



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

Case No: UI-2023-003009

First-tier Tribunal No:
EA/04862/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:

On 21st of June 2024

Before

DEPUTY UPPER TRIBUNAL JUDGE SYMES

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

And

**BIBI SAIDA NAZIR
(No anonymity order made)**

Respondent

Representation:

For the Appellant: Mr T Melvin
For the Respondent: Mr B Hawkin

Heard at Field House on 25 April 2024

DECISION AND REASONS

Introduction

1. This is the appeal of the Secretary of State against the decision of the First-tier Tribunal of 4 May 2023, allowing the appeal of Bibi Saida Nazir, a national of Afghanistan born 5 October 1977. Ms Nazir's appeal to the First-tier Tribunal was against the Secretary of State's refusal (on 21 April 2022) of her application (made on 20 August 2021) under the

Appendix EU family permit route (for convenience I will refer to this as Appendix EUFP).

The application and its refusal

2. The application was for Ms Nazir to come to the UK with her three British children, Tariq Ahmed, Fatima Ahmed and Bibi Maryam Ahmed; all four currently resided in Dubai, UAE, together with Ms Nazir's husband Nazir Ahmed, also a British national. The applications were predicated on the Zambrano right flowing from EU citizenship, which at relevant times required that a primary carer of a British citizen should be permitted to reside in the UK, or be admitted here if not already present, if to exclude them from the UK would otherwise mean that the care receiver could not enjoy the efficacy of their EU citizenship. The application form cited Akinsanya [2021] EWHC 1535 (Admin) ("Akinsanya No 1"), and the family relied on what they understood to be the Secretary of State's concession following the Akinsanya proceedings that Zambrano applications would continue to be considered after July 2021, whereas it might otherwise have been thought that the route had closed. Whilst these were applications made from overseas, applications from Zambrano carers via the entry clearance route have been recognised as in principle feasible in relation to case law under the EEA regulations: see MA and SM (Zambrano: EU children outside EU) [2013] UKUT 00380 (IAC) and Campbell (exclusion) Zambrano [2013] UKUT 00147.
3. The applications were refused because the Respondent considered that applications under Appendix EUFP were viable only where the Sponsor was a family member of a 'relevant naturalised British citizen', a family member of a 'relevant person of Northern Ireland' or a family member of a 'qualifying British citizen.'" Ms Nazir, and indeed Zambrano carers generally, did not fall within any of these categories.
4. The Secretary of State subsequently reconsidered the refusal, issuing a further decision on 13 June 2022, though the parties have not suggested that any material difference arises from the reasoning in this decision to that of its predecessor.

The First-tier Tribunal decision

5. The skeleton argument provided by Times Solicitors for the First-tier Tribunal contended that her application was effectively for a family permit under Regs 11(5)(e) and 16(5)(c) of the EEA Regs 2016, as a person accompanying a British citizen (ie each of her children) who was entitled to reside in the UK, for whom she was the primary carer in circumstances where they would be unable otherwise to reside here if she left the UK for an indefinite period. Thus she held a derived right of residence as the carer of her two European Union citizen children. Her rights under the EEA Regs 2016 were declaratory ones which automatically established her entitlement. Furthermore there was a right under Article 13(2) of the Withdrawal Agreement for family

members of Union citizens to enjoy residence rights under Art 21 TFEU which provided that “Every citizen of the Union shall the right to move and reside freely within the territory of the Member States”.

6. The First-tier Tribunal allowed the appeal. In so doing it had regard to well-crafted further written submissions from Mr Nicholson of counsel who was then representing Ms Nazir. Provided on the day of the hearing, these were to the effect that the Secretary of State’s Akinsanya concession stated that Zambrano applications would continue to be considered after 1 July 2021 under the EEA Regs 2016 as if they had not been revoked. The First-tier Tribunal accepted that
- (a) Ms Nazir was indeed the childrens’ mother, the difference between her name as recorded between her passport and a child’s birth certificate being due to her taking her husband’s name following marriage.
 - (b) She met the requirements under Appendix EUFP because, as I read the decision, Ms Nazir was the “family member of a relevant EEA citizen” under EUFP1 read with Regs 11(5)(e) and 16(5)(c) of the EEA Regs 2016; decisions such as MA & SM had recognised the potential availability of the Zambrano route for entry clearance applications under the latter regime.
 - (c) The Secretary of State had failed to consider the Explanatory memorandum to the Statement of Changes in Immigration Rules HC 1118 published on 15 March 2022, which had set out that “The main changes in respect of the Immigration Rules for the EUSS in Appendix EU and for the EUSS family permit in Appendix EU (Family Permit) are as follows: • To bring within the Rules the current concession arrangements for an EUSS family permit to be issued in place of an EEA family permit (and relied upon in a subsequent EUSS application) where an EEA family permit would have been issued (including on appeal) to a dependent relative extended family member, or a person with a derivative right to reside, had the route not closed after 30 June 2021.”
 - (d) The Secretary of State should have considered the application under the EEA Regs 2016, as per the concession in Akinsanya, and had such an application been made, it should have been granted, as Ms Nazir was accompanying British citizen children to the UK, given she was not an exempt person, she was the childrens’ primary carer, and that the children would otherwise be unable to reside in the UK without her presence here.

Grounds of appeal

7. The Secretary of State’s grounds of appeal contend

- (a) There was no route for Zambrano carers under Appendix EUFP permit;
 - (b) The concession in Akinsanya did not extend to the present circumstances: it was time limited, and the applications which it countenanced were those made under the EEA Regs 2016, not under Appendix EUFP.
8. The Upper Tribunal granted permission to appeal on 20 March 2024 because it was arguable that Reg 5 of the Citizens' Rights (Appeals) Regulations 2020 conferred a right of appeal only on the grounds that the decision was not in accordance with applicable Residence Scheme rules, and those Rules only permitted those with a continuous qualifying period in the UK by the end of the Transition Period to acquire residence rights on Zambrano grounds; further, the EEA Regs 2016 had arguably been impermissibly conflated with the Appendix EUFP route.

Submissions

9. Before me for the Secretary of State Mr Melvin relied on his colleague Mr Deller's grounds of appeal plus the unreported UT case of Zahir UI2023004504 [2024] UKAITUR (21 March 2024), which I admitted into proceedings as the reasoning therein essentially set out the Secretary of State's case with greater cogency than the extant pleadings, and because it was highly relevant to an area of post-Brexit immigration law which lacks reported precedents. Mr Melvin argued that the First-tier Tribunal had impermissibly blurred the old regime under the EEA Regs 2016 with aspects of the Appendix EUFP) regime.
10. Mr Hawkin summarised the written submissions from his own predecessor Mr Nicholson, noting that Siddiga [2024] EWCA Civ 248 §66-68 was authority for the proposition that an application purportedly made in one form might substantively be of another kind. The application's covering letter of 27 August 2021 clearly referenced the EEA Regs 2016 and the case law interpreting Zambrano in relation to that legal regime.

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. Appendix EU (Family Permit) provides:

“(2) The applicant meets the eligibility requirements for an entry clearance to be granted under this Appendix in the form of an EU

Settlement Scheme Family Permit, where the entry clearance officer is satisfied that at the date of application:

- (a) The applicant is a specified EEA citizen or a non-EEA citizen;
- (b) The applicant is a family member of a qualifying British citizen;"

13. Annex 1 to Appendix EUFP defines "family member of a qualifying British citizen" as

"a person who has satisfied the entry clearance officer, including by the required evidence of family relationship, that:

- (a) they will be returning to the UK:
 - (i)-iv) [as the spouse/partner/durable partner of a qualifying British citizen in various circumstances] ...
 - (v) the child or dependent parent of a qualifying British citizen, and the family relationship:
 - (aa) existed before the date and time of withdrawal ... and
 - (bb) continues to exist at the date of application;
 - (vi) before 2300 GMT on 29 March 2022 (or later where the entry clearance officer is satisfied that there are reasonable grounds for the person's failure to meet that deadline), as the child or dependent parent of the spouse or civil partner of a qualifying British citizen (as described in sub-paragraph (a)(i) above), and all the family relationships:
 - (aa) existed before the date and time of withdrawal
 - (bb) continue to exist at the date of application; or
 - (vii) as the child ... of the spouse or civil partner of a qualifying British citizen (as described in subparagraph (a)(ii) above), and:
 - (aa) the family relationship of the child or dependent parent to the spouse or civil partner existed before the date and time of withdrawal and
 - (bb) all the family relationships continue to exist at the date of application; and
 - (cc) the entry clearance officer is satisfied that there are reasonable grounds why the person did not return to the UK with the qualifying British citizen before the specified date;"

14. Appendix EUFP does not mention a Zambrano route in terms. At the date of decision, the definition of "person with a Zambrano right to reside" found in Appendix EU, on the other hand, was (emphasis added):

"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”

15. The Consent Order issued by the court following the Akinsanya proceedings states at (e)-(f):

“e. The Secretary of State intends to implement and publicise a policy under which, for a reasonable period which she will specify, but which will be for a period of not less than six weeks after publication of the outcome of her reconsideration referred to at a. above, Zambrano applications made on or after 1 July 2021 will be deemed, under the definition of 'required date' in Annex 1 to Appendix EU, to have reasonable grounds for the person's failure to make that application at the earlier date relevant to that definition.

f. In accordance with paragraph (c) of the definition of “EEA Regulations” in Annex 1 of Appendix EU, the question of whether an applicant is a person with a Zambrano right to reside as defined in Appendix EU in respect of a period on or after 1 July 2021 is to be determined on the basis of the Immigration (European Economic Area) Regulations 2016 as they had effect immediately before they were revoked, and, where the context requires it, on the basis that they had not been revoked;”

16. Akinsanya No 1 was the subject of onwards proceedings in the Court of Appeal in Akinsanya [2022] EWCA Civ 37 (“Akinsanya No 2”). The issue in that case was the inconsistency between the proviso 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.

17. Whilst 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.
18. The Consent Order in Akinsanya (made after the Administrative Court's judgment, but in any event necessary given the uncertainty identified by the Court of Appeal) arose in this context. It was considered appropriate to preserve the ability of those affected by the uncertainty as to the ambit of Appendix EU's Zambrano route to be able to continue to make applications pending that reconsideration's completion. However, this was of course limited to those who could benefit from the route in the first place: ie those who acquired qualifying residence in the UK before 31 December 2020. There is no suggestion of this concession applying either to entry clearance applications or to those without pre-transition period continuous residence. Nor did the Appellant did not fall into the marginal category for whose benefit the concession was created: she did not hold limited rather than indefinite leave to remain, being an out-of-country applicant with no permission in the UK whatsoever.
19. The Withdrawal Agreement is not in play here: Zambrano residence rights do not fall within its scope, as noted in Akinsanya [2024] EWHC 469 (Admin) ("Akinsanya No 3") §20: "The Withdrawal Agreement had addressed the rights of Chen and Ibrahim and Teixeira carers but did not provide for Zambrano carers (unsurprisingly given that such persons were the carers of British citizens who ceased to be EU citizens when the United Kingdom left the European Union)." So the only question is whether Zambrano rights can found an application under the Residence Scheme Immigration Rules.
20. The primary difficulty for Ms Nazir is that Appendix EUFP is wholly silent on the existence of a Zambrano avenue for applicants. An applicant must be able to point to a route under which their application can proceed to have a tenable case. Appendix EUFP provides for family members of qualifying British citizens to apply, but that category of citizen comprises only those who exercised what were once styled Surinder Singh rights (ie where a British citizen returns to the UK having exercised Treaty Rights in another EU Member State). The agreement by the Secretary of State to reconsider the ambit of Zambrano rights in Akinsanya No 1 was in relation to the Appendix EU definition, which applies only for in-country applicants and their joining family members,

and does not bite on applications made in her circumstances under the Appendix EUFP route.

21. Zambrano applications can thus only be made under Appendix EU, and the route is open only to individuals who can show a period of continuous qualifying residence as a Zambrano-right holder by the specified date, ie 31 December 2020 to apply. There is no question of Ms Nazir having established any such period of residence given she has never lived in the UK.
22. The application's covering letter was headed "Application for Family Permit as a Direct Family Member under the EU Settlement Scheme". However it does indeed, as Mr Hawkin observed, refer extensively to the EEA Regs 2016. It would therefore have been open to a decision maker to construe it as such an application as contemplated in Siddiqi: but only were that route still open. There is no warrant to hold that such an application could be made purely under the EEA Regs 2016 as at August 2021, when Ms Nazir applied. Those regulations were revoked on 31 December 2020 (subject to certain savings for transitional cases and deportation matters not here relevant). Whilst their criteria were for a significant period cross-referenced by the Annex 1 Zambrano definition in Appendix EU, applications were still capable of being made only by reference to the Appendix, not the Regulations.
23. The First-tier Tribunal also took account of its understanding of the Explanatory memorandum to the Statement of Changes in Immigration Rules HC 1118, which it interpreted as creating an avenue for Zambrano applicants from abroad. However, firstly those Rules changes spoke only to applicants with viable applications under Appendix EUFP, which is not here the case. And secondly, as I understand them, they were intended to preserve a practical means by which individuals who had obtained EEA family permits following successful applications or appeals under the EEA Regs 2016 to come to the UK, notwithstanding the revocation of those Regulations, which would otherwise have posed an obstacle to their admission here.
24. The First-tier Tribunal erred in law in failing to follow the approach set out above. There was no available route under Appendix EUFP for Zambrano applicants, nor by the date of the Appellants' applications under the EEA Regs 2016 either. The Order in Akinsanya did not avail them. So the Secretary of State's appeal must be allowed outright.

Decision

The decision of the First-tier Tribunal contained material errors of law.

I set it aside.

The Secretary of State's appeal is allowed outright.

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