



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case Nos.: UI-2023-004599;
UI-2023-004600

First-tier Tribunal Nos:
EU/51120/2023;
LE/00365/2023;
EU/50583/2023;
LE/00922/2023

THE IMMIGRATION ACTS

**Decision & Reasons Issued:
On 17 December 2023**

Before

**UPPER TRIBUNAL JUDGE SMITH
DEPUTY UPPER TRIBUNAL JUDGE BAGRAL**

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

And

**(1) NISANSAL S. H. P. A. H. MUDIYANSELAGE
(2) MR SUNIL J.J. MUDIYANSELAGE**

Respondents

Representation:

For the Appellant: Ms S McKenzie, Senior Home Office Presenting Officer
For the Respondent: Mr D Wellage, Solicitor, Lyon Legal Ltd

Heard at Field House on Thursday 23 November 2023

DECISION AND REASONS

BACKGROUND

1. This is an appeal brought by the Secretary of State. For ease of reference, we refer to the parties as they were before the First-tier Tribunal. The Respondent appeals against the decision of First-tier Tribunal Judge K M Verghis dated 4 October 2023 (“the Decision”) allowing the Appellants’ appeals against the Respondent’s decisions dated 7 February 2023 and 12 June 2023 refusing them status under the EU Settlement Scheme (“EUSS”).
2. The Appellants are a wife and husband. They are Sri Lankan nationals. They are the parents of two children. Their daughter, born in 2015, is a British citizen. Their son, born 2017, is, so far as we can see, not registered as a British citizen.
3. The First Appellant had prior leave to remain as a student from August 2011 to September 2016. At some point prior to October 2020, the Second Appellant claimed asylum with the First Appellant and their children as dependents. On 5 October 2020, following the acquisition of British citizenship by his daughter, the Second Appellant withdrew his asylum application, and an indication was given that he and his wife intended to apply for leave to remain as “Zambrano carers” of their British citizen daughter. On 8 October 2020, the Respondent refused the asylum claim.
4. An initial application for leave to remain as a “Zambrano carer” which the Appellants’ solicitors sought to make on 5 October 2020 was defective but was re-made on 10 November 2020. That was an application for a derivative residence card made under the Immigration (European Economic Area) Regulations 2016 (“EEA Regulations”). It was refused on 13 March 2021. However, an appeal against that decision was allowed by First-tier Tribunal Judge L M Shand QC (as she then was) by a decision dated 21 December 2021 (“the Previous Appeal Decision”). The Previous Appeal Decision appears at [107-112] of the hearing bundle.
5. In the meanwhile, however, the Respondent had granted the Appellants leave to remain under Appendix FM to the Immigration Rules (“Appendix FM”) presumably on the basis that it would not be reasonable for the Appellants’ children to leave the UK and to go to Sri Lanka with their parents. That leave to remain was granted from February 2021 to August 2023. We were told that the Appellants had not sought to extend their leave to remain even though it was open to them to do so.
6. The Appellants requested the Respondent to implement the Previous Appeal Decision. This led to a letter dated 21 June 2022 (at [115-116] of the bundle) which informed the Appellants that although the Respondent was satisfied that the Appellants would have qualified for a residence card under the EEA Regulations, those regulations had since been revoked. The Respondent could not therefore issue a residence card under those regulations. The Appellants were advised by that letter to “obtain the

immigration status required to continue living in the UK". That was said to be via an application under the EUSS. It was pointed out that the period for making an application under the EUSS had also come to an end, but the Respondent advised that there was scope for a late application if there were reasonable grounds to do so.

7. The Appellants' applications under the EUSS were refused by the Respondent by the decisions under appeal on the basis that they could not meet paragraph EU11 of Appendix EU to the Immigration Rules ("Appendix EU") because they could not meet condition 1 of paragraph EU14 of Appendix EU. That was because the Appellants did not have a "Zambrano right to reside" throughout the qualifying period. After February 2021, they had leave to remain under Appendix FM. The continuous qualifying period was said to be from September 2020 when the Appellants' daughter obtained British citizenship to October 2022 when the First Appellant applied under the EUSS.
8. Judge Verghis took as her starting point the Previous Appeal Decision (applying the "Devaseelan" guidance). She also relied on the High Court's judgment in R (on the application of Akinsanya) v Secretary of State for the Home Department [2021] EWHC 1535. It appears that the representatives did not refer Judge Verghis to the Court of Appeal's judgment on the Respondent's appeal to that court ([2022] EWCA Civ 37) ("Akinsanya") which judgment was handed down on 25 January 2022 (therefore well before the hearing before Judge Verghis). Judge Verghis also noted that the Respondent had sought to appeal the Previous Appeal Decision on the basis that Mostyn J had wrongly decided Akinsanya. Permission to appeal was refused by First-tier Tribunal Judge Cox on 14 January 2022 (therefore prior to the handing down of the judgment in Akinsanya by the Court of Appeal). Based on the conclusion of the Previous Appeal Decision that the Appellants were the "Zambrano carers" of a British citizen child and what Judge Verghis understood the law to be in relation to the Appellants having leave to remain under Appendix FM, she allowed the appeals.
9. The Respondent appeals the Decision on the basis that Judge Verghis had misdirected herself in law. It is submitted that the Judge failed to consider whether the Appellants could meet Appendix EU. It is also pointed out that the Appellants could only appeal on two grounds, namely that the Respondent's decisions were not in accordance with Appendix EU or were in breach of the agreement between the UK and the European Union on the UK's departure from the EU ("the Withdrawal Agreement"). It is submitted that Judge Verghis allowed the appeal on the basis that the Appellants are "Zambrano carers" without considering the definition of a "person who has a Zambrano right to reside".
10. Permission to appeal was granted by First-tier Tribunal Judge Cox on 18 October 2023 in the following terms so far as relevant:

"..2. The grounds do not refer to the correct definition, as under EU14 of Appendix FM [sic], an applicant may meet the eligibility requirements for

limited leave to remain in the UK if the applicant is ‘a person with a Zambrano right to reside’ (EU14.1(a)(v)), which is discreet [sic] from ‘a person with a derivative right to reside’.

3. Nevertheless, the definition of ‘a person with a Zambrano right to reside’ also includes a requirement that ‘*they do not have leave to enter or remain in the UK, unless...*’ and one of the exceptions is: this ‘*was granted under this Appendix*’. Arguably the judge erred in law in failing to consider the definition and explicitly finding that the Appellant met Appendix EU.

4. However, given IJ Shand’s decision, it is also arguable that the error is not material. In my view, the key issue that will have to be decided is whether the exception incorporates an applicant who **ought** to have been granted leave under this Appendix.

5. Permission to appeal is granted on all grounds.”

11. We had before us an indexed bundle of relevant documents submitted by the Respondent to which we have referred above.
12. The matter comes before us to determine whether the Decision contains an error of law. If we conclude that it does, we must then consider whether to set aside the Decision. If we set aside the Decision, we must then either re-make the decision or remit the appeal to the First-tier Tribunal to do so.
13. Prior to the start of the hearing, we drew the parties’ attention to the Tribunal’s decision in Sonkor (Zambrano and non-EUSS leave) [2023] UKUT 00276 (IAC) (“Sonkor”) which had been reported shortly before the hearing before us. We considered that Sonkor may be relevant to the issues we had to decide. Having put these appeals back in our list to allow Mr Wellage to consider the decision, he directed us to the Tribunal’s decision in Osunneye (Zambrano; transitional appeal rights) [2023] UKUT 00162 (IAC) (“Osunneye”).
14. Having heard submissions from both parties, we indicated that we found there to be an error of law in the Decision and proposed to set it aside. We also indicated that we could see no way in which the Appellants could succeed in their appeals, and we therefore proposed to dismiss them. We indicated that we would provide our reasons in writing which we now turn to do.

DISCUSSION

Legal Background

15. In order to inform our consideration of the Judge’s reasoning and the arguments put forward by the parties, it is necessary to set out the provisions of Appendix EU which relate or could relate to the Appellants. Those are 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 **relevant EEA citizen** or their family member (or as a **person with a derivative right to reside** or 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:

...

3. (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 in respect of the applicant

Persons eligible for limited leave to enter or remain as a relevant EEA citizen or their family member, as a person with a derivative right to reside or with a Zambrano right to reside or as a family member of a qualifying British citizen

EU14. The applicant meets the eligibility requirements for limited leave to enter or remain where the Secretary of State is satisfied, including (where applicable) by the required evidence of family relationship, that, at the date of application, condition 1 or 2 set out in the following table is met:

Condition Is met where:

1. (a) The applicant is:
- (i) a relevant EEA citizen; or
 - (ii) a family member of a relevant EEA citizen; or
 - (iii) a family member who has retained the right of residence by virtue of a relationship with a relevant EEA citizen;
 - (iv) a person with a derivative right to reside; or
 - (v) a person with a Zambrano right to reside; and
- (b) The applicant is not eligible for indefinite leave to enter or remain under paragraph EU11 of this Appendix solely because they have completed a continuous qualifying period of less than five years; and
- (c) Where the applicant is a family member of a relevant EEA citizen, there has been no supervening event in respect of the relevant EEA citizen."

[underlining is our emphasis]

16. The Appellants could potentially meet sub-paragraph (a)(v) of condition 1 to paragraph EU14 of Appendix EU ("Paragraph EU14"). Although the Respondent's decisions under appeal refer also to condition 3 of paragraph EU11 of Appendix EU, it appears to us that the Appellants could not satisfy that paragraph because they have not had a qualifying period of five years as "Zambrano carers" (their daughter having been given British citizenship

in September 2020). They could only qualify on any view for pre-settled status.

17. However, the Appellants' ability to satisfy condition 1 of Paragraph EU14 depends also on them meeting the definition of either a "person with a Zambrano right to reside" or "a person who had a Zambrano right to reside". For those definitions, one turns to Annex 1 to Appendix EU. Those terms are defined as follows:

person who had a derivative or Zambrano right to reside

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

person with a Zambrano right to reside

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:
 - (i) they are not an exempt person; and
 - (ii) they are the primary carer of a British citizen who resides in the UK; and
 - (iii) the British citizen would in practice be unable to reside in the UK, the European Economic Area or Switzerland if the person in fact left the UK for an indefinite period; and
 - (iv) they do not have leave to enter or remain in the UK, unless this:
 - (aa) was granted under this Appendix; or
 - (bb) is in effect by virtue of section 3C of the Immigration Act 1971; or
 - (cc) is leave to enter granted by virtue of having arrived in the UK with an entry clearance in the form of an EU Settlement Scheme Family Permit granted under Appendix EU (Family Permit) to these Rules on the basis they met subparagraph (a)(ii) of the definition of 'specified EEA family permit case' in Annex 1 to that Appendix; and

(v) they are not subject to a decision made und under regulation 23(6)(b), 24(1), 25(1), 26(3) or 31(1) of the EEA Regulations, unless that decision has been set aside or otherwise no longer has effect; or ...

in addition:

(a) 'relevant period' means here the continuous qualifying period in which the person relies on meeting this definition;
and

(b) unless the applicant relies on being a person who had a derivative or Zambrano right to reside or a relevant EEA family permit case, the relevant period must have been continuing at 2300 GMT on 31 December 2020; and

(c) where the role of primary carer is shared with another person in accordance with sub-paragraph (b)(ii) of the entry for 'primary carer' in this table, the reference to 'the person' in sub-paragraph (a)(iii) above is to be read as 'both primary carers'."

[underlining is our emphasis]

18. The point is made in the Respondent's decisions under appeal that the Appellants must meet the definitions both as at 11pm on 31 December 2020 and throughout the qualifying period on which they rely. As noted above, that period could not begin until the Appellants' daughter became a British citizen (in September 2020) and would have to continue until the date of application in October 2022.
19. A "person with a Zambrano right to reside" must not have leave to remain in the UK except where that is granted under Appendix EU or is in effect by virtue of section 3C Immigration Act 1971 or was leave to enter granted following arrival with an entry clearance under Appendix EU (Family Permit). The Appellants' leave to remain does not fall within those categories; their leave to remain was granted in February 2021 under Appendix FM.
20. Even if the Appellants were to seek to rely on having had a Zambrano right to reside in the past, the definition could not be met because (leaving aside any other considerations) they would have to become a person with a Zambrano right to reside (none of the other categories in (a) to (e) applying). As such, the definition of a person with a Zambrano right to reside would once again need to be met and could not be for the reasons we set out above.
21. Prior to dealing with Judge Verghis' reasoning, it is also necessary for us to deal with Akinsanya. In that case, Mostyn J held that the Respondent had erred in his understanding of the "Zambrano" jurisprudence and regulation 16 of the EEA Regulations (see [36] of the Court of Appeal's judgment). In other words, Mostyn J determined that the applicant in that case had an EU law right to reside which "was not extinguished by 'the existence of a concurrent limited leave to remain'".

22. Having heard the parties' competing arguments, the Court of Appeal held that Mostyn J had erred in his understanding of EU law. It held ([54]) that "the [CJEU] does not regard *Zambrano* rights as arising as long as domestic law accords to *Zambrano* carers the necessary right to reside (or to work or to receive social assistance)".
23. The Respondent's appeal to the Court of Appeal failed, however. That was because the Court of Appeal was unable to determine what were the Respondent's intentions in framing Appendix EU as he had. Under the EEA Regulations, only those with indefinite leave to remain ("ILR") were excluded from the issue of a residence card as "Zambrano carers" whereas under Appendix EU (as set out above) limited leave to remain would be sufficient. The Court of Appeal concluded ([57]) that "[w]hat the Secretary of State's purpose was is not something that [the] Court can answer". Under the second ground which was concerned with the Respondent's understanding of paragraph 16 of the EEA Regulations, the appeal failed. As the Court of Appeal said at [70] of its judgment, at that point in time the Respondent had agreed to reconsider his position following the judgment of Mostyn J.
24. In order to complete the relevant background, we refer to the Respondent's reconsideration of the drafting of Appendix EU which was completed and published on 13 June 2022. The salient part of that published policy reads as follows:

"The Home Secretary has carefully considered the Court of Appeal judgment and has decided that she no longer wishes that definition in Appendix EU to reflect the scope of the 2016 Regulations (which have now been revoked) but wishes it to reflect the scope of those who, by the end of the transition period, had an EU law right to reside in the UK as a Zambrano primary carer, in line with the originally stated policy intention. She therefore intends to maintain the requirement in sub-paragraph (b) of the definition that the applicant did not, by the end of the transition period and during the relevant period relied upon, have leave to enter or remain in the UK (unless this was under the EUSS).

This means applications will be considered under the existing Immigration Rules for the EUSS in Appendix EU. Applicants will be eligible for EUSS status in this category where, by the end of the transition period and during the relevant period relied upon, they met the relevant requirements of regulation 16 of the 2016 Regulations and did not have leave to enter or remain in the UK (unless this was under the EUSS)."
[our emphasis]

Error of Law Decision

25. Having set out that legal background, we can deal relatively shortly with the errors in the Decision which lead us to set it aside. Those are as follows.

26. First, the Judge relied on the Previous Appeal Decision. She did so applying the “Devaseelan” guidance. We accept that, up to a point, she was entitled to do that. She was entitled for example to accept that the Appellants were the primary carers of their British citizen daughter and that a requirement for them to leave the UK would mean that their daughter would also have to leave. However, Judge Verghis should have noted the different legal frameworks between the appeals before her and those which were before First-tier Tribunal Judge Shand. The appeals before Judge Shand were under the EEA Regulations. Those before Judge Verghis were under the EUSS. The statutory framework was entirely different.
27. Second, and flowing from that, Judge Verghis misdirected herself in law when relying also on the judgment of Mostyn J at [22] to [24] of the Decision. She did so by reference to the Previous Appeal Decision. However, as noted above, between the Previous Appeal Decision and the hearing of the appeal before Judge Verghis, the Court of Appeal had handed down judgment in Akinsanya. It was not open to Judge Verghis to rely on Mostyn J’s judgment so far as that concerned the position for Zambrano carers in EU law.
28. Third, and combining those two errors, Judge Verghis erred in her conclusion at [26] of the Decision which reads as follows:
- “The Appellants’ bundle of evidence before me has been unchallenged. It is evident from the immigration history as set out by IJ Shand that the Appellants made applications on 10 November 2020, in advance of the Government deadline of 31 December 2020. The leave granted by the Respondent in early 2021 was undoubtedly limited as the leave ceased in August 2023. In light of their family circumstances, IJ Shand allowed the appeals, having determined that both Appellants were entitled to a **Zambrano** derivative right of residence. I see no reason to depart from IJ Shand’s findings that the Appellants are entitled to a **Zambrano** derivative right of residence, particularly in light of the unchallenged immigration history as set out by IJ Shand. The Respondent has not placed anything before me to displace IJ Shand’s findings or to support a contrary view of **Akinsanya**.”
29. As above, that passage discloses an error by Judge Verghis in adopting the reasoning of Judge Shand when determining these appeals. Judge Shand was right to allow the appeals under the EEA Regulations. The Appellants did not have ILR and therefore met regulation 16 of those regulations (based on Judge Shand’s findings). That immigration background did not however translate to the appeals before Judge Verghis as limited leave to remain precluded the Appellants from satisfying the definition of a “person with a Zambrano right to reside”.
30. The passage also discloses the error we have outlined above in relation to Akinsanya. Whilst the parties must be criticised for failing to draw the Judge’s attention to the Court of Appeal’s judgment which was not a recent one, the Judge ought also to have checked that the law had not changed.

Whilst the Respondent's appeal to the Court of Appeal failed for the reasons set out above, the Respondent had in June 2022 determined to maintain the definition in Appendix EU. Again, the Respondent's Presenting Officer ought to have drawn the Judge's attention to that policy publication. However, if the Judge had checked for an appeal against Mostyn J's judgment, she would have been alert to the point.

31. Finally, the passage discloses an error as set out in the Respondent's grounds of appeal by the Judge's failure to explain how the Appellants could meet the requirements of Appendix EU.
32. For those reasons, we are satisfied that the Respondent's grounds disclose errors of law in the Decision. We therefore set the Decision aside.

Re-making

33. As we observed at the hearing, there can be only one answer to these appeals. The Appellants either meet the requirements of Appendix EU or they do not. In that regard, we disagree with what is said by Judge Cox in the permission grant regarding what the position ought to have been. Whilst, as set out below, we have every sympathy for the position in which the Appellants find themselves, which is in large part of the Respondent's making, we have to apply the law as it stands.
34. Moreover, the issue would be not whether the Appellants ought to be granted leave to remain under the EUSS (when they could not meet the requirements of Appendix EU) but whether they ought to have been given leave under the EEA Regulations (which could not be given as the regulations had been revoked).
35. There are only two grounds of appeal. The Appellants can only succeed if they can show that the Respondent's decisions under appeal are not in accordance with Appendix EU or are in breach of the Withdrawal Agreement. We take those two grounds in turn.

Appendix EU

36. Having set out the relevant provisions of Appendix EU above, and explained why the Appellants cannot fall within the definition of a "person with a Zambrano right to reside" or a "person who had a Zambrano right to reside", we do not need to say much more.
37. We deal very briefly with Mr Wellage's reliance on Osunneye in this context. The guidance for which Osunneye is reported concerns transitional rights of appeal under the EEA Regulations. That guidance was relevant to the appeals which came before Judge Shand and explains why her decision to allow the appeals was correct (on the basis that the Respondent's decisions under appeal were not in accordance with the EEA

Regulations). However, it can have no relevance to these appeals which are concerned with appeal rights under the EUSS and not the EEA Regulations.

38. For the reasons set out above, the Appellants could not meet the definition of a “person with a Zambrano right to reside” as at the date of application under the EUSS because at that date they had limited leave to remain granted under Appendix FM. That conclusion is consistent with the guidance given in Sonkor.
39. We readily accept that the Respondent ought not to have invited the Appellants to make applications under the EUSS as he did in June 2022. This was misleading as the Respondent knew or ought to have known that the Appellants would not be able to succeed under the EUSS because they had limited leave to remain under Appendix FM which continued until August 2023. However, at the date of the EUSS applications subsequently made by the Appellants, the law provides that they could not succeed because of that continuing leave.

Withdrawal Agreement

40. Having pointed out to Mr Wellage that the Appellants could only appeal on the basis that the decisions under appeal were not in accordance with Appendix EU or were in breach of the Withdrawal Agreement, Mr Wellage turned his sights on the Withdrawal Agreement.
41. Mr Wellage referred to [38] of the decision in Osunneye which he considered assisted his argument on this point. That reads as follows:

“I have carefully considered how that interpretation is consistent with the removal of regulations 16 and 20 of the EEA Regulations which, as the Tribunal pointed out in James, are not part of the EEA Regulations which are preserved by the 2020 Regulations. However, the ground of appeal is not whether the Respondent’s decision is contrary to the EEA Regulations but whether it accords with the EU Treaties (as now modified by what is said in paragraphs 5 and 6 of Schedule 3). As the Respondent points out in her supplementary skeleton argument, the impact of the modifications made by paragraph 6(cc) of Schedule 3 is broadly that, in relation to an application made to the Respondent before 31 December 2020 but not decided before that date, an appellant can appeal only on the basis that the Respondent’s decision breaches the EEA Regulations (which no longer include regulations 16 and 20 as a result of paragraph 6 of Schedule 3) or the Withdrawal Agreement (which no longer confers any Zambrano right to reside). However, in relation to decisions taken prior to 31 December 2020 (as here) and appeals against decisions brought but not determined prior to 31 December 2020 an appellant continues to have a right of appeal on the basis that the Respondent’s decision breaches the EU Treaties as they applied prior to withdrawal.”

42. That paragraph does not assist the Appellants. First, as we have already pointed out, Osunneye concerned an appeal under the EEA Regulations

and the transitional arrangements in relation to appeals under those regulations. It says nothing about appeals under the EUSS. Second, the penultimate sentence of that paragraph undermines rather than supports any ground of appeal relying on the Withdrawal Agreement because it makes clear that the Withdrawal Agreement no longer confers a “Zambrano” right to reside.

43. For the Appellants’ benefit, however, we have considered whether it could be said that they have a viable ground of appeal relying on the Withdrawal Agreement. We have concluded that they do not for the following reasons.
44. Citizens’ rights under the Withdrawal Agreement are dealt with under Part Two of that agreement. The personal scope of that part is set out in article 10. Aside EEA nationals, the scope is confined to family members (article 10(e) and (f)) and those who were commonly referred to as extended family members (in other words who fell within Article 3(2) of Directive 2004/38/EC).
45. The latter category did not and does not encompass “Zambrano” carers. The issue is then whether the Appellants can fall within the personal scope as family members.
46. Family members are defined in Article 9(1)(a) as follows:

“Article 9

Definitions

- (a) ‘family members’ means the following persons, irrespective of their nationality, who fall within the personal scope provided for in Article 10 of this Agreement:
 - (i) family members of Union citizens or family members of United Kingdom nationals as defined in point (2) of Article 2 of Directive 2004/38/EC of the European Parliament and of the Council;
 - (ii) persons other than those defined in Article 3(2) of Directive 2004/38/EC whose presence is required by Union citizens or United Kingdom nationals in order not to deprive those Union citizens or United Kingdom nationals of a right of residence granted by this Part;”

47. As that definition makes clear, “family members” can only be those in personal scope provided for in article 10 of the Withdrawal Agreement. The Appellants cannot bring themselves within article 9(a)(i) because the relationship of parent is not with an Union citizen. Insofar as the Appellants might seek to rely on the reference to “United Kingdom nationals” in article 9(a), that cannot avail them. The reference in article 10 to “United Kingdom nationals” is only to those who are exercising rights of residence in other EU member states or rights as frontier workers. Reference to their family members has to be read in that context. It does not extend scope to UK nationals whose status (prior to the UK’s exit from the EU) was also that of an EU citizen and from whose status the Zambrano carer status derives.

48. That interpretation is underlined by the reference to the “right of residence granted by this part” in article 9(a)(ii). The UK national in this case is the Appellants’ child. That child’s right of residence was not granted by the Withdrawal Agreement; it is a right of abode as a registered British citizen.
49. That point is also clear when one looks at article 9(a)(i). It could not sensibly be suggested that the Withdrawal Agreement confers rights on family members of UK nationals whatever the nationality of those family members. Those rights are dealt with by the UK’s domestic laws. The Withdrawal Agreement is an agreement between the EU and the UK. Therefore, just as the UK confers certain rights on EU nationals in accordance with the Withdrawal Agreement, other EU member states are bound by the Withdrawal Agreement to confer the same rights on UK nationals living and working in those states as at the date of the UK’s exit from the EU and on their family members. That is how article 9(a) has to be read and interpreted.
50. For those reasons, article 9(a) read with article 10 does not avail the Appellants. They are not within the personal scope of the Withdrawal Agreement and can derive no rights from it.
51. It follows, therefore, that the Respondent’s decisions under appeal are not in breach of the Withdrawal Agreement.

CONCLUSION

52. In conclusion, we find an error of law in the Decision for the reasons we have given and we set the Decision aside in consequence of those errors.
53. We re-make the decision. The Appellants can only appeal on the basis that the Respondent’s decisions under appeal are not in accordance with Appendix EU or breach the Withdrawal Agreement.
54. For the reasons we have set out the Appellants cannot succeed on either ground. We are therefore bound to dismiss their appeals.
55. We reach these conclusions with no pleasure. It seems to us that the Respondent has by his actions in granting the Appellants leave to remain under Appendix FM deprived the Appellants of the ability to succeed under Appendix EU following the success of their appeals before Judge Shand. We appreciate that the Respondent granted leave to remain under Appendix FM before those appeals succeeded and could not have known the future implications of that course.
56. However, having placed the Appellants in that position and following the misleading letter of June 2022 advising the Appellants of the option to make an EUSS application (which advice they adopted) we would hope that the Respondent will see fit to find a way to resolve the Appellants’ position. We say that in particular in light of the fact that we were told that

the Appellants' leave to remain under Appendix FM has now come to an end and that they have not made any application for further leave (although we did encourage Mr Wellage to consider with the Appellants whether they ought to do so in order to protect their position in light of our conclusions in these appeals).

NOTICE OF DECISION

The Decision of Judge Verghis dated 4 October 2023 involved the making of an error of law. We therefore set aside that Decision. We re-make the decision by dismissing the Appellants' appeals.

L K Smith
Judge of the Upper Tribunal
Immigration and Asylum Chamber
8 December 2023