



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

Case No: UI-2024-000530

First-tier Tribunal No:
EA/00854/2023

THE IMMIGRATION ACTS

**Decision and Reasons Issued:
On 4 July 2024**

Before

UPPER TRIBUNAL JUDGE SMITH

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

And

SAVANE KADY

Respondent

Representation:

For the Appellant: Mr T Melvin, Senior Home Office Presenting Officer

For the Respondent: Mr H Broachwalla, Counsel instructed by MCR solicitors

Heard at Field House on Tuesday 25 June 2024

DECISION

1. This is an appeal by the Secretary of State. For ease of reference, I refer to the parties as they were before the First-tier Tribunal. The Respondent appeals against a decision of First-tier Tribunal Judge G J Ferguson dated 19 December 2023 (“the Decision”), allowing the Appellant’s appeal against the Respondent’s decision dated 24 January 2023 refusing her status under the EU Settlement Scheme (“EUSS”).
2. By a decision sent on 4 April 2024, I adjourned a previous hearing of this matter in order that the Appellant could secure legal representation. This she did very shortly before the hearing on 25 June. Notwithstanding the lateness of instructions, her new solicitors were able to instruct Counsel

for the hearing before me. As I will come to, Mr Broachwalla was familiar with the legal arguments relevant to the Appellant's case having appeared for another appellant in a similar appeal. As a result, he was able to proceed with the hearing. I am grateful to him for his very able submissions prepared at such a late stage.

3. The Appellant's application under the EUSS relies on her relationship with her two children who are said to be British and French nationals having been born to the Appellant (who is from the Ivory Coast) and her French partner from whom she is now estranged. Although the evidence in the bundle relating to the children shows only that they hold British citizenship, I am satisfied that their birth certificates show that their father was born in France and that at the very least they are entitled to French citizenship whether they presently hold that or not.
4. The Appellant's application under EUSS was on two bases. First, she claimed to have a "Zambrano" right to reside. Second, she claimed to have a right relying on the "Ibrahim/Teixera" principle as her children are in education in the UK.
5. The Respondent decided the application on the "Zambrano" issue alone. The Appellant did not have a "Zambrano" right recognised at the time of the UK's withdrawal from the EU (31 December 2020). Her application was not made until 14 November 2022. Moreover, she had leave to remain under Appendix FM to the Immigration Rules ("Appendix FM" to "the Rules"). Accordingly, she was precluded from relying on any "Zambrano" right under Appendix EU to the Rules ("Appendix EU"). The agreement between the UK and the EU on the UK's withdrawal from the EU ("the Withdrawal Agreement") does not contain any rights for "Zambrano" carers. The Appellant has had leave to remain under Appendix FM since March 2016. Her leave in that capacity currently expires in December 2024. She is currently on her third period of leave on the ten-year route.
6. It was accepted by the Respondent's Presenting Officer that the Appellant had made an application also relying on "Ibrahim/Teixera" rights. It was also accepted by her that the Withdrawal Agreement did contain some measures applicable to those claiming such rights. Although the "Zambrano" issue was not conceded, the Appellant's representative did not pursue that before Judge Ferguson.
7. The Appellant relied on Article 24(2) of the Withdrawal Agreement. Although that is set out at [11] of the Decision, the Judge made no reference to it thereafter. Instead, the Judge relied on Appendix EU. He concluded that the relevant provisions of Appendix EU were met and also found that Home Office Guidance published 12 April 2023 confirmed the Appellant's position and her entitlement to a derivative right to reside.
8. The Respondent appealed on the basis that the Judge had misunderstood the provisions of Appendix EU. He also asserted that the

“Ibrahim/Teixera” issue might be a “new matter” but did not go so far as to say that the Judge was not entitled to deal with it. The Respondent argued, however, that since the Judge had considered the issue, he had properly to apply the Rules and had not done so.

9. Permission to appeal was granted by First-tier Tribunal Judge Monaghan on 14 February 2024 in the following terms:

- “1. The application is in time.
2. The Judge has arguably made a material error of law in failing to have regard to a material matter; namely that an Ibrahim/Teixera right cannot be claimed in a situation where a child or children relied upon is an ‘exempt person’ as defined in Annex 1 to Appendix EU.
3. An ‘exempt person’ includes a person with the right of abode under section 2 of the 1971 Act. As the children are dual French and British nationals, it is arguable that they have the right of abode and fall within the definition of ‘exempt person’.”

10. The matter comes before me to determine whether there is an error of law in the Decision. If I conclude that there is, I then have to decide whether to set aside the Decision in consequence. If I set aside the Decision, I then either have to re-make the decision or remit the appeal to the First-tier Tribunal to do so.

11. I had before me a bundle filed by the Respondent running to 312 pages (pdf). Mr Broachwalla did not have a copy of that bundle but was content to proceed. As he pointed out, there is no dispute of fact in this case. The argument is entirely one of law.

12. Having heard submissions from Mr Melvin and Mr Broachwalla, I indicated that I would reserve my decision and provide that in writing which I now turn to do.

ERROR OF LAW

13. Judge Ferguson’s reasoning for allowing the appeal is set out at [11] to [15] of the Decision as follows:

“11. Savane Kady relies on Article 24(2) of the Withdrawal Treaty which sets out that:

‘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 the 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.’

12. The relevant provisions set out in Appendix EU of the Immigration Rules are that a

person has a derivative right to reside if they have satisfied the Secretary of State that they are the primary carer of a person who meets the requirements of being in education in the UK and any of the person’s parents is an EEA citizen and both the person and their parent have resided in the UK at the same time when the parent was a worker, and the person

would be unable to be educated in the UK if the primary carer left the UK for an indefinite period.

13. That factual situation applies to Ms Kady as the primary carer of [A] who is aged 12 and in full time education and whose father was a French national who resided with them in the UK at the time he was an EEA worker. [A] is at an age where he requires a primary carer and if his mother left the UK he would be unable to continue his education. His mother states that he also has a speech impediment which is assessed to be a disability for which she receives a carers allowance meaning that he depends on her to a greater extent than other 12-year-old children. These facts are not disputed by the respondent.

14. It is also not disputed that the three key eligibility elements are met where an applicant relies on being a person with a derivative right to reside. Those are set out at pages 14 - 15 of the Home Office Guidance published 12 April 2023. Ms Kady has met the requirements throughout the continuous qualifying period in the UK, which began before 31 December 2020 and continued at that date and up to the date of application.

15. In those circumstances there is no real challenge to the fact that Ms Kady is entitled to succeed in her appeal under the Ibrahim provisions rather than the Zambrano provisions. I note the acceptance that Ms Kady did apply under each provision and yet her application was considered only under the Zambrano provisions. It may be that this was considered to be of little practical difference to the appellant since she already had leave to remain in the UK and was on a path to settled status. But as was submitted on her behalf she is entitled to remain under the best possible conditions.”

14. I deal first with the Respondent’s argument that the Appellant cannot meet the rules in Appendix EU. As he points out, a person with a derivative right to reside under “Ibrahim/Teixera” principles is defined in Annex 1 to Appendix EU as follows (so far as relevant):

person with a derivative right to reside	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: <ul style="list-style-type: none">(a) resident for a continuous qualifying period in the UK which began before the specified date and throughout which the following criteria are met:<ul style="list-style-type: none">(i) they are not an exempt person; and(ii) they are the primary carer of an EEA citizen (in accordance with sub-paragraph (a)(i) of that entry in this table and, where they are also a British citizen, the EEA citizen falls within sub-paragraphs (c) and (d) of the entry for ‘relevant naturalised British citizen’ in this table); and(iii) the EEA citizen is under the age of 18 years and resides in the UK as a self-sufficient person; and(iv) the EEA citizen would in practice be unable to
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- remain in the UK if the person in fact left the UK for an indefinite period; and
- (v) ...; or
 - (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 in education in the UK; and
 - (iii) any of the person's parents ('PP') is an EEA citizen (in accordance with sub-paragraph (a)(i) of that entry in this table and, where they are also a British citizen, PP falls within sub-paragraphs (c) and (d) of the entry for 'relevant naturalised British citizen' in this table) who resides or has resided in the UK; and
 - (iv) both the person and PP reside or have resided in the UK at the same time and during such a period of residence PP has been a worker or self-employed person in the UK; and
 - (v) ...; or
 - (c) 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 person who meets the requirements of sub-paragraph (b) above ('PPP'); and
 - (iii) PPP would in practice be unable to continue to be educated in the UK if the person in fact left the UK for an indefinite period; and
 - (iv) ...; or
 - (d) 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 derivative 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) or (c) 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)

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) ...; and
- (d) 'self-sufficient person' means a person with sufficient resources not to become a burden on the social assistance system of the UK, regardless of whether they hold comprehensive sickness insurance cover in the UK; and
- (e) 'education in the UK' excludes nursery education but does not exclude education received before the compulsory school age where that education is equivalent to the education received at or after the compulsory school age."

15. The Respondent relies in particular on the definition of "an exempt person" which includes a person who has the right of abode under section 2 of the Immigration Act 1971.
16. I do not understand Judge Ferguson to rely on (a) of the definition which is included for completeness. That covers a so-called "Chen" carer. That sub-section could not apply as, although the Appellant is not herself an exempt person, the application of this section requires that the person for whom she cares is an EEA citizen but, importantly, where that person is a dual national, he/she has to show that he/she meets the definition of a "relevant naturalised British citizen" which would require that person to show (by cross-reference to definitions in the Immigration (European Economic Area) Regulations 2016) that they were exercising rights as a qualified person prior to naturalising as a British citizen. There is no indication that either child would meet that criterion. In any event, the Appellant did not apply on the basis of being a "Chen" carer.
17. As I understand the way in which Judge Ferguson relied on Appendix EU, he did so by reference to (c) of the definition which is as the parent of a child who is in education under (b) of the definition. However, as the Respondent points out, the Appellant's children cannot satisfy (b) of the definition because they are both "exempt persons" having the right of abode as British citizens. As such, the Appellant cannot herself meet (c) of the definition. I observe in passing that the older of the Appellant's two children is no longer a child, having been born in December 2005. However, the Judge assessed the position by reference to the younger child, born in September 2011 who is therefore still a minor and in education.

18. I do not understand (d) of the definition to have any relevance to this case. As I understand that part of the definition it is to deal with children who may not themselves have any EU law right but where a parent also has a right to remain under Appendix EU because another child does have such a right. It is not relevant to this case where both children are British citizens and the family members of a French national.
19. For the foregoing reasons, the Judge was not entitled to decide the case on the basis he did. The Judge has overlooked the part of the definition which relies on the child in education not being an exempt person. The child in this case is exempt and cannot therefore meet (b) of the definition. Accordingly, the Appellant cannot rely on any rights under Appendix EU as she cannot meet (c) of the definition.
20. I am therefore satisfied that the Judge erred in law when deciding the case in the way he did. However, I am satisfied that the Judge did have jurisdiction to deal with the “Ibrahim/Teixera” issue. The Respondent asserts that it is “arguable” that this was a new matter as it was not dealt with in the decision letter. However, the Tribunal has recently had cause to consider when a new matter arises in the EUSS context in Ayoola (previously considered matters) [2024] UKUT 00143 (IAC) (“Ayoola”), the headnote to which reads as follows:
- “1) If a matter is raised in the course of an application to the Secretary of State, the Secretary of State's refusal of the application will amount to having ‘considered’ the matter for the purposes of regulation 9(6)(b) of the Immigration (Citizens' Rights Appeals) (EU Exit) Regulations 2020, even if the decision under appeal is silent on a matter expressly raised in the application.
- 2) The references to the matter will have to be sufficiently clear to make it reasonable for the Secretary of State to be expected to respond to it. A buried or tangential reference in an application which ostensibly otherwise relies on some other matter is unlikely to be sufficient to merit the conclusion that it has been ‘considered’ by the Secretary of State. Such a matter will be a new matter, requiring the consent of the Secretary of State for it to be considered by the tribunal”.
21. As recorded at [7] of the Decision, the Respondent’s Presenting Officer accepted that the “Ibrahim/Teixera” issue had been raised in the Appellant’s application. Accordingly, Judge Ferguson did not need the Respondent’s consent to consider it even though the decision under appeal was silent in this regard.
22. Having found an error in the Judge’s reasoning, as I pointed out to Mr Melvin, if the Judge could have allowed the appeal in reliance on the way in which the Appellant put her case, via the Withdrawal Agreement, then any error would be immaterial. Mr Broachwalla did at one point suggest that this is what the Judge had done but I cannot read the Judge’s reasoning in that way.

23. However, since Mr Broachwalla also accepted that my decision as to the application of the Withdrawal Agreement would be determinative of the Appellant's appeal, I consider this below through the lens of a re-making.

RE-MAKING

24. The Appellant relies on Article 24(2) of the Withdrawal Agreement ("Article 24(2)") which is set out in the Decision cited at [13] above.

25. As Mr Broachwalla fairly conceded, although not part of the guidance for which Ayoola was reported, the Tribunal (of which I was a panel member) set out at [42] to [52] of the decision its views on the Article 24(2) argument. In essence, the Appellant's argument is (as Judge Ferguson noted) that she must be entitled to continue to reside under the "best possible conditions" consistently with the "key holdings in *Baumbast, Ibrahim and Teixeira*" (see [48] of the decision in Ayoola). The Respondent's position is that where, as here, the parent of the child in education is not compelled to leave because he/she holds domestic law leave, then Article 24(2) has no purchase (see [43] of the decision in Ayoola).

26. The Respondent places reliance on what is said by Andrews LJ in Velaj v Secretary of State for the Home Department [2022] EWCA Civ 767. At [33] of that judgment, she said this:

"33. The history which I have set out above illustrates that **the premise upon which the impact on the British Citizen dependant's rights is considered is, and always has been, expressed in exactly the same terms for a Zambrano carer as it is for a Chen or Ibrahim/Teixeira carer, and that this was a matter of deliberate choice. The interpretation must therefore be the same irrespective of which of these derivative rights is being claimed.** Moreover, the phrase must bear the same meaning irrespective of whether the applicant for derivative rights is a sole primary carer, or shares caring responsibilities equally with another person."

[my emphasis]

27. Although it was submitted in Ayoola that these remarks were obiter (Velaj was a "Zambrano" right case), they are nonetheless persuasive. I, as did the Tribunal in Ayoola, consider that they are correct.

28. Mr Broachwalla was one of the appellant's Counsel in Ayoola. I accepted in discussion with him that the Tribunal's comments about Article 24(2) there made were also obiter as the Tribunal did not consider itself to have jurisdiction to determine the issue.

29. However, I was unpersuaded by Mr Broachwalla's submissions seeking to persuade me that the Tribunal's observations were wrong in law.

30. Mr Broachwalla submitted that there was nothing in Article 24(2) which indicated that it is fatal if an “Ibrahim/Teixera” carer has a right to remain in domestic law. That seems to me to ask the wrong question. Article 24(2) itself says nothing about the right to remain at all save that one must exist. Whilst I accept that the article does not include any reference to an exempt person, that is readily understandable because the Withdrawal Agreement is an agreement between States and therefore remains flexible as to the achievement of the aims and objectives of the agreement.
31. As Mr Broachwalla submitted, the Appellant’s children have rights under the Withdrawal Agreement as EU nationals who are the family members (children) of an EU national (Article 10(1)(f)). I accept that the Appellant may be (or have been) entitled to derive rights from those children notwithstanding that she is herself no longer the family member of an EU national. I should say in passing that I would have been less inclined to accept that argument if the children could not be shown to be also French citizens since a British citizen child born of a British or settled person and living in the UK does not come within the personal scope of the Withdrawal Agreement. However, that is not the position here.
32. Article 24(2) comes under the heading of “Rights of Workers and Self-Employed Persons”. I accept that Article 24(1) deals with the rights which those persons have derived from EU law and in particular the right to be treated in the same way as nationals of the host State. However, that does not take matters any further. The Appellant’s children (who are the EEA nationals) have the right to education as any other British national.
33. Even if the Appellant’s argument as to the right to reside under the “best possible conditions” were accepted, it is not clear what conditions are imposed on her leave under Appendix FM which are worse than those which she would enjoy under the Withdrawal Agreement. This is dealt with briefly at [49] to [51] of the decision in Ayoola.
34. As is pointed out at [49] of Ayoola, the main condition of leave is the right to reside. As is there noted, the ability to remain in accordance with Article 24(2) does not count towards permanent residence. There is no right to reside which continues beyond the age when the Appellant’s children cease to be in education. By contrast, the Appellant is on a ten-year route to settlement under Appendix FM. She is already on her third period of thirty months and will qualify for indefinite leave, as I understand the chronology, in March 2026.
35. Insofar as the same arguments are made about the conditions to which the Appellant’s leave are subject as were made in Ayoola, those are dealt with at [51] of the decision. It is not clear whether the same considerations apply in this case. It is suggested in the skeleton argument and witness statement before the First-tier Tribunal that the Appellant may wish to enrol for university and would not be able to do so

as a home student. However, the Appellant's statement is vague as to her intentions. The children's birth certificates describe her as a full-time mother, and it is not clear in what profession she works (if she does) or what educational course she might be seeking to pursue (or the likelihood of her being able to do so given the caring responsibilities she has). As was said at [51] of Ayoola, "Article 24(2) is silent as to the ability of its beneficiaries to access student finance".

36. For the foregoing reasons, I am unpersuaded that the Respondent's decision refusing the Appellant status under the EUSS is contrary either to Appendix EU or the Withdrawal Agreement. It follows that I dismiss the appeal.

NOTICE OF DECISION

The decision of First-tier Tribunal Judge G J Ferguson dated 19 December 2023 contains an error of law. I set aside that decision. I re-make the decision by dismissing the appeal.

L K Smith
Upper Tribunal Judge Smith
Judge of the Upper Tribunal
Immigration and Asylum Chamber
2 July 2024