



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-004023
UI-2023-004024

First-tier Tribunal No: EA/11013/2022
EA/00466/2023

THE IMMIGRATION ACTS

Decision & Reasons Issued:

22nd November 2023

Before

UPPER TRIBUNAL JUDGE GLEESON

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**A T T
R O A**

[ANONYMITY ORDER MADE]

Respondents

Representation:

For the Appellant: Mr Chris Avery, a Senior Home Office Presenting Officer
For the Respondents: In person

Heard at Field House on 2 November 2023

Order Regarding Anonymity

Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, the claimants have been granted anonymity, and are to be referred to in these proceedings by the initials A T T and R O A. No-one shall publish or reveal any information, including the name or address of either claimant, which is likely to lead members of the public to identify the claimants or their children.

Failure to comply with this order could amount to a contempt of court.

DECISION AND REASONS

Introduction

1. The Secretary of State challenges the decision of the First-tier Tribunal allowing the claimants' appeals against his decisions on 18 October 2022 and 23 December 2022 to refuse them settled or pre-settled status under the EU Settlement Scheme as persons with a *Zambrano* right of residence.
2. The claimants are a wife, who is a citizen of Zimbabwe, and her husband, who is a Ghanaian citizen. They are responsible for two minor children, a son born to the wife in 2018, who is a British citizen and for whom the husband has parental rights, and their joint son born in 2020. It is not in dispute that they are living together and bringing up the boys together.
3. The claimants' applications were made on 16 February 2022, for an EUSS residence card, as the primary carers of the first claimant's British citizen child. That was long after the EU Exit specified date (11 p.m. on 31 December 2020) and accordingly the Immigration (European Economic Area) Regulations 2016 no longer applied and the claimants needed to bring themselves within the EUSS provisions in Appendix EU.
4. For the reasons set out in this decision, I have come to the conclusion that the decision of the First-tier Tribunal must be set aside for error of law. I remake the decision by dismissing the appeals of both claimants.
5. **Mode of hearing.** The hearing today took place face to face.

Background

6. The first claimant has two sons, one from a previous relationship and one with the second claimant. Her older son is a British citizen. The second claimant in November 2020 successfully applied for a parental rights order in relation to the older boy and is thus in a parental relationship with both of the children.
7. The first claimant has had non-EU leave from 15 March 2019 until 14 September 2021 and from 16 October 2020 until 14 April 2023, under Appendix FM of the Immigration Rules HC 395 (as amended). The second claimant has had leave under Appendix FM for some time (the dates are nowhere in the documents before me) but at the specified date of 11 p.m. on 31 December 2020, he had no leave at all. He never held an EEA residence card before the specified date, whether based on a *Zambrano* right to reside or any other basis. At the specified date, he had no extant leave.
8. The First-tier Judge allowed the claimants' appeals by reference to the definition of derivative right to reside in Regulation 16 of the Immigration (European Economic Area) Regulations 2016 (as saved), treating them as joint primary carers as there defined.

9. The First-tier Judge did not make any finding as to whether these claimants could bring themselves within the definition of a person with a *Zambrano* right to reside set out in Appendix EU, regarding the EUSS application which these claimants have made.
10. The Secretary of State appealed to the Upper Tribunal.

Permission to appeal to the Upper Tribunal

11. Permission to appeal to the Upper Tribunal was granted in the following terms:

“ 2. The grounds of appeal assert that the Judge erred in law by failing to identify how the Appellants satisfy the requirements under Appendix EU. It is argued that it was not open to the Judge to allow the appeal under Regulation 16(5) of the Immigration (EEA) Regulations 2016. There is some merit in this assertion given that both Appellants had limited leave to remain in a capacity other than as a ‘*Zambrano* carer’ and were not in the process of completing a ‘continuous qualifying period’ which began before the ‘specified date’, such that they did not fall within the requisite definition in Annex 1 of Appendix EU. Given the Judge allowed the appeal under Regulation 16(5), it is not entirely clear whether she was satisfied the Appellants in fact met the requirements under Appendix EU, which was necessary given the grounds open to the Appellants.

3. The grounds also assert that the Appellants have not demonstrated that their children would be compelled to leave the United Kingdom if their applications were refused. In order to qualify under Appendix EU, the Appellants needed to show that their British citizen children would in practice be unable to reside here if the Appellants in fact left the country. Whilst the Judge was entitled to find that the children would not be able to remain if their parents left, it is not sufficiently clear whether she considered whether they would in fact leave or indeed be required to leave, bearing in mind they had limited leave to remain and, as the Judge notes, it is highly probable they would succeed in any subsequent application for further leave (see paragraph [45]).”

Rule 24 Reply

12. On 10 October 2023, the claimants filed a Rule 24 Reply to the grant of permission. It is significantly out of time, but I admit it as the claimants are representing themselves and it gives me some assistance in understanding how they put their case. They argue that, applying *Akinsanya*, it had been open to the First-tier Judge to look back to the pre-EU Exit position and to apply Regulation 16(5) of the Immigration (European Economic Area) Regulations 2016. The second claimant, who had no leave to remain on any basis at the specified date, argues that this gives him a right to an EUSS *Zambrano* right to reside.
13. That is the basis on which this appeal came before the Upper Tribunal.

Upper Tribunal hearing

14. The oral and written submissions at the hearing are a matter of record and need not be set out in full here. I had access to all of the documents before the First-tier Tribunal.

Error of law decision

15. I am not persuaded by the argument that it was open to the First-tier Judge to go back to the pre-EU Exit position and rely on the provisions of the 2016 EEA Regulations. At the date when these applications were made, the UK was no longer an EEA member and the applicable provisions were those in Appendix EU of the domestic Immigration Rules.
16. The First-tier Judge did not engage with the Appendix EU requirements. She erred in law in applying the EEA Regulations to these applications, which were made long after the specified date and were expressly made for EUSS status under Appendix EU.
17. **The Secretary of State's appeal therefore succeeds.**

Remaking the decision

18. The decision of the First-tier Tribunal was set aside and I proceeded to remake the decision in the claimants' appeals. The claimants were both present at the hearing and confirmed that they both now have leave within the Rules and are on a pathway to settlement.
19. Neither of them could show 5 years' EEA residence as at the specified date of 31 December 2020, because the first claimant had been granted continuous limited leave under Appendix FM and the second claimant had at least some periods of Appendix FM leave, albeit at the specified date he had no leave at all. Before the specified date, he had never held an EEA residence card on any basis, still less asserted a *Zambrano* right to reside.

Appendix EU - the *Zambrano* right to reside

20. The provisions in Appendix EU regarding persons with a *Zambrano* right to reside are at EU 11. So far as relevant to these applications, EU 11 provides as follows:

“Persons eligible for indefinite leave to enter or remain as a relevant EEA citizen or their family member, or as a person with a derivative right to reside or with a *Zambrano* right to reside

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, including (where applicable) by the **required evidence of family relationship**, that, at the date of application, one of conditions 1 to 7 set out in the following table is met:

[Condition 3] is met where

3. (a) The applicant: ...

(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 in respect of the applicant. ...

EU13. The reference to the applicant completing a continuous qualifying period of five years:

• In condition 3 in the table in paragraph EU11 can include a period during which the applicant was a family member of a qualifying British citizen or a family member who has retained the right of residence by virtue of a relationship with a qualifying British citizen before becoming (as the case may be) a relevant EEA citizen, a family member of a relevant EEA citizen (or thereafter a family member who has retained the right of residence by virtue of a relationship with a relevant EEA citizen), a person with a derivative right to reside or a person with a Zambrano right to reside.”

21. The relevant definition of a person with a *Zambrano* right to reside is in Annex 1 to Appendix EU:

“...a person who, before the specified date, was a person with a derivative right to reside or a person with a *Zambrano* right to reside, immediately before they became (whether before or after the specified date):

(a) a relevant EEA citizen; or

(b) a family member of a relevant EEA citizen; or

(c) a person with a derivative right to reside; or

(d) a person with a Zambrano right to reside; or

(e) a family member of a qualifying British citizen,

and who has remained or (as the case may be) remained in any (or any combination) of those categories (including where they subsequently became a family member who has retained the right of residence by virtue of a relationship with a relevant EEA citizen or with a qualifying British citizen)

in addition, where a person relies on meeting this definition, the continuous qualifying period in which they rely on doing so must have been continuing at 2300 GMT on 31 December 2020. ”

22. The First-tier Judge was asked to take account of an April 2023 decision by Upper Tribunal Judges Smith and Stephen Smith, but dismissed it briskly, and properly, because it was unreported and might be under appeal.

23. That decision has now been reported as *Sonkor (Zambrano and non-EUSS leave)* [2023] UKUT 00276 (IAC) and is of assistance to me in considering this appeal. The Upper Tribunal gave the following guidance:
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.*
24. That guidance is fatal to the first claimant’s position. She held non-EUSS limited leave to remain at all material times and cannot, therefore, be a person with a *Zambrano* right to reside.
25. The second claimant has never had an EU residence card on the basis of a *Zambrano* right to reside, or any other basis. He has had Appendix FM leave at times such that he could not show 5 years’ continuous EU leave. At the specified date, he had no extant leave, and the parties were living together and bringing up their children together. Neither of the claimants was entitled to a *Zambrano* right to reside at the specified date.
26. Accordingly, the claimants’ appeals cannot succeed and are dismissed. Neither claimant will have to leave the UK in consequence of this decision as they both now have limited leave and are on a settlement route within the Rules.

Notice of Decision

27. For the foregoing reasons, my decision is as follows:

The making of the previous decision involved the making of an error on a point of law.

I set aside the previous decision. I remake the decision by dismissing the claimants’ appeals.

Judith A J C Gleeson
Judge of the Upper Tribunal
Immigration and Asylum Chamber

Dated: 15 November 2023