



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2024-000175

First-tier Tribunal No:
EU/55359/2023

THE IMMIGRATION ACTS

Decision & Reasons Issued:

14th March 2024

Before

UPPER TRIBUNAL JUDGE MACLEMAN

Between

JUDITH NICOLA PARSONS

(no anonymity order requested or made)

Appellant (in the FtT)

and

Secretary of State for the Home Department

Respondent (in the FtT)

*For the Appellant: Ms A Patyba of counsel, instructed by Hackney
Community Law Centre*

For the Respondent: Mr P Deller, Senior Home Office Presenting Officer

Heard at Field House, London on 26 February 2024

DECISION AND REASONS

1. This decision refers to parties as they were in the FtT.
2. The appellant appealed to the FtT against a decision of 12 September 2023 to refuse her application under the EU Settlement Scheme (EUSS) based on a “Zambrano” right as the primary carer of her daughter, a UK citizen.
3. FtT Judge Swinnerton allowed the appellant’s appeal by a decision dated 7 December 2023, concluding thus:

15. In the *Velaj* case, which is relied upon by the Respondent, the applicant lacked leave to remain (being subject to automatic deportation procedures) and was the joint primary carer and not the sole carer. It appears to have been common ground that Mr Velaj would not qualify under *Zambrano* because his son would not be compelled to leave the UK/EEA if Mr Velaj were denied a derivative residence card. The son of Mr Velaj would have been able to stay in the UK with his British citizen mother which is not the case in this appeal as emphasised by Mr Spencer given that it is accepted by both parties that the Appellant is the sole carer of her daughter.

16. Having considered carefully the submissions made by both parties and the case law to which I was referred, I find that the Appellant continues to be the primary carer for her daughter and has always been the primary carer for her daughter. There is no other family member in the UK who can care for her. Natasha continues to attend secondary school in the UK. She is aged 14. The Appellant has no leave to remain in the UK. She has never had leave to remain in the UK. She has never made an application for leave to remain in the UK previously. I find that the Appellant's daughter would in practice have been unable to reside in the UK had the Appellant in fact left the UK for an indefinite period despite the contentions of the Respondent that on a balance of probabilities the Appellant would likely have qualified for Appendix FM leave to remain if she had applied for this before 11pm on 31 December 2020.

17. I find that the Appellant meets the definition of a person with a *Zambrano* right to reside in the UK under Appendix EU and has a limited leave to remain under EU 14 as a person with a *Zambrano* right to reside.

4. The SSHD sought permission to appeal to the UT on these grounds: ...

Judge Swinnerton has incorrectly distinguished the Court of Appeal decision in *Velaj* in order to hold that prospects of a successful application under Appendix FM were not a reckonable factor in the question of whether the appellant would be unable to remain and her British child would thus be required to leave. The point was not that Mr Velaj was a joint carer whereas Ms Parsons was not. The point was that *Velaj* held (as had *Akinsanya* at the Court of Appeal) that the *Zambrano* right had been one of last resort applicable only where the primary carer's departure would compel the British national to leave the UK. Any question of a clearly assertable right to remain under Article 8 rights was to be measured in that consideration. Judge Swinnerton did not properly perform this exercise and the ensuing determination was flawed by material error of law.

5. FtT Judge Parkes granted permission on 16 January 2024 for the SSHD to appeal to the UT: ...

2. The grounds argue that the Judge erred in distinguishing *Velaj v SSHD* [2022] EWCA Civ 767 and finding that the prospects of an application under Appendix FM could not be considered in assessing whether the Appellant would be unable to remain in the UK and her child be compelled to leave. The point being that a *Zambrano* right was one of last resort.

3. The grounds are arguable, also applicable may be the decision in *Sonkor (Zambrano and non-EUSS leave)* [2023] UKUT 276 (IAC) that a person without EUSS leave on the relevant date cannot be a person with a *Zambrano* right to reside.

6. There is no skeleton argument on file from the SSHD.

7. Representatives agreed that *Sonkor* does not bear on the present case.

8. For the appellant, there is a helpful skeleton argument by Ms Patyba, dated 22 and filed on 23 February 2024, inviting the UT to find no error of law by the FtT and to dismiss the SSHD's appeal.
9. I thank both representatives for their through oral submissions, having heard which, I reserved my decision.
10. With all respect to those submissions, I have come to the view that the case is settled shortly, by the defining condition in the EUSS.
11. The SSHD's decision under appeal says that the appellant would have "a realistic prospect of success" on an application under appendix FM of the immigration rules, and has not shown that she would be "in fact required to leave the UK for an indefinite period"; which is said, by reference to *Velaj*, to be "a fact-specific enquiry ... not to be based on a hypothetical or counterfactual assumption".
12. In my view, however, whether a *Zambrano* right is a last resort only is irrelevant to appendix EU. The condition here is simply that "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" (emphasis added).
13. That does require the decision-maker to hypothesise that the carer is leaving indefinitely. It does not require consideration of whether the carer might decide to stay, or has another route to lawful immigration status.
14. The SSHD's decision, and grounds to the UT, are based on an incorrect analogy with the Immigration (European Economic Area) Regulations 2016. The case law in that area is beside the point.
15. The essence of the FtT's decision is not a distinction from *Velaj* (or from *Akinsanya*).
16. No error is suggested in the FtT's factual analysis at [16] that the appellant's daughter would in practice be unable to reside in the UK if the appellant was to leave indefinitely. No error is shown in concluding at [17] that the appellant accordingly meets the definition in the EUSS.
17. The SSHD's appeal to the UT is dismissed. The decision of the FtT, allowing the appellant's appeal, stands.

Hugh Macleman

Judge of the Upper Tribunal
Immigration and Asylum Chamber
26 February 2024