



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case Nos.: UI-2023-000398

First-tier Tribunal Nos:
EA/03646/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:

On 13th of March 2024

Before

UPPER TRIBUNAL JUDGE SMITH

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

And

RASHIDAH MALIKA AISHAH NERO

Respondent

Representation:

For the Appellant: Mr S Walker, Senior Home Office Presenting Officer

For the Respondent: Mr R Solomon, Counsel instructed by McKenzie Solicitors

Heard at Field House on Thursday 7 March 2024

DECISION AND REASONS

BACKGROUND

1. This is an appeal brought by the Secretary of State. For ease of reference, I refer to the parties as they were before the First-tier Tribunal. The Respondent appeals against the decision of First-tier Tribunal Judge Mills promulgated on 14 October 2023 ("the Decision") allowing the Appellant's appeal against the Respondent's decision dated 15 March 2022 refusing her status under the EU Settlement Scheme ("EUSS").
2. The facts of this case are not in dispute and can be shortly stated. The Appellant is a national of Trinidad and Tobago now aged 20 years. She came to the UK with her mother in 2008 as a visitor and overstayed.

However, both she and her mother were permitted to stay in 2014 following an application made by the Appellant's mother as a "Zambrano carer" of the Appellant's British citizen stepbrother (R). The Appellant's mother was given a residence card under regulation 16(5) of the Immigration (European Economic Area) Regulations (then 2006 now 2016) ("the EEA Regulations"). The Appellant was given a residence card under regulation 16(6) of the EEA Regulations. Those residence cards were of five years duration.

3. In 2019, the residence cards of the Appellant and her mother were extended. However, the Appellant's card was stated to expire on 8 September 2020 (when she turned 18). The Appellant's mother has since been granted settled status under the EUSS but the Appellant was refused status on the basis that she no longer had a "Zambrano right to reside" as she was by that time an adult. She had ceased to have a "Zambrano right to reside" prior to 31 December 2020.
4. The Judge however accepted that the Appellant could qualify for status under the EUSS in two ways. First, she could do so based on her previous "Zambrano right to reside" for a period of five years. Second, she could do so as she had become the joint primary carer of R. The Judge also made reference to Article 8 ECHR. Although he accepted that he could not directly consider this, he thought it relevant to the question of proportionality under the Withdrawal Agreement. He therefore allowed the appeal under the EUSS rules (Appendix EU) and under the Withdrawal Agreement.
5. The Respondent appeals the Decision on two grounds:

Ground one: Eligibility under the Rules

The Judge failed to provide sufficient reasons for the finding that the Appellant became a joint primary carer of R. It was submitted that the Appellant could not meet the definition of a joint primary carer as her mother had been given settled status under the EUSS.

Ground two: No breach of Withdrawal Agreement right to a proportionate decision

The Appellant was not in personal scope of the Withdrawal Agreement and therefore the rights under that agreement could not apply. In any event, by giving "Zambrano rights of residence" to certain individuals (which did not include the Appellant), a decision had been taken by Ministers that the EUSS could not benefit persons in the Appellant's position.

6. Permission to appeal was refused by First-tier Tribunal Judge Galloway on 22 December 2022 in the following terms so far as relevant:

"..3. Having considered the grounds of appeal and the judgment in full, I do not consider there to be an arguable error of law. The judge has given a fully reasoned decision and was aware that Article 8 ECHR formed no part of the appeal. He has given adequate reasons for his factual findings.

4. The grounds and the decision and reasons do not disclose an arguable error of law and permission for appeal is therefore refused on all grounds.”
7. On renewal of the appeal to this Tribunal, permission to appeal was granted by Upper Tribunal Judge Macleman on 10 March 2023 in the following terms so far as relevant:
 - “..3. The decision is clear and careful, and it is easy to see why the tribunal’s sympathies were with the appellant.
 4. However, ground 1 shows an arguable absence of a legal basis for holding that the appellant on her 18th birthday acquired a derivative right to reside ‘as a joint primary carer of her British half-brother’.
 5. Ground 2 shows arguable error on (i) the scope of the Withdrawal Agreement and (ii) on whether the expense of an available route under the rules is (ever) relevant to proportionality.
 6. If parties wish to make representations on whether the hearing of this case should be deferred pending the outcome of *Celik* in the Court of Appeal, they should do so not less than 14 days after this decision is issued.”
8. The Appellant filed a Rule 24 Reply submitting in short summary that even if there were any error disclosed by the grounds, those could make no difference to the outcome given the alternative basis for allowing the appeal as set out at [29] to [32] of the Decision.
9. The matter comes before me to determine whether the Decision contains an error of law. If I conclude that it does, I must then consider whether to set aside the Decision. If I set aside the Decision, I must then either re-make the decision or remit the appeal to the First-tier Tribunal to do so.
10. Having discussed the case with Mr Walker and Mr Solomon, I indicated that I accepted the Appellant’s arguments that any error would make no difference to the outcome of the appeal under Appendix EU. For that reason, I concluded that there was no material error of law and it was not necessary to set aside the Decision. Mr Walker agreed with the reasons which I expressed during our discussion and which are set out below. He therefore accepted that any error of law could make no difference. I indicated that I would set out my reasons for this conclusion in writing which I now turn to do.

DISCUSSION

11. As is pointed out by the Appellant in her Rule 24 Reply, the Judge allowed the appeal on two alternative bases. Mr Solomon accepted in our discussions that the issue regarding the Appellant’s asserted joint primary care of R was a red herring if, as he submitted, the Judge was entitled to allow the appeal on the other basis put forward.
12. The other (primary) basis on which the appeal was allowed is set out at [29] to [32] of the Decision as follows:

“29. Firstly, he [Mr Solomon] points out that EU11(3)(a) does not necessarily require that the person continues to have a ‘Zambrano right to reside’, so long as she previously did, that this lasted for a ‘continuous qualifying period’ of more than five years [EU11(3)(b)], and also that no ‘supervening event’ has occurred since [EU11(3)(c)]. He points out that both ‘continuous qualifying period’ and ‘supervening event’ are also defined in Annex 1 of Appendix EU and submits that the appellant meets the requirements of both.

30. As such, Mr Solomon argues, even if I were to find that the appellant no longer holds a ‘Zambrano right to reside’ because she cannot meet the requirements of regulation 16(6) since she turned 18, so long as I find that she did meet the requirements of those regulations for a period of more than 5 years, given that there has been no supervening event since she turned 18, she qualifies for settled status.

31. I find this to be an accurate submission as to the stricture of the rules, and I accept it. The appellant was first issued with a derivative residence card in October 2014, and her second card did not expire until September 2020. She was therefore recognised as having a Zambrano right to reside (in other words that she met the test set out in Regulation 16(6) and its predecessor in the 2006 EEA Regulations) for a period of almost 6 years. I also accept that there has been no supervening event (lengthy absences from the UK, deportation orders, etc) since the appellant lost that right to reside when she turned 18 in September 2020.

32. On this basis, I find that the appellant is entitled to settled status under the EUSS, as she meets the requirements of paragraph EU11 of Appendix EU of the rules....”

13. This then was the primary basis on which the appeal was allowed. Mr Walker indicated that he could not find any fault in that reasoning. Having looked at the relevant parts of Appendix EU for myself, I accept that concession. I am reinforced in my view that there is no error in that regard by the fact that the Respondent did not take issue with this aspect of the reasoning when seeking to appeal the Decision.
14. I therefore agree with the Appellant that any other errors in the Decision are not material.
15. I should say, however, that I accept the Respondent’s second ground. A “Zambrano right to reside” is not encompassed in the Withdrawal Agreement and since the Appellant is not therefore in personal scope, the issue of proportionality under Article 18 could not apply. It is not a permissible approach to have regard to Article 8 ECHR in order to consider the ambit of proportionality under Article 18 of the Withdrawal Agreement. I have for those reasons set aside the conclusion that the appeal should be allowed under the Withdrawal Agreement.
16. I do not however have to consider the Respondent’s first ground since it is accepted that the Appellant succeeds under Appendix EU in her application for settled status on the primary basis set out by the Judge and as set out above.

CONCLUSION

17. Although there is an error disclosed by the Respondent's ground two and the allowing of the appeal under the Withdrawal Agreement, that error and any error based on the Respondent's first ground make no difference to the outcome. The Appellant is entitled to succeed for the reasons set out at [29] to [32] of the Decision. I therefore conclude that there is no material error of law in the allowing of the Appellant's appeal under the EUSS.

NOTICE OF DECISION

Although I accept that there is an error of law made in the allowing of the Appellant's appeal under the Withdrawal Agreement, that conclusion makes no difference to the outcome under the EUSS rules. The Decision of Judge Mills promulgated on 14 October 2022 did not involve the making of an error of law which could affect the outcome of the appeal. I therefore uphold the Decision with the consequence that the Appellant's appeal remains allowed under the EUSS rules.

L K Smith
Judge of the Upper Tribunal
Immigration and Asylum Chamber
7 March 2024