



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

Case No: UI-2023-005567

First-tier Tribunal No: EA/12624/2022

**THE IMMIGRATION ACTS**

**Decision & Reasons Issued:**

**On 23<sup>rd</sup> of April 2024**

**Before**

**UPPER TRIBUNAL JUDGE SHERIDAN**  
**DEPUTY UPPER TRIBUNAL JUDGE WELSH**

**Between**

**Secretary of State for the Home Department**

Appellant

**And**

**Oluwatobiloba Anthony**  
**(NO ANONYMITY DIRECTION MADE)**

Respondent

**Representation:**

For the Appellant: Mr Melvin, Senior Home Office presenting Officer  
For the Respondent: None

**Heard at Field House on 4 March 2024**

**DECISION AND REASONS**

Introduction

1. This is an appeal by the Secretary of State. However, we will refer to the parties as they were designated in the First-tier Tribunal.
2. Prior to the hearing the appellant's father wrote to the Upper Tribunal stating that he would not be available for the hearing and requesting that the appeal be decided on the papers. The request was refused. However, the appellant was invited to apply for an adjournment if there was a reason his father could not

attend on the scheduled date. The appellant's father replied stating that he would prefer the case to be decided on the papers but that the hearing should proceed if the respondent insists.

3. Although the hearing proceeded, we informed Mr Melvin that we would not need to hear from him.

### Background

4. On 28 October 2022 the appellant was granted limited leave (known as "pre-settled status") under Paragraph EU3 of Appendix EU to the Immigration Rules as a "person with a Zambrano right to reside".
5. The reason he was granted limited leave (i.e. pre-settled status) and not indefinite leave (i.e. settled status) was that prior to 29 May 2020 he had leave to remain in the UK under Appendix FM of the Immigration Rules. His period of leave under Appendix FM was from 28 November 2017 until 28 May 2020. The respondent's position, as set out in the decision granting the appellant limited leave, is that the 5 years of continuous residence necessary to be granted indefinite leave under Appendix EU could not start to run before 29 May 2020 because the appellant had leave under Appendix FM prior to that date.
6. The appellant appealed under the Immigration (Citizens Rights) (EU Exit) Regulations 2020, arguing that the decision to grant him limited leave, rather than indefinite leave, was not in accordance with the EU Settlement Scheme Rules (i.e. Appendix EU).
7. The appeal was heard by Judge of the First-tier Tribunal Hands ("the judge"). In a decision promulgated on 9 October 2023, the judge allowed the appeal. The respondent now appeals against this decision.

### Decision of the First-tier Tribunal

8. The judge noted that the respondent had previously written to the appellant (in August 2020) referring to him having a Zambrano right of residence commencing in 2017. The judge stated that this was binding on the respondent who could not change her mind in a later decision.
9. The judge also found that the appellant has been continuously resident in the UK from February 2017 and that he should have been granted leave in line with his father, who was granted indefinite leave to remain. In addition, the judge made a finding that it would be in the appellant's best interests to be granted indefinite leave to remain.

### Grounds of Appeal

10. The grounds argue that the judge failed to identify how the appellant satisfied the requirements for indefinite leave under Appendix EU.
11. When granting permission to appeal, Upper Tribunal Judge Kebede stated that the judge arguably strayed beyond the statutory basis of the appeal which was only to consider whether the relevant Rules were met.

## Error of Law

12. Under Appendix EU, to be eligible for indefinite leave, the appellant needed to have completed a period of 5 years as a “person with a Zambrano right to reside”. The term “person with a Zambrano right to reside” is defined in Annex 1 to Appendix EU. In relevant part, this provides:

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:

...

(b) 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 under the age of 18 years (unless they were previously granted limited leave to enter or remain under paragraph EU3 of this Appendix as a person with a Zambrano right to reside and were under 18 at the date of application for that leave); and

(iii) their primary carer meets the requirements of sub-paragraph (a) above; and

(iv) the primary carer would in practice be prevented from residing in the UK if the person in fact left the UK for an indefinite period; and

(v) **they do not have leave to enter or remain in the UK**, unless this:

(aa) was granted under this Appendix; or

(bb) is in effect by virtue of section 3C of the Immigration Act 1971; or

(cc) is leave to enter granted by virtue of having arrived in the UK with an entry clearance in the form of an EU Settlement Scheme Family Permit granted under Appendix EU (Family Permit) to these Rules on the basis they met sub-paragraph (a) (ii) of the definition of ‘specified EEA family permit case’ in Annex 1 to that Appendix; and

(vi) they are not subject to a decision made under regulation 23(6)(b), 24(1), 25(1), 26(3) or 31(1) of the EEA Regulations, unless that decision has been set aside or otherwise no longer has effect

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; and

(c) where the role of primary carer is shared with another person in accordance with sub-paragraph (b)(ii) of the entry for ‘primary carer’ in this table, the reference to ‘the person’ in sub-paragraph (a)(iii) above is to be read as ‘both primary carers’

**[Emphasis Added]**

13. As is apparent from the parts of the definition we have highlighted, a person who has leave to remain (other than in narrow exceptions not applicable in this case) does not fall within the definition of a person with a Zambrano right to reside in Annex 1 to Appendix EU. The appellant had leave to remain under Appendix FM between 28 November 2017 and 28 May 2020. He therefore could not be a person with a Zambrano right to reside until after 28 May 2020.

14. Accordingly, the judge erred by finding that the appellant’s continuous qualifying period began in February 2017, when it could only have begun after 28 May 2020 when his leave under Appendix FM expired. This is a clear legal error and consequently the decision cannot stand.

### Remade Decision

15. Under regulation 8 of the 2020 Regulations, two grounds of appeal are available to the appellant. The first is that the decision to grant him limited (rather than indefinite) leave was not in accordance with the EU Withdrawal Agreement. The second is that it is not in accordance with the residence scheme Immigration Rules; i.e. Appendix EU.
16. An argument based on the EU Withdrawal Agreement cannot succeed as those claiming a Zambrano right are not within the scope of the EU Withdrawal Agreement. See paragraph 7 of *Sonkor (Zambrano and non-EUSS leave)* [2023] UKUT 00276 (IAC).
17. An argument based on Appendix EU cannot succeed because, for the reasons explained above, the continuous qualifying period began after 28 May 2020 and therefore the necessary 5 years have not been accrued.
18. It is understandable why the judge was sympathetic to the appellant, given the findings that (a) the respondent told the appellant his Zambrano right to reside ran from 2017 in line with his father's leave; (b) his father was granted indefinite leave to remain; and (c) it would be in the appellant's best interests to be granted indefinite leave in line with his father. We are also sympathetic to the appellant. However, these considerations, which were given weight by the judge, are irrelevant. The only question is whether the decision to grant the appellant limited leave and not indefinite leave was in accordance with Appendix EU; and, for the reasons explained above, it plainly was.

### Notice of Decision

19. The decision of the First-tier Tribunal involved the making of an error of law and is set aside. We remake the decision by dismissing the appeal.

D. Sheridan  
**Upper Tribunal Judge Sheridan**

Judge of the Upper Tribunal  
Immigration and Asylum Chamber

**15.4.2024**