



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

Case No: UI-2022-004606

First-tier Tribunal No:  
EA/15507/2021

**THE IMMIGRATION ACTS**

**Decision & Reasons Issued:**

On 25<sup>th</sup> of June 2024

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE SYMES**

**Between**

**LIKEZO SERA LUTOMBI  
(No anonymity order made)**

Appellant

**And**

**SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellant: Mr Adophy  
For the Respondent: Mr T Melvin

**Heard at Field House on 2 May 2024**

**DECISION AND REASONS**

1. This is the appeal of Likezo Sera Lutombi, a citizen of Namibia, born 15 October 1979, against the decision of the First-tier Tribunal of 28 July 2022, itself brought against the Respondent's refusal of her application under Appendix EU as a Zambrano carer made on 1 February 2021.
2. The immigration history as summarised by the Respondent is that the Appellant

- (a) Entered the UK as a working holidaymaker on in 2004 with leave until 11 June 2006, and extended her leave as a student until 30 June 2008.
  - (b) By then she had formed a relationship with an EEA national and was issued a residence permit in 2008, although an application on “retained rights” grounds was subsequently refused owing to the EEA national’s deportation in 2011.
  - (c) She applied for leave to remain on long residence grounds in October 2014 - that application was refused and the consequent appeal rights became exhausted in June 2017.
  - (d) She applied for leave based on her relationship with her partner and parental responsibility for a British citizen child and on 12 October 2017 was granted leave to remain under Appendix FM until 28 March 2021.
  - (e) The application leading to the present appeal was made under the EU settled status scheme as a Zambrano carer on 13 July 2020 and refused on 1 February 2021.
  - (f) On 26 March 2021 she applied for further leave under Appendix FM and this was granted until 15 May 2024.
3. The application was refused because, as the date of decision in February 2021, the Appellant held leave to remain under Appendix FM as a parent until 28 March 2021, which was seen as excluding her from the Zambrano definition in Annex 1 of Appendix EU.
  4. The First-tier Tribunal reviewed the immigration history (in rather less full a form than now supplied by Mr Melvin) and noted that the Appellant had not previously been granted a residence card based on any derivative rights. It considered that the answer to the controversy before it was governed by Akinsanya [2022] EWCA Civ 37 (“Akinsanya No 2”) and Velaj [2022] EWCA Civ 767 and that given the grant of leave, the Appellant’s British citizen child would not face any necessity to depart the EU as there was now no reason for the Appellant to have to return to Namibia. Akinsanya No 2 had found that the Secretary of State had correctly interpreted the scope of the Zambrano right under EU law and the reconsideration of Appendix EU that Akinsanya mandated did not assist the Appellant. There was no basis for finding that the Withdrawal Agreement compelled a different result.
  5. The Appellant's grounds of appeal contend that Akinsanya considered only Reg 16(7) of the EEA Regs 2016 and anything stated therein vis-à-vis Reg 16(5) could have been no more than obiter dicta; the fact was that the Akinsanya litigation showed that the Respondent had misconstrued Reg 16 of the EEA Regs 2016 and nothing therein ruled

out the grant of Zambrano leave simply due to the possession of another form of leave under the Rules.

6. Judge Gill granted permission to appeal to the Upper Tribunal on the basis that whilst the decision by Eyre J in Akinsanya [2024] EWHC 469 (Admin) indicated that those who had leave to remain by virtue of another provision of the Rules are not entitled to leave to remain under Appendix EU, that decision was made in line with Rules in force from 18 October 2022 whereas the present decision was made under an earlier set of Rules.
7. Mr Melvin via his skeleton argument and oral submissions that the instant appeal was indistinguishable to Sonkor [2023] UKUT 276 (IAC) which had ruled in the Secretary of State's favour. Mr Adophy relied on his own skeleton argument. I address these arguments so far as necessary in my reasons below.

## **Legal framework**

8. Annex 1 of Appendix EU at the date of the Secretary of State's decision defined "person with a Zambrano right to reside" thus:

"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.”

9. In Velaj Andrews LJ examined the meaning of Reg 16(5)(c) of the EEA Regs 2016. Reg 16 provided:

“(1) A person has a derivative right to reside during any period in which the person –

- (a) is not an exempt person; and
- (b) satisfies each of the criteria in one or more of paragraphs (2) to (6).

(5) The criteria in this paragraph are that –

- (a) the person is the primary carer of a British Citizen ("BC")
- (b) BC is residing in the United Kingdom; and
- (c) BC would be unable to reside in the United Kingdom or in another EEA State if the person left the United Kingdom for an indefinite period.

(7) In this regulation— ...

(c) an “exempt person” is a person—

- (i) who has a right to reside under another provision of these Regulations;
- (ii) who has the right of abode under section 2 of the 1971 Act(13);
- (iii) to whom section 8 of the 1971 Act(14), or an order made under subsection (2) of that section(15), applies; or
- (iv) who has indefinite leave to enter or remain in the United Kingdom (but see paragraph (7A)).

(8) A person is the "primary carer" of another person ("AP") if-

(a) the person is a direct relative or a legal guardian of AP;

and

(b) either –

- (i) the person has primary responsibility for AP's care; or
- (ii) shares equally the responsibility for AP's care with one other person.

(9) In paragraph ... 5(c), if the role of primary carer is shared with another person in accordance with paragraph 8(b)(ii) the words "the person" are to be read as "both primary carers."

10. Andrews LJ considered §47 the meaning of the words “*if the person left the United Kingdom for an indefinite period*” in Reg 16(5)(c), as modified by Regs 16(8) and (9), concluding

“In that context the word "if" requires the decision maker to consider the position of the child on the basis that something is (actually) going to happen. It does not require that premise to be purely hypothetical, let alone counterfactual. Given that the person asking themselves the question has to decide what in practice would happen to the child if that event occurred, it would make

little sense to require them to make an assumption that the event will happen if it plainly will not.”

## Decision and reasons

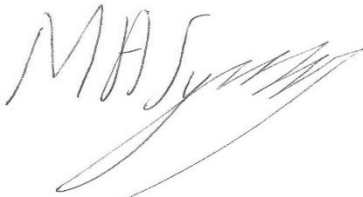
11. This is an appeal where the nature of the issues in play are ones of pure law such that either the appeal falls to be dismissed, or to be allowed outright. Neither advocate suggested that any further evidence would be required in so doing. I will therefore take questions that would normally fall separately into the two arenas of “error of law” and “continuation” hearing together.
12. The decision of Mostyn J in Akinsanya [2021] EWHC 1535 (Admin) (“Akinsanya No 1”) was the subject of onwards proceedings in the Court of Appeal in Akinsanya No 2. At issue in those proceedings was the inconsistency between the provisos excluding certain potential beneficiaries of the route under the EEA Regs 2016 as opposed to under Appendix EU. The former materially excluded only those holding indefinite leave to remain, whereas the latter excluded those holding many forms of limited leave.
13. Whilst Mostyn J in the Administrative Court found that the EEA Regs 2016 expressed the correct position, the Court of Appeal disagreed. Its view §55 was that such rights arose only indirectly and contingently in order to prevent a situation where EU citizen dependants are compelled to leave the EU, such that it made sense to treat them as arising only in circumstances where the carer has no domestic (or other EU) right to reside (or to work, or to receive necessary social assistance). However, the Secretary of State’s intention in framing the ambit of rights under Appendix EU was unclear. It was possible that the practical business of adapting an EU right into a domestic scheme meant going beyond the minimum requirements of the right at the margins. Thus it left the substance of Mostyn J’s Order necessitating a reconsideration of the ambit of Appendix EU’s Zambrano definition intact.
14. Having set out the legal framework and the developments in the Akinsanya proceedings, it is possible to analyse the realities of the instant appeal.
15. The rather prosaic starting point is that the Immigration Rules at the date of decision stated that the Zambrano route was barred to a person “without leave to enter or remain in the UK, unless this was granted under this Appendix”. As at February 2021, when the refusal responded to the Appellant’s application of July 2020, the Appellant held leave to remain under Appendix FM, and thus not under “this Appendix” (which refers to Appendix EU), which was granted in October 2017 and lasted until March 2021. There is thus a short and simple answer to the appeal, which is that this form of leave ruled out her application’s success under Appendix EU.

16. Then the question arises as to whether there is any binding legal norm that might contraindicate this result. It is difficult to see from where any such norm might arise. The Withdrawal Agreement chose not to protect Zambrano rights in the first place. The suggestion is made that the Akinsanya litigation might give rise to some alternative interpretation that would help the Appellant. However, this notion has already been dispelled by the Upper Tribunal in Sonkor [2023] UKUT 276 (IAC). That appeal also concerned an applicant caring for British citizen children who had been granted Appendix FM leave before her application under Appendix EU and who retained that leave as at the date the application was determined. The Secretary of State's refusal, however, was motivated by the *possibility* that she would obtain leave to remain. The argument was put that the Secretary of State's approach was inconsistent with the decision of the Court of Appeal in Akinsanya No 2, which had found that there was no discernible justification for the draftsman of Appendix EU ruling out applicants with limited leave when the previous legal regime under the EEA Regs 2016 only excluded those holding indefinite leave to remain. But there was nothing in Akinsanya No 2 to suggest that the requirement in Annex 1's Zambrano definition at para (b), viz the exclusion for possessing "leave to enter or remain in the UK granted under another part of these Rules", was itself unlawful.
17. The Annex 1(b) definition examined in Sonkor is worded differently to the Rules in question at the present appeal's decision date, which says "without leave to enter or remain in the UK, unless this was granted under this Appendix", but there is no substantive difference in the meaning of the two phrases. Akinsanya No 2 held §48-56 that what it styled the 'Zambrano circumstances' were not engaged in relation to a person who holds existing leave to remain under domestic Rules.
18. Sonkor also addresses a further point in relation to the decision in Velaj [2022] EWCA Civ 767, where at §69 Andrews LJ contemplated the possibility of a Zambrano application succeeding under the EEA Regs 2016 because a person's leave was due to expire shortly after the application date. As the Upper Tribunal pointed out, however, that potential eventuality arose only because, under the EEA Regs 2016 regime, there was no threshold exclusion simply for possessing domestic leave to remain in the first place. The argument made in the instant grounds of appeal that a different sub-section of Reg 16 was the true subject of the proceedings in Akinsanya misses the point that Reg 16 did not rule out Applicants possessing Appendix FM leave in the first place. Unfortunately for Ms Lutomba, Appendix EU contains just such an exclusion.
19. Mr Adophy's skeleton argument essentially argues that at the date of the hearing before the First-tier Tribunal, the proper ambit of the Annex 1 definition was uncertain, and that therefore the Appellant should benefit from consideration of her case on the basis of the Appendix's wording before the latest review and revision of Appendix EU. Doubtless

there was a period over which the ongoing existence of this exclusion was moot, from the date of Mostyn J's Order of 9 June 2021 until the Secretary of State announced the maintenance of the status quo via a press release of 13 June 2022 clarifying that the Annex 1(b) criteria would remain unamended. But at no time did the Appendix EU legal regime substantively change. However, as I have explained, the difficulty confronting this submission is that the Appendix's wording before that date does in fact exclude the Appellant from its purview in any event: because she held an alternative form of domestic leave to remain at all material times.

Decision:

The decision of the First-tier Tribunal contains no material error of law.  
The appeal is dismissed.

A handwritten signature in black ink, appearing to read 'M. A. Symes', with a long, sweeping underline that extends to the left and then curves back under the signature.

Deputy Upper Tribunal Judge Symes  
Immigration and Asylum Chamber

15 June 2024