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

Case No: UI-2024-002588

First-tier Tribunal No:
EU/51199/2023

**THE IMMIGRATION ACTS**

**Decision & Reasons Issued:**
**On the 14 January 2025**

**Before**

**UPPER TRIBUNAL JUDGE SMITH**

**Between**

**MONICA INES RAMOS SEGURA**
**(NO ANONYMITY ORDER MADE)**

Appellant

**and**

**SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**
For the Appellant: Not attending and not represented
For the Respondent: Mr P Deller, Senior Home Office Presenting Officer

**Heard via hybrid hearing at Field House on Friday 3 January 2025**

## DECISION AND REASONS

## BACKGROUND

1. By a decision issued on 1 October 2024, I found an error of law in the decision of First-tier Tribunal Judge Ian Howard dated 8 March 2024 allowing the Appellant's appeal against the Respondent's decision dated 11 April 2021 refusing her status under the EU Settlement Scheme ("the EUSS") as a "Zambrano carer". In consequence of that decision, I set aside Judge Howard's decision so that Ms Segura is once again the Appellant in this appeal. My error of law decision is appended hereto for ease of reference.

2. The Appellant has not attended any of the hearings in this Tribunal. The first hearing following the grant of permission to appeal was listed for hearing on 19 August 2024. However, at that date the Appellant's previous solicitors had only recently applied to come off the record as they had been unable to obtain the Appellant's instructions. It was not clear whether the Appellant herself had notice of the hearing. The hearing was therefore adjourned and details taken from both the Home Office and the former solicitors to obtain relevant postal and email addresses for contact with the Appellant.

3. The hearing was relisted on 24 September 2024. I was satisfied at that date that the Appellant had been served with notice of the hearing. She had not applied for an adjournment or contacted the Tribunal to excuse her absence. I therefore determined that it was in the interests of justice to proceed in her absence. That led to the error of law decision referred to above.

4. In my error of law decision, I set out for the benefit of the Appellant the issues which required to be determined, the errors made by Judge Howard and relevant case-law in relation to "Zambrano carers". I gave directions for the Appellant to file further evidence by 15 November 2024 and to inform the Tribunal if she required an interpreter for the hearing.

5. As before, there has been no communication from the Appellant. I was satisfied that she had been properly served with notice of the hearing on 3 January 2025. She had not applied for an adjournment nor written to explain her non-attendance. Mr Deller confirmed that he had checked Home Office records and there had been no contact from the Appellant. I therefore determined that it was in the interests of justice to proceed in the absence of the Appellant.

6. I had before me a composite bundle of documents previously filed by the Respondent running to 1312 pages (pdf) to which I refer below as [B/xx]. Having heard brief submissions from Mr Deller as to the law and issues (as set out in my error of law decision) and as to the relevant evidence, I indicated that I would provide my decision with reasons in writing which I now turn to do.

## THE FACTS

7. The factual background to this appeal is set out at [2] and [3] of my error of law decision and I do not repeat what is there said. The Appellant's son ([R]) is now aged 23 years. As Mr Deller pointed out, given that he was in his final year at Cambridge University in the course of this appeal, having started his course in 2020, it may well be that he has now completed that course. As Mr Deller also pointed out, as [R] is a British citizen, the Home Office would have no up-to-date information in that regard.

8. The most recent evidence in relation to [R]'s ADHD and his relationship with his mother is to be found in the Appellant's supplementary bundle before the First-tier Tribunal at [B/25-31] and the witness statements of [R] and the Appellant dated 25 January 2024 at [B/154-155] and [B/156-157]

respectively and the letter from [R]'s GP at [B/159]. There are also earlier statements from the Appellant and [R] dated 28 and 16 June 2022 at [B/253-256] and [B/257-258] respectively. Although I refer below only to that evidence, I have read and had regard in what follows to all the evidence submitted by the Appellant.

## THE ISSUES

9. The Appellant's appeal is against the Respondent's decision refusing her settled status under the EUSS.

10. There are two grounds of appeal available to the Appellant, namely whether the Respondent's decision is contrary to Appendix EU to the Immigration Rules ("Appendix EU") and/or whether it breaches the withdrawal agreement between the UK and EU on the UK's departure from the EU ("the Withdrawal Agreement"). "Zambrano" rights are derivative on status as an EU national (which UK citizens ceased to be on withdrawal) and are for that reason not covered by the Withdrawal Agreement. The only ground of appeal is therefore whether the Respondent's decision under appeal is contrary to Appendix EU.

11. The refusal was on the basis that, although the Appellant had been given a residence card as the Zambrano carer of [R] when he was a child up to his eighteenth birthday on 8 September 2019, she had no continuing rights as such thereafter. The Respondent's case is that the Appellant did not therefore have a right continuing up to the end of the transition period on 31 December 2020 and could not meet the definition of a "person with a Zambrano right to reside" under the annex to Appendix EU.

12. The issue before me therefore is whether the Appellant has shown that in the period between 8 September 2019 and 31 December 2020 she did have such a right. In order to do so, she would have to show that she was [R]'s primary carer and that [R] "would in practice be unable to reside in the UK …if the Appellant in fact left the UK for an indefinite period".

13. Although Mr Deller accepted that the issue whether the Appellant is [R]'s primary carer is less contentious because [R] only has intermittent if any contact with his biological father, he submitted that this remains an issue in relation to whether [R] who was, after 8 September 2019, an adult, required a carer at all at 31 December 2020.

14. The main issue is however whether [R] would be unable to remain in the UK if the Appellant were to leave or, put another way, whether he would be compelled to leave if she did so.

## THE LAW

15. I set out at [13] of the error of law decision a citation from the Court of Appeal's judgment in Secretary of State for the Home Department v RM (Pakistan) [2021] EWCA Civ 1754 ("RM (Pakistan)") and at [30] of that decision a citation from the Supreme Court's judgment in Patel v Secretary

of State for the Home Department [2019] UKSC 59 ("Patel"). I do not need to replicate those in full.

16. The salient principle to be derived from those cases is that the test in relation to an adult dependent is that much higher than in relation to a child (where dependency on a parent, for example can generally be assumed). The Court of Appeal in RM (Pakistan) described the test as "very demanding" – "[n]othing short of compulsion to leave is enough". The Court of Appeal also there made clear that whether the test is met is to be determined on "an objective consideration in the light of all the relevant circumstances". The question is "whether the relevant facts as a whole, viewed objectively, cross the threshold between 'choice' to leave and 'compulsion' to leave".

17. The demanding nature of the test is further underlined by the Supreme Court in Patel. As the Supreme Court there said "[i]t follows that the identification of a relationship between two adult members of the same family as a relationship of dependency, capable of giving rise to a derived right of residence under article 20 TFEU is conceivable only in *exceptional cases,* where, having regard to all the relevant circumstances, there could be no form of separation of the individual concerned from the member of his family on whom he is dependent".

## THE EVIDENCE AND FINDINGS

18. As the Appellant explains in her first statement ([B/253-256]), she came to the UK from Panama as a visitor in 1998. Whilst in the UK, she met and married a British citizen, her former husband, who is the father of [R]. They married in Panama in December 1998 and returned to the UK in 1999, the Appellant once again entering as a visitor. She applied to remain as a spouse but was refused leave to remain. Before she could complete an appeal against the decision, her relationship with her former husband broke down.

19. [R] was born in September 2001. Following the breakdown of her relationship in 2004, the Appellant and [R] returned to Panama to live with her mother. [R]'s father visited him there in 2005 and thereafter obtained a British passport for [R]. The Appellant and [R] visited the UK in 2006 for one month. [R] had some birth defects which required a further operation in the UK. They then returned to Panama where they lived with the Appellant's mother and her then partner.

20. The Appellant's then partner obtained a student visa to come to the UK in 2008. The Appellant accompanied him, again obtaining entry as a visitor. [R] was of course entitled to come to the UK as a British citizen. When the Appellant's partner completed his studies, he returned to Panama and the relationship broke down in 2009. The Appellant and [R] remained in the UK. The Appellant was by then an overstayer.

21. [R] retained some contact with his father but his father was not involved in his day-to-day care nor did he provide financial assistance.

22. The Appellant applied in 2013 to remain in the UK as [R]'s "Zambrano" carer. Her application was refused but her appeal succeeded, and she was given a residence permit until 8 September 2019 when [R] turned eighteen. She applied for an extension of her permit in June and August 2019, but the applications were refused.

23. The Appellant says in her statement that she has lived in the UK for twenty years but that ignores the fact that she lived in Panama (as she accepts) from 2004 to 2006 (or in fact longer since she says that she did not come back on the last occasion until 2008). In any event, this is an appeal against an EUSS decision and not against a refusal of any human rights claim that she may wish to make.

24. Turning then to the position after [R]'s eighteenth birthday, he went to study at Cambridge University in September 2020. He lived there during term-time, returning home for the holidays (as would be the case for most students). During lockdown, in common with most other students, he lived at home as the university was closed. The Appellant says that [R] (then aged twenty) "still needs parental guidance and depends on [her] financially, emotionally and needs support with most important life decisions". She says that she continues to financially support him and that they are very close. [R] requires a base of a family home outside of term-time. If they were separated, the Appellant says that it would be "devastating" for him. She accepts that [R] maintains "a connection" with his father, aunt and brothers but the connection is "not as strong as the connection to [her]". It appears from other evidence (in particular Dr Ventor's report – see below) that [R] has four half-brothers.

25. [R] was diagnosed with ADHD in 2022 following a referral for an assessment by Jan Brightling, RGN, MSc. Ms Brightling is a practitioner associated with Pembroke College, Cambridge. She has provided two letters dated 14 June 2023 and 6 December 2023 ([B/26] and [B/25]). She has supported [R] since March 2021. Following a referral to Dr Rudolph Venter on 19 January 2022, [R] was treated with ADHD medication after which "[h]e made significant improvements in his mental health and academic studies". He was expected to achieve good grades in his finals.

26. Ms Brightling also explains that [R] was receiving support from the Disability Resource Centre at the university.

27. In relation to [R]'s relationship with his mother, Ms Brightling opines that "[R] needs the support of his mother as the adult who he lives with out of term time and who provides the stability required to maintain his progress". It is however notable that she does not mention the Appellant's input into [R]'s treatment for ADHD nor does she mention having met or even having any contact with the Appellant.

28. The same is also true of Dr Ventor, Consultant Child and Adolescent Psychiatrist, who has provided a report dated 19 January 2022 ([B/27-31]). He confirms the history set out by Ms Brightling. He also explains the support which was put in place to assist [R] in his studies. [R] was also

given six counselling sessions. In terms of [R]'s own account to Dr Ventor, [R] said that he had struggled with his mood and focus since being at school but had "become quite good at compensating for and hiding" his problems. Dr Ventor says that neither of [R]'s parents were involved in the assessment. Dr Ventor makes no recommendations involving the support of either parent. His recommendations are focussed on additional academic support, medication and counselling.

29. Finally, in relation to [R]'s diagnosis, there is a letter from Dr Liz Reynolds, MBChB, MRCGP (2019), DRCOG dated 28 December 2023 ([B/159]). She does not explain the nature or extent of her involvement with [R] beyond saying that she had been asked by [R] to provide a letter giving information about his mental health. There is no information about how many times she has met [R] if at all and whether the information in the letter is obtained by personal contact or records. The letter is extremely brief and not in the form of a report. She says that [R] relies on the Appellant's help to manage his condition but does not say what help the Appellant gives. She says that withdrawal of the Appellant's "practical and emotional support … would have a detrimental impact on [[R]'s] mental health and studies" but does not condescend to any detail in that regard. I am unable to place any weight on this letter.

30. I turn then to [R]'s own evidence and in particular his most recent statement at [B/154-155]. He describes the Appellant's support as helping with purchases for his studies, helping him to adhere to a work schedule, helping him organise travel and packing when going to university. She also helps him to organise his finances. [R] says that in the past, his mother has assisted him to find work experience and volunteer opportunities although he does not say what those were. He says that the Appellant is his only family in the UK although I note that this account differs from what was said to Dr Ventor in relation to having his father and half-brothers also in the UK although I accept that [R] did not tell Dr Ventor that he was in contact with them.

31. [R] also confirms that his only family home outside term time is with his mother. [R] says that he does not consider himself to live independently because for half of the year he lives in university-provided accommodation and for the other half with his mother. He has no experience of applying for jobs and considers that he will need his mother's support with job-hunting once his studies are complete. The high point of his evidence is that, if the Appellant were to leave the UK, "[he] would be left without a place to live, with no money of [his] own, and with no support in order to help [him] find work and accommodation". He says that as a result, he "would almost certainly be compelled to leave the UK".

32. The Appellant's most recent statement at [B/156-157] focusses on the evidence which I have already set out above from Ms Brightling, Dr Ventor and Dr Reynolds. What is notable from this statement is that the Appellant fails to explain what support she gave [R] during his years at school when apparently his problems began. She says that she has "manage[d] and supervise[d] all aspects of life as his parent and carer" but does not

explain why in those circumstances, there was no intervention for a referral or assessment before he left home and went to university. In fact, the evidence shows that the main support which [R] has had in relation to his ADHD and mental health problems has arisen due to the intervention of the university healthcare providers. Whilst it is undoubtedly the case that [R] as the only child of a single-parent family will have formed a very close emotional bond with his mother which undoubtedly survives into adulthood and whilst the Appellant may well have to give [R] more practical support as a result of [R]'s ADHD, I am quite unable to find that the relationship remains one of carer and cared-for dependent.

33. I also do not accept that [R] would be compelled to leave the UK if his mother were obliged to return to Panama. There is no reason why she could not provide financial support from Panama and they could retain their close emotional connection at a distance. [R] as a British citizen is entitled to medical assistance with his ADHD and mental health problems at public expense.

34. I assume that [R] has now completed his studies. Ms Brightling mentions in her June 2023 letter, an expectation about [R]'s final grades which may suggest that he graduated in that year, but it does appear that [R] remained in education in January 2024. As his university course began in 2020, though, I would expect that he has now completed his studies. There is a complete absence of evidence about his situation now due to the Appellant's failure to engage with this appeal. However, any concerns which [R] had about applying for jobs post-university are likely now to be in the past. Again, in any event, he would be entitled to assistance from career advisers at the university and similar assistance more generally.

35. Although I accept that there is no evidence that [R] has maintained contact with his father and his father's family, there is no reason why he could not resurrect that contact. As above, the Appellant accepted in her first statement that [R] had some connection with his father and his father's family and had some contact following their return to the UK in 2008.

36. Viewed objectively on all the evidence, I am not satisfied that [R] would be compelled to leave the UK if the Appellant were to return to Panama. He may choose to accompany her but that is not the same as being obliged to go. It would be a matter of choice not compulsion.

## CONCLUSION

37. The Appellant is not the primary carer of [R] who is now an adult and does not therefore need a carer. Further, he would not be compelled to leave the UK were the Appellant to return to Panama. The Appellant is therefore not "a person with a Zambrano right to reside". The Respondent's decision is not contrary to Appendix EU. The Withdrawal Agreement contains no provision for Zambrano carers. Accordingly, this appeal fails and is dismissed.

## Notice of Decision

**The appeal is dismissed**

L K Smith

Judge of the Upper Tribunal
Immigration and Asylum Chamber

7 January 2025

**APPENDIX: ERROR OF LAW DECISION**

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

Case No: UI-2024-002588

First-tier Tribunal No:
EU/51199/2023

**THE IMMIGRATION ACTS**

**Decision and Directions Issued:**

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**Before**

**UPPER TRIBUNAL JUDGE SMITH**

**Between**

**SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Appellant

**And**

**MONICA INES RAMOS SEGURA**

Respondent

**Representation:**
For the Appellant: Ms S McKenzie, Senior Presenting Officer
For the Respondent: Ms Segura did not attend and was not represented

**Heard at Field House on Wednesday 24 September 2024**

**DECISION AND DIRECTIONS**

**BACKGROUND**

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 challenges the decision of First-tier Tribunal Judge Ian Howard dated 8 March 2024 ("the Decision") allowing the Appellant's appeal against the Respondent's decision dated 11 April 2021 refusing her status under the EU Settlement Scheme ("the EUSS") as a "Zambrano carer".

2. The facts of this case can be quite shortly stated. The Appellant is a Panamanian national and the mother of [R]. [R] is a British national. The Appellant applied for a residence card as the "Zambrano" carer of [R] in 2012. One was granted to her on 14 November 2014 which was valid until 8 September 2019 when [R] turned eighteen. Since turning eighteen, [R] has completed his secondary education and taken up a place at Cambridge University. Following his move to university, he was diagnosed with Attention Deficit Hyperactivity Disorder (ADHD). As a result of that diagnosis and although he is now an adult, I have anonymised his identity.

3. It is said that as a result of his ADHD, the Appellant has to give him more support than would be usual for a young adult attending university. Although [R] lives away from home during university term time, he returns to live with his mother during the holidays (which is not uncommon for university students). The Appellant provides additional financial, emotional and practical support to him.

4. The Judge found that the facts were such that the Appellant remained [R]'s primary carer as at 11pm on 31 December 2020. He concluded at [23] of the Decision that because of that finding "the appellant is entitled to the grant of settled status as a 'Zambrano carer' under the EUSS scheme".

5. The Respondent appealed on two grounds. Ground one is that the Judge has materially misdirected himself in law by failing to consider the definition of a "person with a Zambrano right to reside" under Annex 1 of the Immigration Rules relating to the EUSS (Appendix EU). That definition includes not simply whether the Appellant is [R]'s primary carer but also whether [R] would be unable to remain in the UK if the Appellant left for an indefinite period. Ground two is that the Judge has made irrational findings when considering whether the Appellant can be said to be [R]'s primary carer.

6. Permission to appeal was granted by Resident Judge Phillips on 29 May 2024. He had initially intended to review the Decision and set it aside for re-hearing. However, having invited the parties' submissions on that course, the Appellant conceded that there was an error of law established by ground one but not the second ground and argued that the error which the Appellant conceded was not for that reason material. There was no response from the Respondent.

7. Judge Phillips therefore decided to grant permission to appeal so that the grounds could be considered by this Tribunal. He did so in the following terms:

> "1. The application is in time.
> 2. This is a **Zambrano** claim. There are two grounds. First, that the Judge failed to make any findings on an issue raised in the Respondent's Review: whether the Appellant's son would be unable to reside in the UK if

> the Appellant left the UK for an indefinite period. Second, that the Judge's finding that the Appellant was her son's primary carer was irrational, given it was accepted that her son lived away from her at university during term time: [16] – [21].
> 3. I was satisfied that there was merit in both Grounds. The Judge did not make the necessary findings as argued in Ground 1. It is also difficult to reconcile the finding of primary carer status with the fact that the Appellant and her son lived apart for periods of time, as argued in Ground 2.
> 4. I initially proposed to set aside this Decision and direct that the appeal be reheard in the First-tier Tribunal, rather than grant permission to appal. I issued a r.35 notice, inviting the Parties to make submissions, before making a final decision.
> 5. The Appellant responded, conceding a material error of law in respect of Ground 1, but disputing any material error in Ground 2. The Appellant argues that the appeal should be returned to the Judge to make the necessary findings to resolve Ground 1 only, or alternatively, that permission to appeal should be granted so that the Parties could make their submissions on Ground 2 to the Upper Tribunal. The Respondent made no submissions.
> 6. In the circumstances, I grant permission on both Grounds as they raise arguably material errors of law."

8. The Appellant was previously represented by Duncan Lewis solicitors. However, by a letter dated 15 August 2024, they indicated that there were no longer able to represent the Appellant because she had failed to respond to their request for instructions. The matter therefore came before me at error of law stage on the first occasion on 19 August 2024 with the Appellant being a litigant in person. The Appellant did not attend and nor was she represented. The Tribunal had received no communication from her about the hearing.

9. As a result of enquiries made of the Respondent on that occasion, it appeared that the Appellant might not have had notice of the hearing as she had apparently moved address. Accordingly, with the consent of the Respondent, I adjourned that hearing for relisting before me on the first available date after 16 September 2024. So it was that the matter came back before me on 25 September 2024.

10. The Respondent was represented by Ms McKenzie. The Appellant did not attend and was not represented. The hearing was put to the back of my list and did not begin until midday. I was satisfied that the Appellant had been properly notified of the hearing. The notice was sent to her at her postal address as updated by the Respondent and confirmed by her previous solicitors. It was also sent by email to two addresses provided by her former solicitors, one a yahoo address and one a g-mail address. The clerk assured herself prior to the start of the hearing that there had been no communication from the Appellant, explaining her absence or seeking an adjournment.

11. For those reasons and also because the Appellant's former solicitors came off the record due to an inability to obtain instructions from the

Appellant, I determined that it was in the interests of justice for the hearing to proceed in the Appellant's absence.

12. By letter dated 20 September 2024, the Respondent sought to vary her grounds. She did so it was said to expand on her second ground. She submits that the Judge had failed to apply guidance given by the Court of Appeal in Secretary of State for the Home Department v RM (Pakistan) [2021] EWCA Civ 1754 ("RM (Pakistan)"). The guidance in RM (Pakistan) in turn relies on the CJEU's judgment in KA v Belgium [2018] 3 CMLR 28 ("KA") and the Supreme Court's judgment in Patel v Secretary of State for the Home Department [2019] UKSC 59 ("Patel").

13. Relevant to this appeal is what is said by the Court of Appeal at [44] of its judgment in RM (Pakistan) as follows:

> "44. The correct approach to the construction and application of the test is now well-established, and a matter of common ground in this case. In the light of *KA* and *Patel* the legal test for derivative status will be met in the case of an adult, only if the dependent British citizen would, in practice be compelled to leave the United Kingdom (and therefore the EU) if the third country family member were to leave indefinitely. Nothing short of compulsion to leave is enough. An adult person's choice to leave, based on an understandable preference to be cared for by the third country national family member, will not be sufficient unless an absence of practical alternatives leaves that person with no practical choice but to leave. This is a very demanding test. It is common ground that whether or not it is fulfilled is to be determined by an objective consideration in the light of all the relevant circumstances, of whether any form of separation of the individual concerned from the member of his or her family on whom he or she is dependent is not practically possible. Put another way, the question to be answered is whether the relevant facts as a whole, viewed objectively, cross the threshold between 'choice' to leave and 'compulsion' to leave."

14. In essence, the amendment which the Respondent seeks is to underpin her argument that the Judge's findings were irrational by reason of having ignored relevant case-law. That might equally have been put as a failure by the Judge to direct himself in accordance with relevant case-law.

15. In fact, that failure stems from the error argued by the Respondent's first ground that the Judge has failed to decide the issue dealt with by RM (Pakistan) (and Patel) at all. As I have pointed out, the definition of a "person with a Zambrano right to reside" includes not only the issue of whether that person is the primary carer of a British citizen but also whether that British citizen would be unable to remain in the UK if his carer left for an indefinite period. That is the issue which arose for consideration in RM (Pakistan) and Patel.

16. As I discussed with Ms McKenzie, it appeared to me that the submission now made did not involve an amendment at all. The issue raised by the first ground is whether the Judge has failed to consider or

determine whether the Appellant could meet part of the definition of a "person with a Zambrano right to reside" which is expressly stated by the first ground to be whether [R] would be unable to remain in the UK if the Appellant were to leave. That point was put in issue by the Respondent's Review which itself refers to RM (Pakistan). Accordingly, that case-law was already relevant to the first ground as pleaded. If and insofar as any amendment is required, I grant permission to amend since the case-law is clearly relevant to the first ground as pleaded.

17. There has been no Rule 24 Reply from the Appellant or her former solicitors. Before coming off the record, the Appellant's solicitors made an application under Rule 15(2A) of the Tribunal Procedure (Upper Tribunal) Rules 2008 to adduce further medical evidence about [R]'s condition which it is said the Appellant would be providing. None has been provided.

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

## DISCUSSION

### Ground one

19. As indicated by the terms of the grant of permission by the First-tier Tribunal, the Appellant's former solicitors had conceded an error on the first ground when it was suggested that the Decision be reviewed. They invited the First-tier Tribunal either to return the appeal to the same Judge to make findings on the issue whether [R] would be unable to remain in the UK in the Appellant's absence or to grant permission and allow the Appellant to make arguments about why any error on the second ground was not material. As it was, the First-tier Tribunal granted permission. There is accordingly a concession that there is an error on the first ground.

20. I would in any event have found an error for the following reasons.

21. A "person with a Zambrano right to reside" is defined in Annex 1 to Appendix EU as follows (so far as relevant to this case):

> "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
> (iv) they do not have leave to enter or remain in the UK, …; and
> (v) 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 … or
> (b) …
> 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) …"

22. In accordance with that definition, unless the Appellant were suggesting that she can meet the definition of a "person who had a … Zambrano right to reside" (which is not suggested), she must show that she continued to meet the definition of a "person with a Zambrano right to reside" as at 11pm on 31 December 2020. She could not meet the definition of a "person who had a Zambrano right to reside" since that definition would require her to have moved into another relevant category on ceasing to have that right. The only category which could apply under that definition is a "person with a Zambrano right to reside". She would therefore have to satisfy the same definition. Accordingly, the Appellant needs to show that she continued to be a "person with a Zambrano right to reside" as at 11pm on 31 December 2020.

23. At [14] of the Decision, the Judge set out what he considered to be the relevant issues as follows:

> "This raises two issues, whether the appellant was the primary carer for her son (a) for a continuous 5-year period beginning before 11pm 31 December 2020; and (b) continuing at 11pm 31 December 2020."

The Judge was right to identify this as one of the issues in this case.

24. However, the extract from the Respondent's decision under appeal made clear that the issue was also whether the Appellant could meet the definition of a "person with a Zambrano right to reside". Whilst I accept that the decision under appeal referred only to the part of the definition under paragraph (a)(ii), the Respondent made clear at [6] of her Review that she also relied on the part of the definition at paragraph (a)(iii). She there referred expressly to RM (Pakistan) and the test of compulsion as set out in [44] of the Court of Appeal's judgment (as cited above).

25. The Judge failed entirely to consider whether [R] would be unable to remain in the UK (or put another way would be compelled to leave the UK) if his mother were to leave. There is therefore a failure by the Judge to consider and determine a relevant issue. That is an error. It is material on the facts of this case because [R] is now and was at 31

December 2020 an adult. The test set out in RM (Pakistan), KA and Patel then needed to be considered.

26. I am for those reasons satisfied that there is an error disclosed by the Respondent's first ground. That is clearly material. The only grounds of appeal available to the Appellant are whether the Respondent's decision under appeal is either contrary to Appendix EU or contrary to the agreement between the UK and EU on the UK's withdrawal from the EU ("the Withdrawal Agreement"). Since "Zambrano" rights are not covered by the Withdrawal Agreement, the only ground available is that the Respondent's decision is not in accordance with Appendix EU. The Judge having failed to deal with part of the relevant definition could not rationally conclude that the Appellant met Appendix EU or that she was "entitled to the grant of settled status as a 'Zambrano carer' under the EUSS scheme" ([23] of the Decision).

27. The error disclosed by the Respondent's first ground is therefore material and the decision requires to be re-made.

**Ground two**

28. By this ground, the Respondent challenges the Judge's findings as to whether the Appellant is the primary carer of [R]. Having concluded that the error disclosed by the first ground is material, and that the decision requires to be re-made in consequence, strictly I do not need to determine whether there is an error disclosed by the second ground. I do so however as I need to consider whether any findings made by Judge Howard can be preserved.

29. The findings leading to the conclusion that the Appellant is [R]'s primary carer are set out at [15] to [22] of the Decision as follows:

> "15. I was told and I accept as entirely credible, that having turned 18 he none the less continued to live at home with his mother exactly as he had over the preceding seven years. The years since the original application was made.
> 16. At that time [R] was completing his secondary education. He was living at home with his mother as he had done throughout his secondary education. Notwithstanding the impact of the pandemic he attained his anticipated grades and in September 2020 started an undergraduate course in English literature at Pembroke College Cambridge. He resided at the college during term time and, without fail, returned to his and his mother's home for the vacations.
> 17. The college remained open to students for the first term of that academic year, but in January 2021 students were advised not to return to college and he remained at home for all but the last few weeks of that academic year. Sadly he did not pass his first year exams and retook the year. He was at college to repeat the first year, but again spent the vacations at home. He passed the first year at second attempt and the second year at first attempt. He is currently in his final year. He has lived

in college throughout, spending the vacations back at home with his mother.

18. Both he and his mother told me that she spends many weekends at Cambridge with her son. She still helps him with his day to day living by organizing him. Helping him with the purchase of his many texts for the forthcoming term, his laundry and other mundane matters. They explore Cambridge together. This is perhaps not the common undergraduate experience and is explained by the fact that in May 2021 he was diagnosed with Attention Deficit Hyperactivity Disorder (ADHD). I have a report confirming this. The relationship he and his mother described is entirely consistent with [R]'s presentation before me. In no sense would I describe him as worldly wise.

19. I was told he has never had a job, not even a part-time job at school or at university. For the same reason I find this entirely credible.

20. I was told and I accept that the appellant's relationship with his father remains a it was when his mother was first held to be a Zambrano carer in 2014. That aspect of the factual matrix is not challenged.

21. So it is that the appellant claims that she remains her son's carer. The respondent points to the fact the appellant is claiming a 25% discount on her Council Tax as evidence that she in fact lives alone. I am not charged with determining whether that is a discount to which she is entitled on the facts as I have found them. What I am satisfied about is that the appellant is at this moment in time [R]'s carer and has been since she was granted a residence card as a Zambrano carer in 2014. He has in no way embarked upon a life independent of his mother and I reject the respondent's assertion that as an undergraduate this must be the case.

22. Returning to the two questions posed at paragraph 14 above I am satisfied that it is more likely than not that the appellant was the primary carer for her son for a continuous 5-year period beginning before 11pm 31 December 2020 and that the state of affairs was extant at 11pm 31 December 2020."

30. How, when and why a "Zambrano" right arises was explained by the Supreme Court by reference to relevant CJEU case-law in Patel as follows:

"16. The CJEU explained that in very specific situations a TCN may have a right of residence if the Union citizen would otherwise be obliged to leave Union territory. Those limits are very important in considering these appeals because Charter rights are not engaged unless an EU law right is triggered. As stated, the TCN's derived right of residence is only given in order that the Union citizen's rights should be effective. That would be the limit of the entitlement under EU law of the TCN to reside in the Union. Moreover, there must be a 'relationship of dependency' between the Union citizen and the TCN:

> '51. In this connection, the court has previously held that there are very specific situations in which, despite the fact that secondary law on the right of residence of third-country nationals does not apply and the Union citizen concerned has not made use of his freedom of movement, a right of residence must nevertheless be granted to a third-country national who is a family member of that Union citizen, since the effectiveness of Union citizenship would otherwise be undermined, if, as a consequence of refusal of such a right, that citizen would be obliged in practice to leave the territory of the European Union as

> a whole, thus depriving him of the genuine enjoyment of the substance of the rights conferred by that status (see, to that effect, *Ruiz Zambrano*, paras 43 and 44 and *Chavez-Vilchez*, para 63).
>
> 52. However, a refusal to grant a right of residence to a third-country national is liable to undermine the effectiveness of Union citizenship only if there exists, between that third-country national and the Union citizen who is a family member, a relationship of dependency of such a nature that it would lead to the Union citizen being compelled to accompany the third-country national concerned and to leave the territory of the European Union as a whole (see, to that effect, *Dereci v Bundesministerium für Inneres* (Case C-256/11) [2012] All ER (EC) 373, paras 65 to 67; *O*, para 56 and *Chavez-Vilchez*, para 69)."

17. The distinction noted between dependence in the case of an adult Union citizen and that of a Union citizen child is then explored. A TCN could have a relationship of dependency with an adult Union citizen capable of justifying a derived right of residence under article 20 TFEU only in 'exceptional circumstances' [2018] 3 CMLR 28:

> '65. As regards, first, the cases in the main proceedings where the respective applicants are KA, MZ and BA, it must, at the outset, be emphasised that, unlike minors and a fortiori minors who are young children, such as the Union citizens concerned in the case that gave rise to the judgment *Ruiz Zambrano*, an adult is, as a general rule, capable of living an independent existence apart from the members of his family. It follows that the identification of a relationship between two adult members of the same family as a relationship of dependency, capable of giving rise to a derived right of residence under article 20 TFEU, is conceivable only *in exceptional cases*, where, having regard to all the relevant circumstances, there could be no form of separation of the individual concerned from the member of his family on whom he is dependent.' (Emphasis added)"
>
> [my emphasis]

31. I accept that the issue of whether an individual is the primary carer of a Union citizen so as to derive a "Zambrano" right turns on an issue of dependency. I also accept that the CJEU in KA appears to suggest that the test of dependency may have some overlap with the test for family life between adults under Article 8 ECHR. As I observed in discussions with Ms McKenzie, Judge Howard's reasoning for finding that the Appellant is [R]'s primary carer (in the sentence I have emphasised above) appears to be focussed on the usual test for family life between adults under Article 8 ECHR. However, that may not be an incorrect approach having regard to what is said in KA.

32. There is however an elision in the case-law between the issue whether a person is a primary carer and the need to show that the Union citizen would not be able to remain without the primary carer. As explained in the sentence of KA which I have emphasised the question is not simply whether the person cared for has or can establish an independent life but whether "there could be no form of separation" due

to the level of dependency. That issue clearly has an overlap with the issue which Judge Howard failed to consider of whether [R] could remain in the UK if his mother were to leave.

33. For those reasons, the error disclosed by the first ground overlaps with the second ground. I therefore find an error on the second ground and set aside the finding that the Appellant is [R]'s carer.

34. Although the main issue in this appeal is whether the "Zambrano" right continued as at 31 December 2020, that will have to be reconsidered against whatever evidence is available at the next hearing. Accordingly, I do not consider it appropriate to preserve any of the findings of fact made by Judge Howard.

## CONCLUSION

35. The Respondent's grounds disclose an error of law in the Decision. I set aside the Decision and set out below my directions for re-making.

## NOTICE OF DECISION

**The Decision of First-tier Tribunal Judge Ian Howard dated 8 March 2024 involves the making of an error of law. I set aside the Decision. I make the following directions for the rehearing of this appeal:**

## DIRECTIONS

1. **This appeal will be relisted for re-hearing face to face before me on the first available date after 1 December 2024. Time estimate ½ day.**
2. **If the Appellant wishes to rely on any further evidence, she must send that to the Tribunal and the Secretary of State by 4pm on Friday 15 November 2024.**
3. **If the Appellant requires an interpreter for the hearing, she shall notify the Tribunal also by 4pm on Friday 15 November 2024, specifying the language required.**

L K Smith
**Upper Tribunal Judge Smith**
Judge of the Upper Tribunal
Immigration and Asylum Chamber
26 September 2024