



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-003266

First-tier Tribunal No: EA/01976/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 11 July 2024

Before

UPPER TRIBUNAL JUDGE LINDSLEY

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

ALEJANDRA TEJERINA ARAMAYO
(ANONYMITY ORDER NOT MADE)

Respondent

Representation:

For the Appellant: Mr Parva, Senior Home Office Presenting Officer

For the Respondent: Mr Thoree, of Thoree & Co Solicitors

Heard at Field House on 9 July 2024

DECISION AND REASONS

Introduction

1. The claimant is a citizen of Bolivia born on 20th May 1989. She applied to remain under the EUSS on 25th May 2021. She is the spouse of a Spanish citizen who has settled status under the EUSS. They married on 9th April 2021 and have a child born on 22nd November 2020. The application was refused on 3rd February 2022. The appeal was allowed before the First-tier Tribunal but was set aside in light of the decision in Celik by the Upper Tribunal. The Upper Tribunal preserved the finding that the relationship between the claimant and her husband was genuine. During the hearing the issue arose as to whether the claimant might have a Zambrano/ derivative right of residence. The remaking of the appeal was remitted back to the First-tier Tribunal to determine whether the Zambrano issue enabled her to succeed under EU11A and EU14A of Appendix EU. Her appeal against the decision refusing her application under the EUSS was allowed under the Immigration Rules by

First-tier Tribunal Judge SL Farmer in a determination promulgated on the 15th June 2023.

2. Permission to appeal was granted by Judge of the First-tier Tribunal Hatton on 31st July 2023 on the basis that it was arguable that the First-tier judge had erred in law in finding that the claimant could meet the terms of Appendix EU when she had not made an application to facilitate her right to remain as a durable partner prior to the specified date of 31st December 2020. It was therefore arguable, in accordance with Celik, that as no Zambrano application had been made prior to 31st December 2020 that there was no application to facilitate the claimant's leave and she could not succeed as a durable partner on this basis either.
3. The matter came before me to determine whether the First-tier Tribunal had erred in law, and if so whether any such error was material and whether the decision needs to be set aside.

Submissions – Error of Law

4. In the grounds of appeal and in oral submissions from Mr Parva it is argued for the Secretary of State in short summary as follows.
5. It is firstly argued that the claimant could not succeed in this appeal because she either had to be married prior to 31st December 2020 or have a relevant document showing that she had had her leave facilitated by the Secretary of State as a durable partner. Any Zambrano right is not facilitation but a direct right. It is noted that the Home Office Presenting Officer, Mr Mustafa, accepted, as recorded at paragraph 11 of the decision of the First-tier Tribunal, that facilitation included the existence of a Zambrano right but this is contrary to the position taken in Celik and so the Secretary of State should be entitled to resile from this position which is simply wrong in law.
6. Secondly, it is argued, that there was also a failure to analyse properly whether the claimant had a Zambrano right applying the case law in Akinsanya and Velaj which focuses on a real and practical test as to whether a British child of a two parent family would be compelled to leave notwithstanding the presence of a parent with a right to remain. Mr Parva argued that there was a failure to see if the father could not adapt his life in the UK as the First-tier Tribunal had focused on the past situation and not future possibilities.
7. There was no Rule 24 response but Mr Thoree argued that there was no error of law in the decision of the First-tier Tribunal. The matter had been remitted to the First-tier Tribunal to decide if the claimant had a Zambrano right to remain in her very particular circumstances where her child had been born just five weeks prior to the specified date, 31st December 2020. The First-tier Tribunal had made a perfectly reasonable and reasoned decision that if the claimant was not allowed to remain this British citizen baby/child would be forced to leave the UK which given the very young age of the child and the roles of the

parents, with the father working full time nights and the mother the stay at home parent, was entirely lawful.

8. At the end of the hearing I informed the parties that I found that there was no material error of law, but gave no oral decision and set out my reasoning below.

Conclusions- Error of Law

9. The issues identified to be dealt with before the First-tier Tribunal at paragraph 9 were firstly whether the claimant had a Zambrano right to reside and secondly whether she meets the requirements of EU11A and EU14A of Appendix EU of the Immigration Rules. As set out at paragraph 11 of the decision it was conceded by Mr Mustafa for the Secretary of State that if the claimant established a Zambrano right then her residence was being facilitated by the Secretary of State, and therefore logically that the appeal only rested on this issue. As I indicated to Mr Parva at the hearing it was not correct for Mr Mustafa and indeed the First-tier Tribunal Judge (at paragraph 25 of the decision) to have referred to a Zambrano right as one that is facilitated by the Secretary of State however this terminological error is not a material error as Mr Parva did not dispute that EU11 provides a route to EUSS status if the claimant is a person with a Zambrano right to reside. This right is defined at Annex 1 of Appendix EU and reads as follows:

“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 was granted under this Appendix or in effect by virtue of section 3C of the Immigration Act 1971 ... ;

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;”

10. There was not argument from the Secretary of State that the claimant is an exempt person or that she had leave to enter or remain. The only substantive issues to resolve in the appeal were therefore the Zambrano ones identified in the Appendix EU definition; i.e. whether she was the primary carer of a British citizen residing in the UK and whether in practice her British citizen baby/toddler would be unable to reside in the UK, EEA or Switzerland if she left the UK for an indefinite period.
11. The First-tier Tribunal comes to an unarguably reasonable and lawful decision that the claimant is the primary carer for her British citizen son for the reasons set out at paragraphs 16 to 19 of the decision which include the child's very young age; the fact that he does not attend any nursery or other care facility; the fact that the claimant is the stay at home parent; and the fact that the claimant's husband works nights and sleeps until the afternoon. The claimant and her sponsor husband are found to be credible witnesses and their evidence that the claimant is the person who provides overwhelming for their child's physical and emotional needs is accepted. There is no explicit challenge to any of this reasoning in the grounds and Mr Parva did not put any forward.
12. The issue that is then considered by the First-tier Tribunal is whether the claimant's British citizen child would have to leave the UK with her if she were required to leave. The First-tier Tribunal places reliance on Akinsanya at paragraph 21 of the decision. I find that an entirely lawful approach is adopted to this question with the focus, as per the Immigration Rules set out above, on the question as to whether the British citizen baby/toddler would in practice be unable to reside in the UK and EEA if the claimant were required to leave for an indefinite period. It is concluded, at paragraph 22 to 23 of the decision, that the British child would have to leave the UK if his mother were forced to do so for reasons relating to his father's work, the lack of other family members in the UK, and the emotional and physical needs of the child to be with his mother/primary carer in the context of his being very young. It is not the case that the First-tier Tribunal simply focused on the past in coming to this conclusion. This is an entire practical decision based on the current family circumstances and work arrangements, which also, at paragraph 23 of the decision, included consideration as to whether the family could relocate to Spain but the accepted evidence of the husband/sponsor was that he had left Spain as he had been unable to find work there so that this was not a practical option.

Decision:

1. The making of the decision of the First-tier Tribunal did not involve the making of an error on a point of law.
2. I uphold the decision of the First-tier Tribunal allowing the appeal under Appendix EU of the Immigration Rules.

Fiona Lindsley

Appeal Number: UI-2023-003266

Judge of the Upper Tribunal
Immigration and Asylum Chamber

9th July 2024