a "respondent's review" of the appellant's appeal before the First-tier Tribunal in response to the judgment of *Akinsanya* in the Court of Appeal. The judge was rightly entitled to be concerned about that. He was deprived of the assistance he was entitled to from the Secretary of State. The focus of the hearing before the judge seems to have been the presenting officer's submissions that the appellant was not the primary carer for his children, even though that point had not been taken by the refusal letter. The judge rejected those submissions and reached findings of fact, that have not been challenged by the Secretary of State, that the appellant was a joint primary carer for his children. But the judge also said that the presenting officer relied on the refusal letter. As I have set out above, the refusal letter did make the central point about the appellant holding non-Appendix EU leave at the specified date: see the summary at para. 8, above.
23. I respectfully consider that the judge made an error of law by finding that the Secretary of State's decision to refuse the appellant's application for leave to remain under Appendix EU was "wrong in law". It was a misdirection which was central to the decision to allow the appeal. The appeal was incapable of being allowed because the appellant did not meet the requirements of Appendix EU, and that was the only applicable ground of appeal. This is entirely consistent with the conclusions of *Sonkor*, as set out in the Headnote:
  - “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.”
24. I should note that *Sonkor* had not been reported at the date of the hearing in either the First-tier Tribunal or the Upper Tribunal. Nothing turns on this since the explanation I provided to the appellant at the hearing before me was entirely consistent with that taken by *Sonkor*, in which I was a member of the panel.
25. I therefore set the decision of the judge aside. There has been no challenge to the judge's findings of fact concerning the appellant's role as a joint primary carer for his younger son, and the finding that he is, in practical terms, the primary carer for his older son. I preserve those findings.
26. Having set aside the decision of the judge, it then necessary either to remit the case to the First-tier Tribunal, or to remake the decision in the Upper Tribunal. I decided to remake the decision in the Upper Tribunal, there and then, by dismissing the appeal, acting under section 12(2)(b)(ii) of the Tribunals, Courts and Enforcement Act 2007. I did this because there were no findings of fact to be reached and it would have been a waste of time and resources to send the case back to the First-tier Tribunal in the circumstances.

## **Postscript**

27. The appellant held leave to remain (under Appendix FM) when he made the EUSS application which led to the decision under appeal in this case. That means the Appendix FM leave he previously held should continue under section 3C of the Immigration Act 1971 until these proceedings are finally determined (that is, until the time for an application for permission to appeal to the Court of Appeal expires, or any further appeal is concluded). It is a matter for the appellant to make a further application under Appendix FM if he wishes. If he does decide to make a further application, he will be able to rely on the preserved findings of fact reached by Judge Mills in the First-tier Tribunal when he makes the application, provided there has been no change in his circumstances.

## **Notice of Decision**

The decision of the First-tier Tribunal involved the making of an error of law and is set aside, subject to the findings of fact set out above being preserved.

I remake the decision, dismissing the appeal.

**Stephen H Smith**

Judge of the Upper Tribunal  
Immigration and Asylum Chamber

**7 December 2023**