



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

**Case No: UI-2023-005194**  
**First-tier Tribunal No:**  
**EA/00461/2023**

**THE IMMIGRATION ACTS**

**Decision & Reasons Issued:**  
**On the 08 October 2024**

**Before**

**UPPER TRIBUNAL JUDGE NORTON-TAYLOR**

**Between**

**IDIAT LOLADE SALAMI**

**(NO ANONYMITY ORDER MADE)**

Appellant

**and**

**SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the appellant: Ms A Selvakumaran, Counsel, instructed by MA Consultants

For the respondent: Mr P Deller, Senior Presenting Officer

**Heard at Field House on 3 October 2024**

**DECISION AND REASONS**

**Introduction**

1. This is the re-making of the decision in the appellant's appeal against the respondent's decision of 29 December 2022, supplemented by what was either a further decision or an additional reasons letter dated 5 June 2023

(“the June 2023 letter” - there is no significance in any distinction as to the nature of this letter), refusing her application for leave to remain under the EUSS, specifically Appendix EU to the Immigration Rules.

2. The appellant is a citizen of Nigeria born in September 1979. On 30 November 2020 she made the EUSS application on the basis that she was the primary carer of her child, C, who is now 14 years old and became a British citizen in April 2017. C’s biological father was also a Nigerian citizen, but following the breakdown of the relationship with the appellant, he had married a Portuguese national, Ms Andrade. Ms Andrade had exercised Treaty rights in the United Kingdom between 2009 and 2013 before leaving this country. In August 2013, the marriage between C’s father and Ms Andrade was dissolved. The appellant asserted that Ms Andrade had been the stepmother of C and this was sufficient to make C the direct descendant of an EEA national worker. In turn, the appellant asserted that this meant that she should be granted leave to remain under the EUSS in line with the well-known principal in the Ibrahim and Teixeira judgments of the CJEU [2010] PTSR 1913 (“Ibrahim and Teixeira” - a derivative right of residence available to a third country national primary carer of a minor child of an EEA citizen who worked, or had worked, where that child would be unable to continue to be educated unless that primary carer for granted right to reside).
3. Importantly for the purposes of this appeal, at the time she made the EUSS application the appellant had leave to remain under Appendix FM to the Immigration Rules on the basis that she was the primary carer of C: an initial grant of leave had run from 14 March 2018 until 14 September 2020, with an extension on the same basis running from 21 October 2021 until 20 April 2024.
4. The respondent initially refused the application on the erroneous premise that the applicant was relying on the well-known principle in Zambrano [2012] QB 265. It was said that as she continued to have leave to remain,

the appellant had failed to demonstrate that C would be compelled to leave the United Kingdom for an indefinite period of time.

5. The appellant appealed to the First-tier Tribunal under the Immigration (Citizens' Rights Appeals)(EU Exit) Regulations 2020 ("the 2020 Regulations").
6. When the respondent's misunderstanding of the application was highlighted to her during the preparatory process in the First-tier Tribunal, the respondent issued the June 2023 letter. The respondent concluded that (a) C's acquisition of British citizenship in 2017 meant that she had become an exempt person and therefore the appellant could not meet the relevant definition in Annex 1 in Appendix EU and (b) in any event, C had not been the child of an EEA national at the time of the application because her father's marriage to Ms Andrade had been dissolved in 2013.
7. There was no express reference to the Withdrawal Agreement in either the original refusal decision or the June 2023 letter.

### **The decision of the First-tier Tribunal**

8. Two points of note should be recorded here. First, the respondent declined to send a Presenting Officer to the hearing. That was a matter for her. It follows that the respondent's case was predicated only on the original refusal decision and the June 2023 letter. Secondly, the appellant was represented by a "Mr Otchie" of Counsel. It is a matter of record that this individual was arrested at Field House and subsequently convicted in relation to the impersonation of a barrister. A suspended sentence of imprisonment was imposed in March 2024.
9. It appeared to be common ground that if the appellant had to leave the United Kingdom (although, at that time she would not have had to by virtue of her leave under Appendix FM), C would be compelled to leave as

well; there is no suggestion that there were alternative care arrangements in place, whether on a temporary or long-term basis. Nothing to indicate that my understanding of this position is wrong has ever been put forward by the respondent.

10. Before the First-tier Tribunal, the appellant relied squarely on Article 24(2) of the Withdrawal Agreement (“Article 24(2)” - I will set this provision out later). The appellant accepted that she could not succeed under Appendix EU because she had extant leave to remain under Appendix FM.

11. In light of the evidence and relevant he judge concluded that:

(a) the appellant was the primary carer of C (this had never been in dispute);

(b) C’s acquisition of British citizenship in 2017 did not preclude the application of Article 24(2);

(c) C was a direct descendant of an EEA national, namely Ms Andrade;

(d) that she (Ms Andrade) had been a worker in this country;

(e) the divorce from C’s father did not preclude reliance on Article 24(2); and

(f) Ms Andrade had in fact left the United Kingdom in 2013.

### **The error of law decision**

12. The error of law decision is annexed to this re-making decision and the two should be read together. In summary, a panel of the Upper Tribunal (comprising myself and Deputy Upper Tribunal Judge Woodcraft) concluded that the First-tier Tribunal had materially erred in law by

failing to consider the relevance of the appellant's extant leave to remain at the time of the EUSS application and the hearing, with specific reference to the Court of Appeal's judgment in Velaj v SSHD [2022] EWCA Civ 767. Her status was relevant to the question of whether she, and in consequence, C, would have to leave the United Kingdom: [22].

13. The panel took the view that Velaj decided, amongst other matters, that the need to conduct a careful assessment of the factual realities in a Zambrano case also applied to one concerning Ibrahim and Teixeira: [21].
14. It is to be noted that the respondent had been given permission to amend her grounds of appeal to include the Velaj point. However, the respondent had confirmed that she was not pursuing the argument that C ceased to be the direct descendant of Ms Andrade at the point the marriage was dissolved: [13]. None of the other findings made by the First-tier Tribunal, as set out previously, were challenged.
15. The decision of the First-tier Tribunal was set aside and the appeal retained in the Upper Tribunal for the purposes of re-making the decision.
16. It was noted at the error of law hearing on 18 June 2024 and in the decision itself that the appellant's leave to remain under Appendix FM had expired on 20 April 2024 and the panel was informed that no extension application had been made.

### **Representation and new evidence**

17. Prior to the hearing, the appellant confirmed that she was now been represented by MA Consultants. In addition, a new witness statement was provided, dated 30 September 2024. This includes details as to why no application had been made to extend leave under Appendix FM. In summary, the appellant explained that she had received "legal advice" from "Mr Otchie" to the effect that she need not extend because

she had won her appeal before the First-tier Tribunal. She states that “Mr Otchie” had been arrested (see above) and that she now understood that what he told her was unreliable.

**The resumed hearing: adjournment application**

18. There was a preliminary discussion of to what the live issues now were. Ms Selvakumaran confirmed that (a) it was accepted the appellant could not succeed with reference to Appendix EU because she had had leave to remain at the date of the EUSS application and the specified date of 31 December 2020 and (b) the only possible route to success in this appeal was Article 24(2).
19. The parties referred me to the recently reported decision of the Upper Tribunal in Maisiri (EUSS; Zambrano; ‘Realistic Prospect’ policy) [2024] UKUT 00235 (IAC).
20. Mr Deller asked for additional time to consider the respondent’s position, which I readily gave. On resumption of the hearing, he applied for an adjournment. In essence, he submitted that there were a number of potentially complex and/or contentious issues and that additional time should be provided for the respondent to consider and set out her position in this appeal.
21. Ms Selvakumaran opposed the application. She submitted as follows. The appellant is a privately-paying single mother who has already had to wait a long time for her case to be finally resolved. The respondent has misunderstood the applicant’s case over the course of time (believing to be a Zambrano scenario, when it was not) and this should not now prejudice the appellant. In light of the error of law decision and recent authorities, the issue is now narrow and clear: this case is all about Article 24(2) and whether the appellant can succeed under this provision in light of her lack of status as at the date of hearing.

22. I refused the application for an adjournment, essentially for the reasons set out by Ms Selvakumaran. Importantly (and without criticising Mr Deller personally), it is the respondent's fault that she has laboured under a misapprehension as to the nature of the appellant's case over the course of time and in my view the live issues are indeed narrow. As helpfully elucidated by Mr Deller, the core issue is now whether the appellant's lack of any status in the United Kingdom can be taken into account at the re-making stage and, if it can, whether this permits her to succeed in her appeal under the 2020 Regulations. Again without criticising Mr Deller, the respondent has had ample time to consider and prepare for the resumed hearing: it has now been over a year since the First-tier Tribunal's decision and approximately 2 ½ months since the error of law decision was sent out.
23. In all the circumstances of this case, fairness did not require an adjournment.
24. Having given my decision on the adjournment, I offered Mr Deller additional time on the day to collect his thoughts in preparation for submissions. I was satisfied that the not insignificant additional time was fair and proportionate.
25. The hearing resumed and Mr Deller assisted with customarily focused submissions. He confirmed that there was no suggestion that the appellant had acted in bad faith when failing to apply to extend her leave to remain under Appendix FM. He also confirmed that there was no issue as to the appellant's ability to qualify under the Ibrahim and Teixeira principle.
26. The core issue was, Mr Deller submitted, whether the change in the appellant's factual circumstances (i.e. the expiration of her leave to remain on 20 April 2024) was a matter which could be considered by the Tribunal at this stage. In particular, he relied on regulation 9(4) of the 2020 Regulations and the jurisdictional requirement that matters could

be considered on appeal if they were “relevant to the substance of the decision under appeal”. Mr Deller submitted that the expiration of the appellant’s leave was not “relevant to the substance” of the respondent’s decision to refuse the EUSS application. He urged me to consider authorities which have addressed the particular phrase in question, which might include some relating to the “new matter” issue (these had not been provided to me, but in the circumstances I do not criticise Mr Deller for this omission).

27. To be clear, Mr Deller confirmed that he was not submitting that the expiration of leave constituted a “new matter” within the meaning of regulation 9(5) and (6) of the 2020 Regulations.
28. Ms Selvakumaran made the following submissions. The applicant’s EUSS application was clearly concerned with whether she was entitled to leave to remain in the United Kingdom. This could have been on the basis of either Appendix EU or the Withdrawal Agreement. The appellant’s case was, and always has been, predicated on the Ibrahim and Teixeira principle and, whether implicitly or expressly, Article 24(2) of the Withdrawal Agreement. The respondent’s refusal of the application was a conclusion that the appellant was not entitled to leave to remain. The expiration of the appellant’s leave to remain under Appendix FM was relevant to the substance of the respondent’s decision. The wording of regulation 9(4) permitted consideration of matters arising after the decision.
29. I was specifically referred to paragraph 61, 67, and 94 of Maisiri. It was of particular note that the appellant could not now apply for leave to remain under the EUSS as that route been closed.
30. There was no reply from Mr Deller.
31. At the end of the hearing I reserved my decision.



**Analysis and conclusions**

32. The issues in this case have narrowed over the course of time. Matters which had been in dispute have been resolved, either by positions adopted by the respondent or unchallenged findings made by the First-tier Tribunal.

33. The following matters are settled for the purposes of my task in re-making the decision in this case:

(a) the appellant was and remains the primary carer of C;

(b) if the appellant had to leave the United Kingdom, C would in fact be compelled to leave as a consequence of this;

(c) C is the direct descendant of an EEA national, Ms Andrade, who had exercised Treaty rights in the United Kingdom as a worker between 2009 and 2013;

(d) C's acquisition of British nationality in 2017 does not preclude the appellant from succeeding under the Withdrawal Agreement;

(e) the fact that Ms Andrade left United Kingdom in 2013 and then divorced C's father does not preclude the appellant from succeeding under the Withdrawal Agreement;

(f) the appellant's leave to remain under Appendix FM expired on 20 April 2024 and this occurrence did not involve any bad faith on her part;

(g) the appellant cannot succeed with reference to Appendix EU because the relevant definition in Annex 1 to Appendix EU requires a consideration of the individual's circumstances as at the date of

application and the specified date of 31 December 2020: at each of those points in time, the appellant had leave to remain under Appendix FM.

34. Turning to the Withdrawal Agreement, Article 24(2) reads as follows:

“Rights of workers

...

2. Where a direct descendant of a worker who has ceased to reside in the host State is in education in that State, the primary carer for that descendant shall have the right to reside in that State until the descendant reaches the age of majority, and after the age of majority if that descendant continues to need the presence and care of the primary carer in order to pursue and complete his or her education.”

35. There is no dispute that this provision covers the Ibrahim and Teixeira principle, on which the appellant has relied throughout.

36. It will be recalled that the criticism made by the respondent of the First-tier Tribunal’s decision, which ultimately led to that decision being set aside, was that the judge had failed to take account of the appellant’s extant leave to remain under Appendix FM: the Velaj point. As a matter of logic, the respondent was asserting that the compulsion test which applies in Zambrano cases also applies in Ibrahim and Teixeira cases. In other words, where a primary carer in either scenario has extant leave to remain under Appendix FM or some other provision, they cannot succeed in establishing a derivative right leading to a grant of leave to remain.

37. I conclude that whatever the respondent’s position is, the same approach to extant leave to remain must be taken in both types of case types of case. This much is clear from what was said by Andrews LJ (with whom Whipple and King LJ agreed) in Velaj: [23], [33], [38], and [50]. The final passage of her judgment reads as follows:

“50. That interpretation is also consistent with the stated intention to give effect to Zambrano rights, whereas the rival interpretation would confer a new species of purely domestic derivative rights on someone who would never meet the Zambrano test (or the test in Chen or Ibrahim or Teixeira), in circumstances where the departure of that person from the UK would in practice have no effect at all upon the ability of the British Citizen dependant to remain in the UK. The question whether the legislator is likely to have intended this consequence admits of only one answer in the present case, and that is no. Requiring the decision maker to assume that both primary carers will leave the UK when one of them will undoubtedly stay behind also precludes the type of nuanced inquiry that was envisaged in Chavez-Vilchez and therefore, if Mr Cox were right, the 2018 amendment, far from implementing Chavez-Vilchez, would have the opposite effect.

38. It is also clear from Maisiri and Akinsanya and Aning-Adjei [2024] EWHC 469 (Admin) that in Zambrano cases there is no basis for an assessment as to whether an individual who has no leave to remain in this country might stand a realistic prospect of obtaining such leave. In light of Velaj there is no basis, either in principle or by virtue of any other authorities, on which to distinguish the situation in Zambrano cases from that in Ibrahim and Teixeira cases. The respondent has not sought to argue the contrary in this case.

39. With the above in mind, I conclude that:

(a) holding extant leave to remain under Appendix FM or some other provision of the Immigration Rules other than Appendix EU precluded the appellant from being able to rely on Article 24(2). This is because the appellant would not then required to leave the United Kingdom, which in turn meant that C would not have been compelled to leave either;

(b) the fact that the appellant no longer has leave to remain under Appendix FM does not preclude her from relying on Article 24(2) on the ground that there might be a realistic prospect of her obtaining further leave under Appendix FM, as she had done in the past.

40. I turn to the core issue identified by Mr Deller: am I able, as a matter of jurisdiction, to take account of the expiration of the appellant's leave to remain?

41. Regulation 9(4) of the 2020 Regulations provides as follows:

“(4) The relevant authority may also consider any matter which it thinks relevant to the substance of the decision appealed against, including a matter arising after the date of the decision.”

42. Is the expiration of the appellant's leave to remain under Appendix FM “relevant to the substance of the decision appealed against? For the following reasons, which align in the most part with the submissions made by Ms Selvakumaran, in my judgment it is.

43. First, the appellant's EUSS application was clearly put to the respondent; it was based on the Ibrahim and Teixeira principle and, by reasonable implication, Article 24(2). There was a reasonable expectation that the respondent would consider the application on the basis on which it was put.

44. Secondly, whether the respondent did this or not, the original refusal letter and the June 2023 letter concluded that the appellant was not entitled to leave to remain under the EUSS by virtue of, amongst other matters, her extant leave to remain under Appendix FM: see in particular page 3 of 6 of the original refusal letter. In my judgment, it is clear that the consideration of whether the appellant was entitled to leave to remain and the conclusion that she was not formed the

“substance of the decision appealed against”. Frankly, on a common sense basis it is difficult to see what other view one could come to.

45. For completeness, the fact that the respondent did not expressly address Article 24(2) does not detract from the second reason, above. The omission was matter of conscious choice or ineptitude. Either way, the “substance” of the decision remains the same.
46. Thirdly, Mr Deller has urged me to consider case-law in which the phrase “relevant to the substance” of a decision has been considered. The cases decided by the Upper Tribunal are, with respect, of limited value because the respondent has not relied on the “new matter” point in this appeal. However, the phrase “relevant to the substance of the decision” was considered by the Supreme Court in Patel and Others v SSHD [2013] UKSC 72, which approved a wide construction of the words which had been adopted by the Court of Appeal in AS (Afghanistan) v SSHD [2011] EWCA Civ 833. At [38]-[44], Lord Carnwath, JSC (with whom Lords Kerr, Reed and Hughes agreed) set out his conclusions on the phrase with which I am concerned:

“38. There was a similar lack of agreement on the effect of section 85(4), and in particular of the reference to matters relevant to “the substance” of the decision appealed against. That seems a curiously ambiguous term, which can fairly be read as referring either to the substantive effect of the decision or to the substantive reasons underlying it. Arden LJ took the latter view, which she saw as supporting her interpretation of section 85(2) (paras 31-2). At para 30 she adopted as “plainly correct” the approach of the Asylum and Immigration Tribunal (EA (Nigeria) v Secretary of State for the Home Department [2007] UKAIT 00013), which had read these words as meaning that the new evidence had to be “relevant to the decision actually made”, and had added at para 6 that:

“...a decision on a matter under the Immigration Rules is a decision on the detailed eligibility of an individual by reference to the particular requirements of the rule in question in the context of an application that that person has made.”

39. Sullivan LJ took the opposite view, seeing section 85(4) as consistent with his view that the tribunal's consideration was not limited to the grounds considered by the Secretary of State:

“Since section 85(2) is concerned with statements of additional grounds which must include any reasons why an appellant should be allowed to remain, and which are expressly not confined to the reasons why he should be allowed to remain under rule x of the Rules, I am not persuaded that the reference to ‘the decision appealed against’ must be a reference to the decision to refuse to vary leave to remain under rule x, rather than the decision to refuse to vary leave to remain, being one of the immigration decisions as defined by section 82 (2). Such an approach to section 85 (2) would be consistent with the reference in section 85 (4) to ‘the substance of the decision’.” (para 113)

40. Moore-Bick LJ thought that section 85(4) itself had “little bearing” on the issues before the court, since it was concerned only with the evidence which the tribunal could consider (para 83). However, his understanding of the word “substance” in this context, agreeing with that of Sullivan LJ, is apparent from his earlier discussion of the appropriate response to a section 120 notice. He saw its purpose as to impose on the appellant a duty to put forward “any grounds he may have for challenging the substance of the decision made against him, rather than simply the grounds on which it was made” (para 80, emphasis added).

41. The broader approach of the majority seems to me to gain some support from the scheme of section 3C, under which (as is common ground) the initial application for leave to remain, if made in time, can later be varied to include wholly unrelated grounds without turning it into a new application or prejudicing the temporary right to remain given by the section. Thus the identity of the application depends on the substance of what is applied for, rather than on the particular grounds or rules under which the application is initially made. The same approach can be applied to the decision on that application, the identity or “substance” of which in the context of an appeal is not dependent on the particular grounds first relied on.

42. It is of interest that, at an earlier stage, the broader approach seems to have accorded with the reading of those responsible within the Home Office for advice to immigration officers. The Immigration Directorate's Instructions, issued in September 2006, noted that it was not possible under section 3C to make a second application, but continued:

“On the other hand, it is possible to vary the grounds of an application already made, even by introducing something completely new. A student application can be varied so as to include marriage grounds. If an application is varied before a decision is made, the applicant will be required to complete the necessary prescribed form to vary his application. If an application is varied post decision, it would be open to the applicant to submit further grounds to be considered at appeal... Once an application has been decided it ceases to be an application and there is no longer any application to vary under section 3C(5). So any new information will fall to be dealt with during the course of the appeal rather than as a variation of the original application.” (para 3.2 emphasis added)

43. The same approach is supported by the current edition of Macdonald's Immigration Law & Practice 8th ed (2010) para 19.22 (under the heading “The tribunal as primary decision maker”). The only implicit criticism made of the Page 17 majority approach in AS is that it did not go far enough. They observe that even without a section 120 notice the tribunal should be free to consider any matter –

“... including a matter arising after the decision which is relevant to the substance of the decision regardless of whether a one-stop notice has been served. The ‘substance of the decision’ is not the decision maker's reasoned response to the particular application or factual situation that was before it but is one of the immigration decisions enumerated in section 82 and a ‘matter’ includes anything capable of supporting a fresh application to the decision maker...”

Whether or not such an extension of the majority's reasoning can be supported, that passage indicates that the broader approach in itself is not controversial.

44. In the end, although the arguments are finely balanced, I prefer the approach of the majority in AS. Like Sullivan LJ, I find a broad approach more consistent with the “coherence” of this part of the Act. He noted that the standard form of appeal, echoing the effect of the section 120 notice, urged appellants to raise any additional ground at that stage, on pain of not being able to do so later, and observed:

“... it seems to me that appellants would have good reason to question the coherence of the statutory scheme if they were then to be told by the AIT that it had no jurisdiction to consider the additional ground that they had been ordered by both the Secretary of State and the AIT to put forward.” (para 99).”

47. Although Patel was not of course considering the 2020 Regulations, in my judgment, the passages set out above provide a complete answer, or at very least a powerful additional answer to the respondent’s principal - indeed, sole - basis for resisting the appellant’s appeal. In short, the phrase “substance of the decision” bears a wide meaning. The same phrase is employed in regulation 9(4) of the 2020 Regulations and there is no good reason why the Court’s conclusion should not apply in the present case, with the outcome I have stated at paragraph 44, above.

48. Fourthly, regulation 9(4) self-evidently permits a tribunal to take account of matters arising after the respondent’s decision, as is the case here.

49. Whilst the “new matter” point not been taken before me, for the sake of completeness, even if it had been I would have concluded that the change in the appellant’s factual circumstances did not engage regulation 9(5) and (6) of the 2020 Regulations. From the outset, the appellant has relied on the Ibrahim and Teixeira principle. Whilst Article 24(2) was not expressly referred to in the EUSS application form, it was at the very least implicit in the application and it was expressly referred to in the first skeleton argument, which prompted the June 2023 letter (this case can be distinguished from the situation in Ayoola (previously



considered the matters) [2024] UKUT 00143 (IAC), where the assertion later relied on had not been properly articulated). This is not a case in which the appellant has sought to shift the case by relying on new legislative provisions. The expiration of the appellant's leave under Appendix FM was an event which was always known to the respondent as a possibility (absent a successful application for extension, as to which there was of course no guarantee: see in this regard, Maisiri at [94]). The fact of the expiration on 20 April 2024 was, in my judgment, simply a factual development relating to a matter which, as a matter of substance, the respondent had considered (noting that the EUSS application was refused on the basis that there was extant leave to remain), or at least had taken a conscious decision not to address.

50. It follows from the above that I am able to take account of the expiration of the appellant's leave to remain under Appendix FM on 20 April 2024.

51. As to the appellant's ability to rely on the Withdrawal Agreement notwithstanding the acceptance that she cannot succeed under Appendix EU, the answer must be that she can. Under regulation 8 of the 2020 Regulations, an individual can rely on two grounds of appeal: whether the respondent's decision is contrary to the relevant Immigration Rules and/or whether the decision breaches rights under the Withdrawal Agreement. Each ground is free-standing. Regulation 8(2) confirms that an individual can rely on a breach of rights under Article 24(2).

52. Bringing all of the above together, I conclude that the respondent's decision under appeal breaches the appellant's rights under Article 24(2). Adopting a fact-sensitive approach, this is because:

(a) the appellant is the primary care of C in the context of the Ibrahim and Teixeira principle;

(b) she has no leave to remain in the United Kingdom;

(c) the appellant is required to leave the United Kingdom;

(d) in consequence of this, C will be unable to reside in United Kingdom and will, as a matter of fact, be compelled to leave the United Kingdom for an indefinite period; and

(e) the appellant is entitled to rely on Article 24(2) in her appeal.

53. It follows that the appellant's appeal must be allowed.

### **Notice of Decision**

**The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law and that decision has been set aside.**

**The decision in this appeal is re-made and the appeal is allowed under the Immigration (Citizens' Rights Appeals)(EU Exit) Regulations 2020, with reference to Article 24(2) of the Withdrawal Agreement.**

**H Norton-Taylor**  
**Judge of the Upper Tribunal**  
**Immigration and Asylum Chamber**  
**Dated: 7 October 2024**

**ANNEX: THE ERROR OF LAW DECISION**

**Upper Tribunal**

**(Immigration and Asylum Chamber)**

Appeal Number: UI-2023-005194

First-tier Case Number: EA/00461/2023

**THE IMMIGRATION ACTS**

**Decision & Reasons  
Promulgated**

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**Before**

**UPPER TRIBUNAL JUDGE NORTON-TAYLOR  
DEPUTY UPPER TRIBUNAL JUDGE WOODCRAFT**

**Between**

**IDIAT LOLADE SALAMI  
(Anonymity order not made)**

Appellant

**and**

**SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellant: Mrs Selvakumaran, Counsel

For the Respondent: Ms A Ahmed, Senior Home Office Presenting Officer

**DECISION AND REASONS**

**Heard at Field House on 26 June 2024**

**The Appellant**

1. The appellant is a citizen of Nigeria born on 10 September 1979. She appealed against decisions of the respondent dated 29 December 2022 and 5 June 2023 to refuse to grant status under the European Union Settlement Scheme (the EUSS). The appellant made an EUSS application to the respondent on 30 November 2020. Her appeal against refusal was allowed at first instance by Judge of the First-tier Tribunal M Harris on 25 July 2023. The respondent appeals with leave against that decision. Thus, although the matter comes before us as

an appeal by the respondent, we shall continue to refer to the parties as they were known at first instance for the sake of clarity.

2. The appellant was granted leave to enter or remain in the UK on 14/03/2018 valid until 14/09/2020, under Appendix FM to the Immigration Rules on the basis of being the mother and primary carer of her child, "C". C was born in 2010 and became a British citizen in 2017. The appellant was later granted an additional 30 months' leave under Appendix FM to the Immigration Rules on 21/10/2021 on the same basis again; that she was the primary carer of C.

### **The Regulation Background**

3. The appellant argues that the respondent's decision breaches a right which she has by virtue of Article 24(2) of the Withdrawal Agreement whose conditions she can satisfy. Article 24(2) states:

"Where a direct descendant of a worker who has ceased to reside in the host State is in education in that State, the primary carer for that descendant shall have the right to reside in that State until the descendant reaches the age of majority ..."

4. Regulation 16 (5) of the Immigration (European Economic Area) Regulations 2016 (no longer in force) gave a primary carer of a child a derivative right to reside if the British citizen child being cared for would be unable to reside in the United Kingdom or another EEA State if the carer left the United Kingdom for an indefinite period. The European Commission Guidance Note relating to the Withdrawal Agreement. Part Two Citizens' Rights provides at [2.12.2]:

"... a child whose EU or UK parent used to work in the host State as beneficiary of the Withdrawal Agreement can continue to reside in the host State and complete his or her education there, even after that parent has ceased to reside in the host State lawfully..."

### **The Appellant's Case**

5. C claims to be the direct descendant of an EEA national exercising Treaty rights. C's Nigerian biological father, Mr Sonibare, was not in an ongoing relationship with the appellant. He was married to Ms Andrade, an EEA national exercising Treaty rights in this country between 2009 and 2013. Ms Andrade was thus the stepmother of C who is therefore the direct descendant of a worker, namely Ms Andrade. The appellant argued (and the First-tier Tribunal accepted) that this relationship of step mother and step child continued for the purposes of EU law despite the separation and subsequent divorce of C's father and Ms Andrade. C, who is now aged 14, continues to be in full time education in this country. Ms Andrade has left the United Kingdom but C's right to education under EU law continued even after his naturalisation in 2017. The appellant argues that she has the right to reside in the United Kingdom until C is 18 years old in four years' time.

### **The Explanation for Refusal**

6. The respondent considered the appellant's application on the basis that she was claiming to have a derivative right to reside in the United Kingdom, as the primary carer of a British citizen pursuant to the case of **Ruiz Zambrano v Office National de l'Emploi (Case C-34/09) [2012] QB 265** ("Zambrano"). The application was refused because the appellant had not demonstrated C would have been required to leave the United Kingdom for an indefinite period. The appellant's previous grants of leave were on the basis of her relationship with C and this had not changed. The appellant would not be required to leave and so C would not either.
7. The appellant appealed the respondent's decision to the First-tier Tribunal arguing that the focus of the respondent's decision was primarily on the Zambrano criteria, which the appellant had not applied under. It was difficult for the appellant to acquire a derivative right to reside because C became an exempt person when he was naturalised. However this situation was contrary to the Withdrawal Agreement. C's nationality should be of no relevance, when considering the appellant's qualification under Article 24(2): see **Baumbast [2002] EUECJ C-413/99**

### **The Decision at First Instance**

8. The respondent was not represented at first instance. In a short determination the First-tier Tribunal accepted that the appellant met the criteria in Article 24(2) and could therefore succeed in her appeal. The Article did not specify the need for a qualifying nationality. When the Withdrawal Agreement came into effect on 31 December 2020, C continued to be the direct descendant of a worker. The judge accepted the appellant's evidence that Ms Andrade had indeed left the United Kingdom (and see paragraph 4 above). The judge allowed the appeal.

### **The Onward Appeal**

9. The respondent appealed the First-tier decision, arguing that the judge had materially erred in allowing the Appellant's appeal on the basis that the refusal of leave to remain under Appendix EU breached the Appellant's rights under the Withdrawal Agreement. The Appellant did not come within the scope of the Withdrawal Agreement as outlined at Article 10 of the Agreement, because it did not extend to those claiming derivative rights to reside.
10. On 25 October 2023 the First-tier granted permission to appeal, noting that the judge did not refer to the case of **Velaj v SSHD [2022] EWCA Civ 767** (we discuss this case in more detail below: see paragraph 16). The appellant had previously been granted leave to remain under Appendix FM. C would not therefore have been compelled to leave the United Kingdom as his primary carer, the appellant, had a right to remain. It was arguable that the appellant was not within the scope either of the EUSS or the Withdrawal Agreement as she was exercising rights to remain in the United Kingdom under national law before the exit date (31 December 2020).

### **The Hearing Before Us**

- 11.** In consequence of the grant of permission the matter came before us to determine in the first place whether there was a material error of law in the decision of the First-tier Tribunal such that it fell to be set aside. If there was then we would make directions on the rehearing of the appeal. If there was not the decision at first instance would stand.
- 12.** The respondent had sought leave to amend his grounds of appeal in February 2024, but for some reason that application had not been decided by the Upper Tribunal in advance of the hearing before us. At the outset of that hearing, the Senior Presenting Officer maintained the application to amend the grounds of onward appeal to include the argument (noted in the First-tier grant of permission) that Judge Harris' determination did not take into account the ratio in **Velaj**. Ms Selvakumaran opposed the application. As we found it arguable that **Velaj** applied to other leave applications as well as those made under the Zambrano jurisprudence, and that the application had been made in good time, we granted permission to amend. In oral submissions the Senior Presenting Officer confirmed that it was not challenged that the EEA national, Ms Andrade had left the United Kingdom.
- 13.** The respondent initially relied upon the argument that C ceased to be the direct descendant of an EEA national on 15 August 2013, when the marriage of C's father and Ms Andrade was dissolved. However we were told that this argument was no longer being pursued. Nevertheless it was submitted that the First-tier was wrong in law because **Velaj** had not been considered. The Upper Tribunal decision in **Ayoola [2024] UKUT 143 (IAC)** was on all fours with the instant case. We discuss Ayoola in more detail below, see paragraph 18. It was submitted that the respondent's appeal should be allowed.
- 14.** We next invited submissions from Ms Selvakumaran, particularly on the **Velaj** point. She argued that there was no merit to ground 2 (as amended) which was now advanced by the respondent because **Velaj** was not relevant. The appellant's leave expired on 20 April 2024 and she had not applied to extend it. She had been representing herself and was not aware how she could renew it. She thus had no actual or valid leave at present.
- 15.** In conclusion, the Senior Presenting Officer said that **Velaj** demonstrated how a case such as the instant one applies to the Withdrawal Agreement. We indicated at the conclusion of submissions that if we found that the Withdrawal Agreement did apply but the judge materially erred in not considering the impact of **Velaj** on the case a further hearing might be necessary because the appellant's circumstances might have materially changed.

### **The Cases of Velaj and Ayoola**

- 16.** Mr Velaj was a citizen of Kosovo who was subject to a deportation order. He sought to resist deportation on the basis that he had a Zambrano right to reside. At [13] of their judgment, the Court of Appeal summarised the issue which arose on the appeal which was :

“..... whether a person deciding whether the requirements of Regulation 16(5)(c) are fulfilled must consider whether the British Citizen dependant would be unable to reside in the UK on the *assumption* that the primary carer (or both primary carers, as the case may be) will leave the UK for an indefinite period (irrespective of whether the assumption is correct); or whether the decision-maker must consider what the impact on the British Citizen would be if *in fact* the primary carer (or both primary carers) *would* leave the UK for an indefinite period. “

17. The Court held that the wording of regulation 16(5) of the 2016 EEA Regulations meant that the decision maker had to consider what would be the position if both the child’s parents were in fact required to leave. Mr Velaj’s appeal failed because the Court of Appeal held that the approach advocated on his behalf, that one should assume that both parents would leave was hypothetical and indeed counterfactual. Mr Velaj’s wife was a British citizen and the Court held that Mr Velaj’s child would not be compelled to leave the United Kingdom if Mr Velaj left as the child’s mother would remain.
18. The facts of **Ayoola** were perhaps more in line with the facts of the instant case before us than were the facts in **Velaj**. The appellant in **Ayoola** was a single parent who had limited leave to remain. She was the primary carer of her child who had no contact with the child’s father. Ms Ayoola was likely to have her leave extended upon application because of these caring responsibilities. She would not necessarily have a derivative right to reside, as she would not be compelled to leave, but her child would also not be compelled to leave because Ms Ayoola would be able to continue to care for her child while the child was being educated. Her leave under Appendix FM was not noticeably inferior to the leave she might obtain from succeeding under Article 24(2) of the Withdrawal Agreement.
19. Strictly speaking, that part of **Ayoola** which is relevant to the case before us was obiter because what the Upper Tribunal had to decide first was whether a claim under the Withdrawal Agreement had been previously considered by the respondent. The Upper Tribunal held that it had not; that was determinative of the appeal. However, the Upper Tribunal then went on to decide the case on an “even if” basis. Even if the claim under the Withdrawal Agreement was properly before the Upper Tribunal it still could not succeed because the appellant had limited leave and there was thus no question of the child being compelled to leave. **Ayoola** is not binding on us, but we consider it to be of real assistance in how to approach the issues in this case.

### **Discussion and Findings**

20. Although the issues in this case are not without difficulty, the point which we have to decide is a narrow one. Did the judge at first instance materially err in law in finding that the appellant could succeed in her appeal under Article 24(2) of the Withdrawal Agreement because she met the criteria set out in that Article? It was held that she had a right to remain in the United Kingdom under the terms of Article 24. The respondent had refused the application in essence because at that time the appellant already had leave under Appendix FM and could not therefore bring herself within the Zambrano criteria or could claim a derived right of residence thereunder.

- 21.** Just as in the case of **Ayoola**, the respondent in the instant case before us had pointed to the fact that the appellant had limited leave to remain under Appendix FM and that was likely to be extended upon application because of the very strong claim the appellant had as a carer of C. What **Velaj** makes clear is that a careful examination of the factual background in a case is required before a decision-maker can accept or refuse a Zambrano-type application *and* one based on the Ibrahim and Teixeira principle: see **Velaj** at [23], [33], [38], and [50]. Here the factual situation has become more complex because we were told during the course of the hearing that the appellant no longer had leave to remain and had not apparently made an application for the leave she previously had to be extended. The impact of that development is an important issue which itself needs to be considered. That is so particularly in the light of the fact that the appellant had applied previously to have her leave extended. She cannot therefore properly, without more, be able to say that she was unaware of the need to apply or how to apply to extend her leave.
- 22.** Be that as it may, in our view there was a material error of law in the decision of the First-tier Tribunal because the tribunal did not consider the approach in **Velaj**. The respondent somewhat unhelpfully in a complex case of this kind was not represented at first instance and the authority of **Velaj** was not brought to the attention of the First-tier judge. Had **Velaj** been brought to the attention of the judge the determination in this case might have taken on a very different aspect. **Velaj** reminds decision-makers when assessing a claim for a derived right of residence, whether on a Zambrano basis or under Ibrahim and Teixeira, one has to look at what would happen in reality rather than what theoretically might happen. In the present case, the appellant had leave to remain under Appendix FM at the material times of her EUSS application and the First-tier Tribunal's determination. Thus, she was not required to have left the United Kingdom and, at the very least arguably, C would not have been compelled to leave either. The First-tier Tribunal failed to take this position into account.
- 23.** In **Velaj** it was easy to illustrate what would happen. If one carer left the United Kingdom that would not necessarily mean that the child had to leave the United Kingdom because there would still be the other primary care available. **Ayoola** had a different factual matrix to **Velaj** and its facts were much more similar to the instant case before us. In **Ayoola** the appellant was the sole primary carer but had leave to remain so would not have to leave and thus there was no risk that the children in that case would also have to leave.
- 24.** Having found a material error of law in the decision of the judge at first instance we set it aside and consider how the appeal should be reheard. As we have indicated, the issue in this case is a narrow one. The appellant can file and serve further evidence, if so advised, on how it has come about that she no longer has limited leave to remain. Further evidence could also deal with the position if the appellant does not have leave (unlike the appellant in **Ayoola**). The appellant has previously accepted that she could not meet the EUSS scheme; she advanced her case before the First-tier Tribunal on the basis that Article 24 gave her a right in itself. In our view this can be properly be decided by the Upper Tribunal without the need to remit it back to the First-tier Tribunal.



- 25.** We do not accede to the respondent’s suggestion that if we were to find a material error of law we should set the decision at first instance aside and then proceed immediately to remake the decision and dismiss the appellant’s appeal against the respondent’s decision.

**Notice of Decision**

**The decision of the First-tier Tribunal involved the making of a material error of law and we set it aside.**

**The appeal is retained in the Upper Tribunal for a resumed hearing to take place on the first available date after 18 September 2024, with a time estimate of 3 hours.**

**Directions to the parties**

- (1) The appellant is to file and serve a consolidated bundle of all evidence relied on **no later than 28 days** after this error of law decision is sent out;
- (2) The respondent may file and serve any new evidence relied on **no later than 14 days** thereafter;
- (3) The appellant is to file and serve a skeleton argument **no later than 10 days** before the resumed hearing;
- (4) The respondent is to file and serve a skeleton argument **no later than 5 days** before the resumed hearing;
- (5) The parties may apply to vary these directions, copying in the other side.

Signed this 9<sup>th</sup> day of July 2024

.....  
Judge Woodcraft  
Deputy Upper Tribunal Judge