IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2024-002538

First-tier Tribunal No: EA/53866/2023
LE/00292/2024

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 16 December 2024

Before

THE HON. MR JUSTICE DOVE, PRESIDENT
UPPER TRIBUNAL JUDGE KEBEDE
UPPER TRIBUNAL JUDGE NEVILLE

Between

HEEMAN MOHUN
(no anonymity order made)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms M Munro Kerr, instructed by South London Refugee Association
For the Respondent: Mr E Terrell, Senior Home Office Presenting Officer

Heard at the Royal Courts of Justice on 28 November 2024

DECISION AND REASONS

1. This is the re-making of the decision in the appellant's appeal, following the setting aside of the decision of the First-tier Tribunal.

2. The appellant is a national of Mauritius born on 7 April 1979. He came to the UK in 2001 as a student. He married his wife in Mauritius in March 2002 and she joined him in the UK as his dependent. They had two daughters together, P born on 23 October 2003 and M born on 25 October 2008. The appellant had leave to remain as a student until 2009/2010, following which he made a human rights claim which was unsuccessful. His appeal against the refusal decision was dismissed and he became appeal rights exhausted in August 2011. He made a further unsuccessful human rights claim in 2013 and following an unsuccessful appeal became appeal rights exhausted again in 2013.

3. Following the registration as a British citizen of his first child P in 2013, when she turned 10 years of age, the appellant and his wife made an application on the basis of a 'Zambrano' right to reside in the UK as the primary carers of a British citizen. Two such applications made in November and December 2015 were rejected as invalid, but following an application made in February 2016 they were issued with residence permits on the basis of a 'Zambrano' right to reside in September 2017. The appellant's residence permit was valid until P's 18th birthday on 23 October 2021, although M also became a British citizen in May 2019.

4. After a series of problems which involved the appellant's substance and alcohol abuse, the family relationship completely broke down in April 2021 when the appellant was arrested and a restraining order was issued against him following an incident of domestic violence. He then applied alone, on 23 June 2021, for settled status under the EUSS as the primary carer of a British child. It appears from his skeleton argument that he did not follow the correct procedure when making the application at that time and the application was therefore not considered. He re-applied with the assistance of his legal representatives on 4 April 2023, relying upon a historic qualifying period of more than 5 years from May 2014, when his eldest child became a British citizen.

5. The appellant's application was refused by the respondent on 2 June 2023 on the basis that he no longer met the definition of a person with a 'Zambrano' right to reside at the date of the application and was no longer a primary carer for a British child after the expiry of his previous leave and until the date of his application given that he had been subject to a restraining order preventing him from coming into contact with his wife and children.

6. The appellant appealed against that decision under the Immigration Citizens' Rights Appeals (EU Exit) Regulations 2020, asserting that he met the definition of a 'person with a Zambrano right to reside' throughout the qualifying period of May 2014 (when his daughter became a British citizen) to April 2021 (when the family relationship broke down) and that the decision was wrong in suggesting that the qualifying period was from 1 May 2014 until 5 April 2023 (the date of the application). It was argued that he had completed a qualifying period of at least five years during that period, from May 2014 until September 2017 as a joint carer for his British child with his wife, and from September 2017 until April 2021 holding a residence permit as a 'person with a Zambrano right to reside', and that there had been no 'supervening event' as defined in Appendix EU.

7. The position taken by the respondent in the Respondent's Review produced for the hearing was revised in that the primary reason given for concluding that the appellant had not met the requirements of a 'person with a Zambrano right to reside' was because he had not completed a five year qualifying period to the date of April 2021, having been issued his residence permit in September 2017 and having had no leave to remain from August 2011 to September 2017.

8. The appellant's appeal was heard by First-tier Tribunal Judge Sweet on 15 April 2024. The appeal proceeded on the basis of legal arguments only with no oral evidence as the appellant was in detention. For the appellant it was argued that there was no requirement for the continuous period of qualifying leave to continue up until the date of application nor that the period of leave needed to be lawful. For the respondent it was argued that the appellant had not had a role as carer since 2021 when the previous leave had expired and that his leave had run from February 2017 until 2021 so that he had not accumulated a continuous five-year residence with

Zambrano status. Judge Sweet concluded that the appellant could not meet the five year continuous residence requirement, as his Zambrano status only ran from September 2017 until April 2021 and, further, that he had no legal status in the UK, and had been appeal rights exhausted by 2014. The appeal was accordingly dismissed.

9. Following a grant of permission to appeal to the Upper Tribunal, the matter came before the Upper Tribunal on 24 September 2024.

10. In a decision promulgated on 30 September 2024, the Upper Tribunal set aside Judge Sweet's decision, as follows:

> "12. Mr Terrell accepted that Judge Sweet had erred by requiring the appellant to have legal status in the UK and he accepted that the continuous qualifying period did not have to be considered up to the date of the application. He also accepted that there did not appear to be anything in the Immigration Rules in Appendix EU to suggest that a person was a 'person with a Zambrano right to reside' only once they had been issued with a residence card. However he did not accept that that meant that the application and appeal had to succeed as the appellant still had to address the 'compulsion' requirement in order to qualify as a Zambrano carer and there was no presumption that the appellant was a joint carer. Those matters still needed to be resolved, as the judge had focussed on the wrong issues.
>
> 13. Ms Munro Kerr submitted that that was not the test for a Zambrano carer and that Mr Terrell was seeking to import parts of other immigration rules into the test. There was no requirement for compulsion. The only issue was whether the appellant was a parent with caring responsibilities at the time, which had already been accepted as a fact. It was an accepted fact, she submitted, that the appellant had been the carer of a British child since 2014, and certainly that he was at the time of the application in February 2016. Ms Munro Kerr submitted that there was therefore no need for there to be a further hearing as the decision could be re-made by allowing the appellant's appeal.
>
> 14. It is common ground that Judge Sweet erred in law in his decision by requiring the appellant to have legal status in the UK. His decision is accordingly set aside. However, I am not able to find that adequate findings of fact have already been made to enable me to conclude that the decision should simply be re-made by allowing the appellant's appeal. I disagree with the submission made by Ms Munro Kerr that it was accepted as a matter of fact that the appellant was a joint primary carer for his British citizen child(ren) for the entire period between May 2014 and April 2021. I can find no such finding of fact. As Mr Terrell submitted, the Secretary of State accepted in September 2017 that the appellant met the requirements of the EEA Regulations as a person with a derivative right to reside as a Zambrano carer at that time. However there have otherwise been no findings made for the purposes of this application. I agree with Mr Terrell that it cannot simply be presumed that the appellant was a joint carer with his wife throughout the five year qualifying period and I agree that the question of compulsion is therefore relevant, as being part of the definition of a 'person with a Zambrano right to reside' in Annex 1, at (a)(iii).
>
> 15. In the circumstances, and considering Mr Terrell's request for a further hearing for the relevant issues to be ventilated, I have decided that the matter should be listed for a resumed hearing in the Upper Tribunal for the decision to be re-made, on a date to be notified to the parties.
>
> 16. Ms Munro Kerr has helpfully set out the appellant's case in great detail in her skeleton argument before the First-tier Tribunal. The respondent's position appears to have changed since the Respondent's Review prepared for the hearing before the First-tier Tribunal in that Mr Terrell accepted that it is not a requirement for the appellant's primary care for his British child(ren) to have been continuing up until the date of his application

> and he also accepted that there did not appear to be anything in the Rules to suggest that a person was a 'person with a Zambrano right to reside' only when they had been issued with a residence card and for the duration of that residence card. He accepted that the relevant 'window' for considering the appellant's status as a primary carer and his Zambrano status was between May 2014 and April 2021. In the circumstances it would be of assistance for the respondent to prepare a skeleton argument for the resumed hearing setting out her case in clear terms: in particular her understanding of the relevant requirements of the rules in Appendix EU and her reasons as to why she does not accept that the appellant is entitled to succeed under the EUSS.
>
> 17. The case will be listed for a resumed hearing in the Upper Tribunal for the decision to be re-made, on a date to be notified to the parties."

11.The matter was listed for a resumed hearing on 28 November 2024 and came before ourselves for the decision to be re-made in the appeal.

Hearing for the Re-making of the Decision

12.The appellant produced a composite bundle for the hearing containing the documentary evidence which had been before the First-tier Tribunal and a further witness statement dated 29 October 2024 together with recent bank statements.

13.It is helpful, at this point, to set out a summary of the appellant's evidence and the submissions made by the parties, in order to understand the factual basis to this application and appeal, as well as the legal principles underpinning the case.

The Appellant's Statements

14.The appellant has produced three witness statements, the first dated 24 March 2023 which was produced together with his EUSS application, the second dated 22 September 2023 was produced for the appeal for the First-tier Tribunal, and the third dated 29 October 2024 was produced for the appeal before ourselves. We have summarised the appellant's evidence in those statements, as follows.

15.After his arrival in the UK the appellant studied for several years, obtaining a higher diploma and a BSc Hons degree. He was employed continuously from 2001 until 2013, following which he was mostly self-employed, as a sole trader fixing and selling laptops and subsequently working for Uber Eats and Deliveroo delivering food in his car. He would take his eldest daughter P to school and pick her up after school every day in his car as his wife did not drive and he used to take his daughters to his mother's sister every week. He would also would take his daughters to birthday parties and would be the driver on family trips. He did the shopping and would sometimes take his daughters in the car with him when delivering food for his work. He led a normal family life. He and his wife co-owned the property where they lived and they lived together at the same address for almost 20 years until their relationship broke down in April 2021.

16.Things started to go wrong during the pandemic lockdown as there was a lot of tension with the family all at home. The appellant continued to work a lot as there were more deliveries during lockdown. He was drinking a lot and was a functioning alcoholic. In June 2020 he was arrested for driving under the influence of alcohol when he was re-parking his car and he was banned from driving for two years and had to stop working as a delivery driver. He was no longer able to pay the mortgage on his house from around December 2020. In April 2021 there was a domestic situation when he was drunk and he threatened kill his wife. His daughter video-recorded the incident

and shared it with the police and he was arrested and sentenced to 14 weeks in prison. He served half of that time. Since then there had been a restraining order in place preventing him from contacting his wife and children, which was effective until April 2026. He was arrested in January 2022 for breaching the restraining order as his wife had permitted him to live in a shed in the back of the garden which he had built and she would bring him food and allow him to use the shower. His daughter told her teachers at school and they called the police. He was kept in custody for a day and released with a fine. In May 2022 he was arrested again for breaching the restraining order, again as he was staying in the shed with his wife's consent. He was given an 18 month suspended sentence. There were further incidents in March to July 2023 when he returned to the property to use the shed. He became homeless and destitute and relied on support from Crisis. He had medical problems as he was diabetic and suffered from depression and, as a result of his dependence upon insulin, was provided with temporary accommodation by the council. He did not return to the family property after that but in March 2024 he was arrested on an outstanding warrant over the 2023 incidents and was serving a further sentence for those breaches. He had been receiving treatment for his addiction.

The Appellant's Oral Evidence

17.The appellant was brought to the court from HMP Pentonville where he was being detained. He gave oral evidence before us. We were informed that he had experienced a hypoglycaemic episode on the journey and as a result did not feel that he was thinking clearly initially, but confirmed that he had improved during his evidence. He did not seek an adjournment and, at our enquiry, both he and Ms Munro Kerr confirmed that they were content to proceed and were satisfied that he was able to present his evidence fully and properly.

18.The appellant adopted his witness statements as his evidence. He submitted that both he and his wife had looked after the children when he was living with them. In 2020 he and his wife fell out and he was arrested and not allowed to go to Croydon, where they lived, for two to three months, but he returned to the family home after that. Although he was not permitted to see the children, he did see them and he would take them to school in his car and go shopping with them. He had admitted that he had been in breach of the order preventing him from doing that. During lockdown he continued working, doing his deliveries, but his children and wife were home all the time. After the restrictions placed on him ended, he returned home. When he stopped working, the children loved it as he was home with them. He would take one child to school, in the car and his wife would take the other child, as she did not drive. He would also fix things in the house. He made the shed in the garden himself and converted it to a small studio flat with a shower and fridge and everything he needed. He would stay in the shed in the evenings when he went to sleep but he would be in the main house in the daytime and would lead a normal routine life, including going shopping for groceries. Nothing changed with regard to his parenting and the children would come to the shed to see him. His younger daughter M was particularly interested in what he was doing in the shed.

19.When cross-examined by Mr Terrell, the appellant said that he had had to go to court in 2020 after an argument with his wife. She had said that he was dangerous. The court took it as a serious offence and he was restricted from going to Croydon. The order restricting him was for one or two months, or two to three months. He could not remember exactly. During that time he stayed in his uncle's office in Wimbledon as it was empty due to the lockdown. His wife came to see him when he was staying there. The appellant agreed that during that time his wife was predominantly looking

after the children, but he said that he still did the school run in the afternoon as he was able to drive whereas his wife could not. He agreed with Mr Terrell that he was banned from driving in June 2020. His drinking increased during lockdown, in March/April 2020. He was very busy in his work doing deliveries during covid because of the lockdown and he would only drink alcohol at night. The appellant agree that he also referred in his statement to drinking in the mornings. He would stay in the shed in the afternoon to isolate himself from his wife, but he would walk back to the house and talk to her. He tried to go cold turkey in October 2020 although he was told that he should not do that in just one week, but he just wanted to stop. He started drinking again on and off and tried to get medical help. The five year restraining order was made in May 2021. When asked about relatives in the UK, the appellant said that he had his mother's sister and brother and a cousin here. He had a good relationship with them in 2019/20, but they would not be able to look after his children if he and his wife left the UK.

20.When re-examined by Ms Munro Kerr the appellant said that he used to take his children to visit his aunt every two weeks or so but then his daughter M stopped wanting to go and he did not want to force her to go. He also said that one reason for isolating in the shed around covid time was that his children were scared of getting covid from him because he was busy going out to work.

Skeleton Arguments

21.The parties relied on their respective skeleton arguments.

22.Ms Munro Kerr's initial skeleton argument identified the pertinent issue as being whether or not the appellant was a primary carer for his children between May 2016 and September 2017, which she submitted the respondent appeared to have accepted. She submitted that the appeal accordingly fell to be allowed, since the appellant had a derivative Zambrano right to reside from at least May 2016 to April 2021.

23.Mr Terrell's skeleton argument proceeded on the basis that, in accordance with (b) of the "in addition" section of the definition in Annex 1 of a "person with a Zambrano right to reside", the appellant had to fulfil the requirements to meet the definition of "person with a Zambrano right to reside" by, at least, 31 December 2020, that the relevant qualifying period upon which the appellant was seeking to rely had therefore to include the period April 2016 to 31 December 2020, and that the appellant had not shown that he was the primary carer of his children during that period as the responsibility lay primarily on his wife in particular in the period leading up to 31 December 2020.

24.Ms Munro Kerr filed an addendum skeleton argument in response to the respondent's skeleton shortly before the hearing, claiming that the respondent's position appeared to have changed and that the respondent was wrong to state that the continuous qualifying period had to be continuing on 31 December 2020. She submitted that such a requirement did not apply where the applicant relied on being a 'person who had a Zambrano right to reside', as in this case.

25.The parties also disagreed on whether there were alternative care arrangements for the children in the UK if the appellant and his wife left the country.

Submissions

26.Having heard preliminary submissions from Mr Terrell about the respondent's current position on the relevant legal tests, Ms Munro Kerr conceded that the continuous qualifying period relied upon did indeed have to be continuing at 11pm on 31 December 2020 and that she had erred in her argument to the contrary. The parties were accordingly in agreement as to the relevant tests and it was agreed that this was now essentially a fact-finding exercise. The focus of the parties' submissions was therefore on the evidence in relation to parental responsibility from April 2016, and in particular in the period around December 2020.

27.Mr Terrell submitted that the appellant did not meet the definition of a primary carer during that period as it was not accepted that he shared responsibility for the children's care equally with their mother. He observed that there was no case law on the definition of equally shared responsibility and no definition in the rules, but he relied upon the Home Office guidance 'EU Settlement Scheme: person with a Zambrano right to reside' in that respect, as well as the case of Patel v Secretary of State for the Home Department [2019] UKSC 59 and the references in that case to K.A. and Others (Regroupement familial en Belgique) [2018] EUECJ C-82/16 and Chavez-Vilchez and Others (Union citizenship - Article 20 TFEU - Access to social assistance and child benefit conditional on right of residence in a Member State : Judgment) [2017] EUECJ C-133/15 which emphasised the need to consider day to day care and dependency. He also referred to the test for 'sole responsibility' in TD (Paragraph 297(i)(e): "sole responsibility") Yemen [2006] UKAIT 00049. Mr Terrell submitted that there was no legal presumption that there would be shared responsibility between two parents and that it was a fact sensitive issue. He submitted that on the facts of this case, there was minimal evidence of the appellant exercising much in the way of parental responsibility, particularly around 2020. He referred to parts of the evidence, particularly in the medical notes, which he submitted strongly suggested that in the period leading up to 31 December 2020 responsibility lay primarily with the appellant's wife, with the appellant not living in the family home but in a shed in the garden, leading a chaotic lifestyle isolated from his wife and children, and being banned for a period from living with the family and having to live somewhere else. With regard to the question of the appellant's children being able to remain in the UK if he and his wife left, Mr Terrell accepted that it would be difficult to convince the Tribunal that that was the case.

28.Ms Munro Kerr disagreed with Mr Terrell's interpretation of 'shared responsibility' and submitted that it was not the same as 'equal responsibility'. She relied upon the Home Office guidance which provided different scenarios and which she submitted supported the case that the appellant continued to have responsibility for the children, given that he maintained a relationship with them when living in the shed, that he continued to pay the mortgage and co-owned the family home and that he had actively financially supported the family prior to December 2020 and was carrying out activities as a parent. Ms Munro Kerr accepted that if the immigration rules had been drafted differently the appellant may not have succeeded and that he would not now be able to benefit from being a Zambrano carer and could not have succeeded after April 2021. She submitted, however, that he just managed to meet the requirements of the rules.

The Legal Framework

29.We set out the relevant provisions within Appendix EU as at the date of the respondent's decision. The appellant relies upon EU11, as follows:

"EU11. The applicant meets the eligibility requirements for indefinite leave to enter or remain as a relevant EEA citizen or their family member (or as a person with a derivative right to reside or a person with a Zambrano right to reside) where the Secretary of State is satisfied, including (where applicable) by the required evidence of family relationship, that, at the date of application, one of conditions 1 to 7 set out in the following table is met:

Condition 3. (a) The applicant: …
(v) is a person with a Zambrano right to reside; and
(vi) is a person who had a derivative or Zambrano right to reside; and
(b) The applicant has completed a continuous qualifying period of five years in any (or any combination) of those categories; and
(c) Since then no supervening event has occurred in respect of the applicant"

30. The relevant definitions appear in Annex 1 of Appendix EU.

"person who had a derivative or Zambrano right to reside" " is defined as follows:

"a person who, before the specified date, was a person with a derivative right to reside or a person with a Zambrano right to reside, immediately before they became (whether before or after the specified date):
(a) a relevant EEA citizen; or
(b) a family member of a relevant EEA citizen; or
(c) a person with a derivative right to reside; or
(d) a person with a Zambrano right to reside; or
(e) a family member of a qualifying British citizen,
and who has remained or (as the case may be) remained in any (or any combination) of those categories …

in addition, where a person relies on meeting this definition, the continuous qualifying period in which they rely on doing so must have been continuing at 2300 GMT on 31 December 2020"

"person with a Zambrano right to reside" is defined in Annex 1 of Appendix EU 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…

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' "

'continuous qualifying period' is defined as

"a period of residence in the UK...
(a)which...began before the specified date; and
(b) during which none of the following occurred [various types of absence from the UK, imprisonment, exclusion, or deportation order]...
(c) which continues at the date of application, unless...
(i) the period is of at least five years' duration"

"primary carer" is defined as:

"A person who:
(a) is a direct relative or legal guardian of another person ("AP"); and
(b)(i) has primary responsibility for AP's care; or
(ii) shares equally the responsibility for AP's care with one other person, unless that other person had acquired a derivative right to reside in the UK as a result of regulation 16 of the EEA Regulations before the person assumed equal care responsibility"

"supervening event" is defined as:

"at the date of application:
(a) the person has been absent from the UK and Islands for a period of more than five consecutive years (at any point since they last acquired the right of permanent residence in the UK under regulation 15 of the EEA Regulations, or the right of permanent residence in the Islands through the application there of section 7(1) of the Immigration Act 1988 (as it had effect before it was repealed) or under the Immigration (European Economic Area) Regulations of the Isle of Man, or since they last completed a continuous qualifying period of five years); or
(b) any of the following events has occurred in respect of the person, unless it has been set aside or revoked:
(i) any decision or order to exclude or remove under regulation 23 or 32 of the EEA Regulations (or under the equivalent provisions of the Immigration (European Economic Area) Regulations of the Isle of Man); or
(ii) a decision to which regulation 15(4) of the EEA Regulations otherwise refers, unless that decision arose from a previous decision under regulation 24(1) of the EEA Regulations (or the equivalent decision, subject to the equivalent qualification, under the Immigration (European Economic Area) Regulations of the Isle of Man); or
(iii) an exclusion decision; or
(iv) a deportation order, other than by virtue of the EEA Regulations; or
(v) an Islands deportation order; or
(vi) an Islands exclusion decision"

Analysis

31.It is a reflection of the overly complex nature of, and the lack of clarity in, the EUSS rules that the position of each party, and in particular the respondent, has changed during the process of this appeal. It is also the case that the way in which the immigration rules have been drafted leads to the rather artificial exercise of having to consider historical circumstances as a Zambrano carer in order to determine a subsequent entitlement to status under the EUSS at a time when the applicant would not otherwise have succeeded. Indeed, Ms Munro Kerr accepted that if the immigration rules had been drafted differently the appellant would not now be able to benefit from being a Zambrano carer. However the rules require us to undertake that artificial exercise and that is what we have done.

32.It is helpful that the parties have ultimately reached a consensus on the issues before us, arising from the tests and definitions within the rules in Appendix EU. We

observe that that is a considerable departure from the respondent's initial interpretation in the refusal decision.

33. It is now agreed that:

(a) It is not a requirement for the appellant's primary care for his British children to have been continuing up until the date of his application
(b) The appellant did not need to have a residence permit for the qualifying five year period, he only needed to be the primary carer for a British child whether or not that was recognised at the time.
(c) The continuous qualifying period relied upon by the appellant had to be continuing at 11pm on 31 December 2020.
(d) The relevant 'window' for considering the appellant's status as a primary carer and his Zambrano status was between May 2014 and April 2021

34. The issue of compulsion was not vigorously pursued by Mr Terrell and he accepted, quite properly, that he would be in some difficulty in persuading us that the appellants' children would be able to reside with other family members if the appellant and his wife left the UK. We are satisfied that there are no adequate alternative care arrangements in the UK and that if the appellant and his wife left the UK, the children would be effectively forced to leave the country. We need not say more on this issue.

35. The primary issue in this case is therefore whether the appellant was a primary carer for his children for a continuous period of five years between May 2014 and April 2021, in particular from April 2016 and up to and including 31 December 2020.

36. It is the appellant's case that, although he had a serious drinking problem, and although he spent the evenings and nights living in a shed in the garden of the family home and was ordered by the court to stay away from Croydon where the family home was located for a short period of time, he remained a joint carer for his daughters, doing the school runs, doing the shopping, visiting the family home during the day and spending time with his younger daughter in his shed, paying the mortgage and remaining as co-owner of the family home.

37. The problem for the appellant is that there is simply no independent evidence to support his claim to have continued to be jointly caring for his daughters, particularly in the period leading up to 31 December 2020. There is no dispute that he continued to co-own the family home and that he paid the mortgage up to around December 2020, and even made a further payment in 2021. However there is nothing from the children's schools or from any of the medical practitioners confirming the appellant's role as joint carer post-2017. The evidence from those sources which refers to him as being a joint carer is dated around 2015 to 2017. There is also, unsurprisingly, no supporting evidence from the appellant's children.

38. It is of particular note that, in his three statements, the appellant provided little evidence of his living and other circumstances prior to 2021 and the clear indication in the statements was that he had been living in the family home until his relationship with his wife broke down in April 2021. The only reference to him living in a shed in the garden post-dated that period of time. However it is clear from the evidence now before us that that was not the case and that he had been living separately from the family in a shed or summer house in the garden since around 2018.

39. In addition, the appellant's oral evidence before us about his role with his children was somewhat difficult to follow and it was not clear which period he was talking about

when responding to the questions put to him. He talked about driving the family around and doing the school runs and the shopping, and mentioned continuing doing some activities when he was supposed to be staying away from Croydon, giving the impression that he continued to do those activities in the period leading up to the end of December 2020. However, when reminded of the evidence about his driving ban, he confirmed that he was no longer driving after being banned in June 2020. He gave an inconsistent account of the reasons for isolating from his family in the shed. The evidence he gave at the end of the hearing, which we permitted after submissions, was that he started isolating because of his children's fear of him passing on covid to them. However that did not sit well with the records in the medical notes dating back to 2018 of him staying in the shed at that time, which clearly pre-dated covid. We accept that there may have been some residual confusion after his hypoglycaemic episode on the journey to the court but nevertheless the appellant confirmed that he felt fine and was able to proceed and we therefore cannot attribute inconsistencies in his evidence entirely to that cause. Rather, it seems to us that the appellant was attempting to exaggerate the role he played in the family and in his children's care.

40. Some helpful insights into the family situation can be gleaned from the medical notes for P (page 129 to 138) and the appellant (page 511 to 561) in the appellant's composite bundle for the appeal. The notes are extensive, given P's ongoing medical issues which included a diagnosis of epilepsy and the appellant's medical issues arising from alcohol abuse. It is clear from those notes that there had been difficulties for many years with the appellant drinking heavily from as far back as 2009, and arguing with his wife and, as already mentioned, isolating himself by staying in the shed in the garden from at least 2018. An entry for 4 December 2019 in P's medical notes, refers to concerns which P reported to the doctor about the appellant sleeping in the shed/summer house when he had been drinking and to the doctor recording that her mother underestimated how much that situation affected the children. Further, on 10 January 2020 the notes refer to the situation at home affecting P significantly, with mention of her parents arguing and the appellant becoming aggressive, of the police being called and of suggestions about social services being involved, as they had been some years earlier. The medical notes for the appellant from 2019/2020 similarly refer to the doctor expressing particular concerns about the family situation, in particular about the appellant's drinking and living circumstances and about the impact on the children and their safety. The notes for May 2020 to July 2020 show matters reaching a peak when the appellant was unable to work as a delivery driver after being banned from driving and the arguments increasing to the extent that the police and courts were involved and a restraining order was put in place.

41. We have not been provided with a copy of the court order preventing the appellant from going to the Croydon area and we therefore have limited information as to the timing and duration of the order as well as the precise nature and extent of the order. We have the appellant's rather vague evidence that the order covered a period of one to two months, or two to three months, and we also note the references in the medical notes for 20 May 2020, 22 May 2020 and 22 July 2020 which we have mentioned referring to the appellant's wife having to get social services and the police involved. It is not clear whether the last of those dates was within the duration of the order. Mr Terrell referred, in his submissions, to a community discharge notification for the appellant on 7 June 2021 at page 627 of the composite bundle which provided details of the appellant being arrested in 2020 for domestic abuse and being given a five year restraining order in May 2020 after threatening to kill his wife and children, but that appears to be a typing error and is referring to the subsequent offence and restraining order in April/ May 2021. It seems, therefore, that the period in which the appellant

was prevented from living with his family was around May 2020 and we have to rely on the appellant's evidence that it lasted for around three months.

42.In the circumstances, taking the evidence as a whole, the appellant has failed to provide a consistent and clear picture of his role in the family and his activities at various times. Other than his somewhat confused oral evidence there is nothing in the evidence before us to support his claim as to the extent of his caring responsibility for his children leading up to the end of December 2020. As we have already said, we consider that he has sought to exaggerate the extent of the role he played in his children's lives. The reality of the situation was that he was leading a completely chaotic life under the influence of alcohol and was not capable of fulfilling the role he may previously have played. We accept, from the medical notes, that he has made efforts at times to seek help from the medical services and to abstain from alcohol, but without success. We do not dispute that he would like to have been able to cope with the situation better and that he had some happy contact time with his children, particularly with his younger daughter who would visit him in his shed and show interest in his activities. However it is undeniably the case that the situation deteriorated substantially in the year and months prior to 31 December 2020 and the evidence suggests that the appellant's relationship with his family became untenable as his situation became more and more chaotic. He was no longer able to work and support the family financially and neither was he able to continue driving his daughters to school. He isolated himself from his family, living in the garden shed/ summer house and drinking all day. At times he was aggressive towards his wife and there were concerns about the safety of the children.

43.It was Ms Munro Kerr's submission that on a consideration of all that evidence, it was nevertheless sufficient for the appellant to succeed, and that he was able to meet the definition of primary carer, sharing that caring responsibility with his wife. Both parties agreed that there was no legal authority on the interpretation of 'shared primary carer responsibility'. In so far as Mr Terrell referred us to the decisions in Patel, K.A. and Chavez-Vilchez, we did not find those cases to be particularly helpful since they were more concerned with the issue of compulsion. Ms Munro Kerr relied upon the Home Office guidance 'EU Settlement Scheme: person with a Zambrano right to reside', in particular the sections on 'shared equal primary carer responsibility' and 'evidence of shared primary carer responsibility' at pages 53 and 54 of the guidance, which she submitted supported the appellant's case.

44.We accept from the guidance that in order to share primary care responsibility both parents do not need to spend the same amount of time with the British child or even live with the child, and that there does not have to be evidence of equal sharing of responsibility. However we do not accept that the guidance extends the meaning of primary carer responsibility to the circumstances before us. We note the statement in the guidance that "*unless there is evidence to indicate the father is in practice unable to care for the child, it can be accepted that both parents share equal primary carer responsibility*". It seems to us that that represents the situation in this case, where the appellant became unable to care for his children and where there were concerns for their safety around him. We have to agree with Mr Terrell that the evidence suggests that the children's mother had a significantly greater responsibility than the appellant. The appellant simply cannot, on any reading of the rules and the guidance, be considered to be a carer for the children in any respect in the period leading up to December 2020 and thereafter.

45.Accordingly we conclude that the appellant has failed to demonstrate that he can benefit from the Zambrano provisions of the rules and that he is unable to meet the

requirements of the rules to acquire status under the EUSS. The appeal must therefore be dismissed.

DECISION

46.The decision of the First-tier Tribunal having been set aside, the decision is re-made by dismissing the appellant's appeal.

Signed: S Kebede
Upper Tribunal Judge Kebede

Judge of the Upper Tribunal
Immigration and Asylum Chamber

4 December 2024