



UT Neutral Citation Number: [2024] UKUT 00143 (IAC)

Ayoola (previously considered matters)

IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Heard at Field House

THE IMMIGRATION ACTS

Heard on 4 March 2024
Promulgated on 18 March 2024

Before

UPPER TRIBUNAL JUDGE SMITH
UPPER TRIBUNAL JUDGE STEPHEN SMITH

Between

Iyabode Adeola Ayoola
(NO ANONYMITY DIRECTION MADE)

Applicant

and

Secretary of State for the Home Department

Respondent

Representation:

For the Appellant: Mr Z. Jafferji and Mr H. Broachwalla, Counsel, instructed by MCR Solicitors

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

- 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.

DECISION AND REASONS

1. There are two principal controversial issues in these proceedings.
2. The first is whether it is a breach of Article 24(2) of the EU Withdrawal Agreement (“the WA”) for the Secretary of State to refuse to grant leave to remain under the EU Settlement Scheme (“the EUSS”) to an applicant on account of their status as a primary carer of a direct descendent of a worker who is in full time education, in circumstances where the applicant already holds limited leave to remain under Appendix FM of the Immigration Rules on the basis of Article 8 of the ECHR on account of being a primary carer for the same child (who is in this case in fact also a British citizen)?
3. We must also assess whether the above issue amounts to a “new matter” within the meaning of regulation 9 of the Immigration (Citizens’ Rights Appeals) (EU Exit) Regulations 2020 (“the 2020 Regulations”). As will be seen, logically it is necessary to address this issue first.

Procedural background

4. These questions arise in the context of an appeal brought by the appellant, a citizen of Nigeria born in November 1977, against a decision of the Secretary of State dated 10 May 2021 to refuse her application under the EUSS as a “person with a Zambrano right to reside”, made under Appendix EU of the Immigration Rules on 29 December 2020. For a discussion of the so-called ‘Zambrano’ right to reside, see *R (Akinsanya) v Secretary of State for the Home Department* [2022] EWCA Civ 37, paras 8 to 15. The appeal was brought under regulation 3(1) of the 2020 Regulations.
5. The appellant’s appeal against the Secretary of State’s decision was originally heard and allowed by First-tier Tribunal Judge Colvin by a decision dated 9 March 2022. The Secretary of State appealed. By a decision promulgated on 7 December 2022, Upper Tribunal Judge Smith sitting with Deputy Upper Tribunal Judge Cotton allowed the Secretary of State’s appeal, on the basis that the judge had failed to provide reasons for allowing the appeal, and erred in relation to the law applicable to *Zambrano* rights of residence (see the **Annex**). The panel set aside the decision of the First-tier Tribunal, and gave directions for the decision to be remade in the Upper Tribunal, acting under section 12(2)(b)(ii) of the Tribunals, Courts and Enforcement Act 2007.
6. Unfortunately, there were a number of delays to the resumed hearing taking place in the Upper Tribunal. The substantive resumed hearing was effective before us on 4 March 2024.

Factual background

7. The appellant arrived in the UK as a visitor in 2005. She overstayed, and on 24 April 2009 her daughter, O, was born. The father is Oluwaseyi Shonaiya, who is also a citizen of Nigeria.

8. The appellant's relationship with Mr Shonaiya came to an end, and, on 2 January 2010, he married a French citizen, Ms Coura Drame. In October 2010, the Secretary of State issued residence cards to O and Mr Shonaiya as the family members of an EEA national under the Immigration (European Economic Area Regulations) 2006 ("the 2006 Regulations"). On 24 February 2014, Mr Shonaiya and Ms Drame divorced.
9. O was issued with a further residence card on 20 February 2015, valid until February 2020 on the basis of retained rights of residence. On 31 July 2015 O naturalised as a British citizen.
10. O is in full time education. The appellant has been her primary carer throughout her life in the UK. O currently has no contact with her father.
11. In November 2016, the appellant was granted limited leave to remain under Appendix FM of the Immigration Rules on account of her caring responsibilities for O; her leave was renewed November 2018 until May 2021, and has most recently been renewed until 28 December 2024. The appellant is on a ten-year route to settlement and will, after the next period of leave is granted, be entitled to apply for indefinite leave to remain under domestic Immigration Rules, assuming that she still qualifies (in late 2026).

The EUSS application

12. On 29 December 2020, while she held leave under Appendix FM, the appellant applied for settled status under the EUSS using the application form for a person applying with a Zambrano right to reside. The cover letter stated that, following Mr Shonaiya's divorce, O acquired rights under regulation 16(3) of the Immigration (European Economic Area) Regulations 2016 ("the 2016 Regulations") to continue her education in the UK, and asserted that she, the appellant, had acquired a right to reside under regulation 16(4) of the 2016 Regulations as her primary carer. The appellant said in the letter that she also qualified as a Zambrano carer, but that the main basis of the application was O's education, her regulation 16(3) right to reside and the derivative right enjoyed by her primary carer.

The EUSS decision dated 10 May 2021

13. The Secretary of State's decision focussed solely on the Zambrano limb of the appellant's application. It concluded that the appellant could not qualify as a Zambrano carer because she held leave to remain granted under Appendix FM, rather than Appendix EU. In any event, O would not be unable to reside in the UK or the European Economic Area if the appellant were to be required to leave for an indefinite period. That was because the appellant had a realistic prospect of renewing her Appendix FM leave. The question of the appellant leaving would simply not arise.

Appeal under the 2020 Regulations

14. The appellant now accepts that she cannot qualify under the provisions of the EUSS relating to a Zambrano right to reside, in light of *Velaj v Secretary of State for the Home Department* [2022] EWCA Civ 767 and *Sonkor (Zambrano and non-EUSS leave)* [2023] UKUT 276 (IAC).

15. The appellant instead contends that she is entitled to a right to reside on the basis of the rights established by *Ibrahim v Harrow London Borough Council* (Case C-310/08) and *Teixeira v Lambeth London Borough Council* (Case C-480/08). Those rights were previously transposed by regulation 16(3) and (4) of the 2016 Regulations, and now find expression in Article 24(2) of the WA (“Article 24(2)”). Article 24(2) provides:
- “2. 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 that 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.”
16. The appellant’s case is that an Article 24(2) right to reside, implemented by leave granted under the EUSS, more accurately reflects the rights that she and her daughter enjoy under the WA than the leave she holds under Appendix FM. This is because fees under the EUSS are lower, the conditions would be less restrictive, and the potential duration of the right extends beyond O’s 18th birthday, lasting until she has completed her further education. In turn, this would give the appellant confidence that she would be able to secure indefinite leave to remain on a ten-year long residence basis elsewhere under the Immigration Rules.
17. For the Secretary of State, Mr Deller submits that the Article 24 issue is a new matter, for which consent is withheld under regulation 9 of the 2020 Regulations (“regulation 9”). He submitted that the Secretary of State had not seen sufficient evidence to be able to decide whether the circumstances of O and the appellant fall within Article 24(2). In any event, the appellant’s case fails because it should be assessed on the same practical, rather than hypothetical, basis as applies to Zambrano cases. The appellant has leave. There is no question that either she or O will have to leave the UK.
18. We are grateful to Mr Broachwalla for his skeleton arguments dated 25 May 2023, 26 October 2023 and 3 March 2024, and to Mr Deller for his skeleton arguments dated 3 January 2023 and 15 December 2023, and to Mr Jafferji and Mr Deller for the quality of their oral submissions.

The first issue: whether the appellant’s Article 24(2) case is a “new matter”

19. We must first consider whether the Article 24(2) submissions are a “new matter”.
20. Under regulation 9(4), this tribunal may consider any matter which we think is relevant to the substance of the decision appealed against. But, pursuant to para. (5), we must not consider a “new matter” without the consent of the Secretary of State. A “new matter” is defined in regulation 9(6) in these terms:

“(6) A matter is a ‘new matter’ if—

- (a) it constitutes a ground of appeal of a kind listed in regulation 8 or section 84 of the 2002 Act, and (b) the Secretary of State has **not previously considered** the matter in the context of—

- (i) the decision appealed against under these Regulations,
or
- (ii) a section 120 statement made by the appellant.”

21. If the appellant’s case based on Article 24(2) amounts to a “new matter”, therefore, we have no jurisdiction to consider it absent consent, which has been refused.
22. It is common ground that the Article 24(2) matter constitutes a ground of appeal of a kind listed in regulation 8 of the 2020 Regulations. Regulation 8(2)(a) provides that a ground of appeal is that the decision breaches any right which the appellant has by virtue of Article 24(2) of the WA.
23. The essential question is whether, “the Secretary of State has not previously considered the matter in the context of... the decision appealed against” for the purposes of regulation 9(6)(a)?
24. For the appellant, Mr Jafferji accepts that the application did not, in terms, refer to Article 24(2) of the WA, but submitted that its references to regulation 16(3) and (4) of the 2016 Regulations were sufficient. Those paragraphs of regulation 16 were made to implement the decisions of the Court of Justice of the European Union in *Ibrahim* and *Teixeira* (see also *Velaj* at para. 23). Article 24(2) of the WA was intended to place on a Treaty-based footing the derivative rights in *Ibrahim* and *Teixeira*. Thus the application placed before the Secretary of State the substantive issues addressed by Article 24(2), requiring the same analysis, albeit using different terminology.
25. Mr Deller submitted that the appellant’s application dated 29 December 2020 was expressly submitted on the basis of her claimed (and now abandoned) Zambrano rights. While the appellant’s cover letter referred to regulation 16(3) and (4) of the 2016 Regulations, it did not refer to the WA at all. Nor did she use the specified form for derivative rights applications.

New matter: legal framework

26. The “new matter” regime in the 2020 Regulations is textually very similar to the equivalent regime in section 85 of the Nationality, Immigration and Asylum Act 2002 (“section 85” of the “2002 Act”), subject to the necessary modifications to cross-refer to the relevant provisions of the 2020 Regulations, rather than the 2002 Act. At para. 93 of *Celik (EU exit; marriage; human rights)* [2022] UKUT 220 (IAC), this tribunal drew on the authorities concerning section 85 for guidance when applying the regulation 9. We will do likewise.
27. In *Mahmud (S. 85 NIAA 2002 - ‘new matters’)* [2017] UKUT 488 (IAC) this tribunal held, at para. 31:

“Practically, a new matter is a factual matrix which has **not previously been considered** by the Secretary of State in the context of the decision in section 82(1) or a statement made by the appellant under section 120. This requires the matter to be factually distinct from that previously raised by an appellant, as opposed to further or better evidence of an existing matter. The assessment will always be fact sensitive...” (Emphasis added)

28. In *AK and IK (S.85 NIAA 2002 - new matters) Turkey* [2019] UKUT 67 (IAC), it was held that reliance on a different provision of the Immigration Rules to that originally relied upon, which entailed the consideration of additional and distinct criteria to those originally relied upon in the application (in that context, an application under Appendix ECAA, which did not exist at the time of the original human rights claim), was a new matter. See para. 40, per Upper Tribunal Judge Gill:

“For the reasons given above, and to summarise, I have concluded that, if an appellant relies upon criteria that relate to a different category of the Immigration Rules to make good his Article 8 claim than that **relied upon in his application** for LTR on human rights grounds or in his s.120 statement such that a new judgment falls to be made as to whether or not he satisfies the Immigration Rules, this constitutes a ‘new matter’ within the meaning of s.85(6) which requires the Secretary of State's consent even if the facts specific to his own case (for example, as to accommodation, maintenance etc) remain the same.” (Emphasis added)

29. We have emboldened “been considered” and “relied upon in his application” above because both terms go to the heart of this issue. Mr Deller submits that “been considered” requires active consideration of the issue by the Secretary of State. On his submission, if a matter is raised in the course of an application, but not expressly addressed by the Secretary of State in any decision or response to a notice served under section 120 of the 2002 Act, it has not been “considered” by the Secretary of State. Mr Jafferji submits that this interpretation is too narrow.

Matter must be sufficiently clear

30. The purpose of the new matter regime, whether in section 85 or regulation 9, is to ensure the Secretary of State has the opportunity to be the primary decision maker, and to confine the jurisdiction of the First-tier Tribunal to those matters which the Secretary of State has already had the opportunity to consider in the course of taking the primary decision under challenge, or when addressing a response to a section 120 statement. The logical conclusion of Mr Deller’s submissions would be that the Secretary of State could evade the jurisdiction and scrutiny of the tribunal simply by declining to address matters expressly raised in an application. If that were so, it would enable the Secretary of State to shield aspects of his decisions from appellate scrutiny simply by omitting expressly to address certain features of the application before him. There would be an inverse correlation: the greater the Secretary of State’s failure to take into account relevant factors, the narrower the tribunal’s jurisdiction would be to consider those alleged failures. That cannot have been the intention of Parliament.

31. It follows that 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), even if the decision under appeal is silent on a matter expressly raised in the application. But the references to the matter will have to be sufficiently clear to make it reasonable for the Secretary of State properly 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.

Article 24(2) WA not raised by the application

32. The essential question is whether the appellant's 29 December 2020 application sufficiently raised the Article 24(2) WA matter she now seeks to rely upon, such that the Secretary of State may be taken to have "considered" that matter, for the purposes of regulation 9(6)(b)(i)? We conclude that it was not sufficiently raised in the course of the application to have been "considered" by the Secretary of State, for the following reasons.
33. First, the appellant did not refer to Article 24(2) of the WA in the application. The references in the appellant's 29 December 2020 cover letter to regulation 16(3) and (4) of the 2016 Regulations were not references to the WA, still less to Article 24(2). Those paragraphs provide:
- “(3) The criteria in this paragraph are that
- (a) any of the person's parents ("PP") is an EEA national who resides or has resided in United Kingdom;
- (b) both the person and PP reside or have resided in the United Kingdom at the same time and during such a period of residence, PP has been a worker in the United Kingdom; and
- (c) the person is in education in the United Kingdom.
- (4) The criteria in this paragraph are that—
- (a) the person is the primary carer of a person satisfying the criteria in paragraph (3) ("PPP");
- and
- (b) PPP would be unable to continue to be educated in the United Kingdom if the person left the United Kingdom for an indefinite period.”
34. Article 24(2), as may be seen from para. 15, above, takes a completely different textual form to regulation 16(3) and (4) of the 2016 Regulations. There is an air of unreality to the submission that, by relying on the latter, the appellant was, in substance, raising the former.
35. We also consider that, if, pursuant to *AK and IK*, reliance on a different category of the Immigration Rules based on the same facts is a new matter, it follows that reliance on an entirely different legal instrument is likely to be a new matter.
36. Secondly, the provisions of the 2016 Regulations referred to in the 29 December 2020 letter are several steps removed from Article 24(2). It is difficult to see how the Secretary of State could reasonably be expected to understand that the appellant was, in fact, advancing an Article 24(2) claim without mentioning it, in these circumstances. Regulation 16(3) and (4) of the 2016 Regulations may be traced back to regulation 15A(3) and (4) of the 2006 Regulations (see the Table of Equivalences at para. 1(3) of Schedule 7 to the 2016 Regulations). Regulation 15A(3) and (4) of the 2006 Regulations were inserted by the Immigration (European Economic Area) (Amendment) Regulations 2012 (SI 2012/1547), the Explanatory Note for which explains that those

amendments were made in order to implement the decisions of the Court of Justice in *Ibrahim* and *Teixeira*. Thus the matter purportedly raised by the appellant in her application would have required the Secretary of State to trace the provisions of the 2016 Regulations mentioned in the 29 December 2020 letter back to the 2006 predecessor Regulations, identify the 2012 amending instrument which inserted regulation 15A(3) and (4) into those Regulations, and identify that the appellant was seeking to rely on an *Ibrahim* and *Teixeira* matter. In turn, the Secretary of State would have had to identify that this was, in fact, a reference to Article 24(2), such that, without mentioning it, the appellant had invited the Secretary of State to grant her application on that basis. It would be wholly unreasonable and unrealistic to expect the Secretary of State to infer those omitted details.

37. Thirdly, the appellant applied using the form for applications as a Zambrano carer. The details she gave in the completed application form pertained to Zambrano considerations, rather than the factors going to an assessment under Article 24(2) or the EUSS provisions giving effect to Article 24(2). See Section 5 of the form, concerning her caring responsibilities for O, and Section 6, concerning why O would be unable to continue to reside in the UK in the event that she, the appellant, were required to leave. Reliance was placed on O being a British citizen and not on her being the direct descendant of an EU worker. The application form relied on a Zambrano right to reside, not an Article 24(2) assessment. Although the covering letter set out a factual matrix which might have given rise to a derivative right under the 2006 Regulations and 2016 Regulations, no reliance was placed on the WA. The covering letter set out the appellant's case based on Appendix EU to the Immigration Rules and made no mention of the WA at all; likewise the appellant's skeleton argument before the First-tier Tribunal.
38. Fourthly, the application was submitted on the premise that the appellant was entitled to settled status. Settled status is the terminology of the EUSS, not the WA. While the WA makes some provision for the right of permanent residence to be enjoyed by some beneficiaries, the right is not extended to Article 24(2) beneficiaries. An Article 24(2) right is precarious, as its continuing validity is conditional upon the child or person in education continuing to be "in education". The right could come to an end if a child leaves education prematurely.
39. Drawing this analysis together, we conclude that the Article 24(2) matter had not been sufficiently relied upon by the appellant in the course of the application to the Secretary of State for it to be regarded as having been "considered" by the Secretary of State in the context of the decision appealed against for the purposes of regulation 9(6)(b)(i). It was simply too far removed from the matters raised in the application to merit a conclusion that it had been "considered" by the Secretary of State. It was a "new matter".
40. Mr Deller confirmed that the Secretary of State did not consent to the new matter being considered by the Upper Tribunal. It follows that we do not have the jurisdiction to make findings on the new matter, and the sole basis upon which the appellant seeks to challenge the Secretary of State's decision to refuse her EUSS application has fallen away. We therefore remake the appeal by dismissing it.

Article 24 considered in the alternative

41. Mr Jafferji invited us to determine the “new matter” issue as a preliminary issue so that the appellant could bring an application for judicial review of were we to conclude that issue against the appellant (as we have done). We decline to adjourn. First, we consider that it is appropriate to address the Article 24(2) submissions in the alternative, having heard full submissions on the point from both parties. Secondly, for the reasons we set out below, we have concluded that the Article 24(2) point is without merit, such that the delay caused by adjourning to enable the appellant to apply to bring judicial review proceedings would be inconsistent with the overriding objective, which includes avoiding delay, so far as is compatible with a proper consideration of the issues. This matter was the subject of a decision of the First-tier Tribunal dated 10 March 2022. Further delay would be contrary to the overriding objective.

Secretary of State’s decision not in breach of any right of the appellant under Article 24(2)

42. Mr Jafferji’s Article 24(2) submissions are as follows. O is a “direct descendent” of an EEA worker, Ms Drame, her former step-mother. O is in education in the UK. Article 24(2) entitles O’s primary carer, the appellant, to a right to reside while O is in education. It does not matter that O is now a British citizen. She should not be disadvantaged on account of her integration in the UK, as the former step-child of an EEA national exercising Treaty Rights. Pursuant to *Baumbast v Secretary of State for the Home Department (Case C-413/99)* [2003] ICR 1347, as expounded in *Ibrahim* and *Teixeira*, O is entitled to complete her education under the “best possible conditions” (see *Ibrahim* at paras 31 and 55). The Article 8-based limited leave to remain held by the appellant is insufficient for that purpose. It is time limited, subject to restrictive conditions, and a fee is charged for an application. It does not lead to settlement on the same basis that EUSS-based leave could. Article 24(2)-based leave under the EUSS would have the beneficial characteristics to which *Baumbast* held O and the appellant are entitled.

43. Mr Deller submitted that the core characteristic of an Article 24(2) derivative right is the compulsion to leave. Since the appellant holds Article 8 leave under Appendix FM that question simply does not arise. She cannot meet the Article 24(2) criteria.

44. We will assume for present purposes that O is a “direct descendent” of a worker, since the term includes step-children (see *Alarape and anr (Article 12, EC Reg 1612/68) Nigeria* [2011] UKUT 413 (IAC)), and it is unlikely that O’s father’s separation from Ms Drame could deprive O of that status. We also assume for the purposes of the analysis that follows that O’s acquisition of British citizenship does not deprive the appellant of the benefits of any derivative rights to which she may otherwise be entitled as O’s primary carer.

45. We have concluded that the Secretary of State’s decision did not breach any rights the appellant enjoyed under Article 24(2) for the reasons set out below.

46. First, the appellant already holds leave. Her removal is not in issue. Not only does she hold limited leave to remain under Appendix FM until December 2024, but the Secretary of State also observed in the refusal decision that a further application under Appendix FM would have a realistic prospect of success. That is sufficient to address the mischief at which Article 24(2) is targeted.

47. As Andrews LJ held in *Velaj* at para. 33,

“...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.”

48. Mr Jafferji submitted that the above extract was *obiter*, and made without consideration of the key holdings in *Baumbast*, *Ibrahim* and *Teixeira*, concerning residence in the host state under the “best possible conditions”. We respectfully disagree. Her Ladyship referred to those cases in detail at paras 23, 24, 33, 38 and 50. There is simply no basis for us to entertain Mr Jafferji’s bold submission that she did not have the full circumstances of those authorities firmly in mind. The consistency of approach in *Ibrahim*, *Teixeira* and other derivative rights cases was a central issue in the case. The para. 33 observations were not *obiter*.
49. In any event, in *Baumbast*, *Ibrahim* and *Teixeira*, the reference to the child, or direct descendent of a worker, residing under “the best possible conditions” is a proxy for a right to reside. Such a right to reside was necessary to guarantee the effectiveness of the directly effective right to access education conferred upon the children of workers by Article 12 of Regulation 1612/68. It did not convey any expectation of permanence, and did not count towards the acquisition of the right of permanent residence under Directive 2004/38/EC: see *Alarape and Tijani* (Case C-529/11) [2013] 1 W.L.R. 2883. That is consistent with an Article 24(2) right to reside not being included in the class of residence rights under the WA that lead to the acquisition of permanent residence.
50. Secondly, we consider that the appellant’s present Appendix FM leave (and the realistic prospect the Secretary of State considers that she has of a future application being successful) is capable of providing a *more advantageous* immigration status than Article 24(2). As we have observed above, Article 24(2) is conditional upon the child in question remaining “in education”. While there is absolutely no basis to conclude on the material before us that O would do anything other than continue the good progress she is making at school, at a general level it remains possible that an Article 24(2) child could leave education before reaching the age of majority, thereby leading to any Article 24(2) right enjoyed by the child’s carer potentially falling away. By contrast, the continued applicability of the appellant’s Appendix FM leave is not conditional on the actions of a child but continues until at least the child’s age of majority (assuming that the parent/child relationship subsists).
51. The remaining submissions made by Mr Jafferji focussed on the conditions to which the appellant’s Appendix FM leave is subject. We are not persuaded by these submissions. It is open to the appellant to apply for a fee waiver in respect of the fee, as she has done in the past: see para. 19 of her statement dated 15 September 2023. The appellant also said in her statement that she is unable to access student finance on the same basis as a home student. In our judgment, that is not a matter for these proceedings. Article 24(2) is silent as to the ability of its beneficiaries to access student finance and, pursuant to *Velaj* at para. 33, the litmus test for determining a breach of the provision is whether O would be compelled to leave. In that regard, given the appellant’s Appendix FM leave, and her accepted realistic prospect of securing a renewal, there is presently no risk of the appellant’s removal.
52. Even had the Secretary of State consented to us considering the Article 24(2) matter, therefore, we would have dismissed the appeal in any event.

Notice of Decision

The decision of First-tier Tribunal Judge Colvin allowing the appellant's appeal involved the making of an error of law and is set aside.

We remake the decision, dismissing the appeal.

Stephen H Smith

Judge of the Upper Tribunal
Immigration and Asylum Chamber

13 March 2024

ANNEX: ERROR OF LAW DECISION



**Upper Tribunal
(Immigration and Asylum Chamber)**

THE IMMIGRATION ACTS

**Heard at Field House, London
On Friday 28 October 2022**

Determination promulgated
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Before

**UPPER TRIBUNAL JUDGE SMITH
DEPUTY UPPER TRIBUNAL JUDGE COTTON**

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

IYABODE ADEOLA AYOOLA

Respondent

Representation:

For the Appellant: Mr S Kotas, Senior Home Office Presenting Officer

For the Respondent: Mr E Thompson, Counsel instructed on a direct access basis

DECISION AND DIRECTIONS

1. This is an appeal by the Secretary of State. For ease of reference, we refer to the parties as they were in the First-tier Tribunal. The Respondent appeals against the decision of First-tier Tribunal Judge Colvin promulgated on 10 March 2022 (“the Decision”) allowing the Appellant’s appeal against the Respondent’s decision dated 10 May 2021 refusing her application under the EU Settlement Scheme (“EUSS”) as a person with a “Zambrano” right to reside.
2. The Appellant is a national of Nigeria. She came to the UK in July 2005 as a visitor. Her daughter [O] was born on 24 April 2009. The Appellant was granted leave to remain in November 2016 as a person with sole responsibility for [O] who became a British citizen in July 2015.

3. The Respondent accepted that the Appellant is the primary carer of a British citizen child. The issue was said by Judge Colvin to be “whether the appellant should have made an application under the Immigration Rules or Article 8” following the Court of Appeal’s judgment in Akinsanya v Secretary of State for the Home Department [2022] EWCA Civ 37 (“Akinsanya”) (see [3] of the Decision). The Respondent’s case in very broad summary is that the Appellant would not be required to leave the UK as she had leave to remain at the time of the application and the “specified date” under the EUSS. Accordingly, she was not entitled to a “Zambrano” right to reside.
4. At [10] of the Decision, the Judge asserted that “[t]he core issue in this appeal is whether the respondent has misdirected herself as to the meaning and effect of EEA Regulation 16(5)(c)” (that is to say paragraph 16(5)(c) of the Immigration (European Economic Area) Regulations 2016 (“the EEA Regulations”). Having set out her reasoning in that paragraph, [11] and [12] of the Decision, she concluded that she had “reached the conclusion that the current interpretation of Regulation 16(5)(c) of the EEA Regulations by the respondent as set out in the refusal letter is a misdirection for all the reasons given above” ([13] of the Decision). She went on to say that, applying that regulation as she considered it should be interpreted “the appellant has a derivative right of residence notwithstanding that she has not made an application under Appendix FM of the Immigration Rules or an Article 8 claim”.
5. The Respondent’s grounds are brief and therefore bear setting out in full:

“The Judge of the First-tier Tribunal has made a material error of law in the Determination. The Tribunal has misconstrued the combined effect of the decision of the Administrative Court in Akinsanya and the Court of Appeal’s dismissal of the Secretary of State’s Appeal. Although the latter Court held – as Judge Colvin notes – that the unambiguous wording of Regulation 16(7) defeated the argument that a right of residence was not held by a person with limited leave on a different basis, it upheld the Secretary of State’s ground that the Ruiz Zambrano right was one of last resort, which had underpinned the policy and the Scheme rules. Specifically the Court did not declare the impugned rule unlawful or indicate that only a rule with the opposite effect could exist. Accordingly the only available statutory ground of appeal available absent any rights under the Withdrawal Agreement – that the decision was not in accordance with Scheme rules – is currently inchoate pending the post-Akinsanya review of the relevant rules. Accordingly the appeal has been allowed on no clear statutory basis.”
6. Permission to appeal was granted by First-tier Tribunal Judge Seelhoff on 27 May 2022 in the following terms so far as relevant:

“... 2. The grounds assert that the Judge erred in that, although there are issues regarding the approach to take to Zambrano cases, she did not identify the legal basis on which the appeal was allowed.
3. The judge has not identified which provisions of the Immigration Citizenship Rights Appeals (EU Exit) Regulations 2020 form the basis for allowing the appeal. Although there are problems regarding the approach to Zambrano cases the Rules have not been set aside and the

judge has not articulated if and how the Withdrawal Agreement might apply.

4. The grounds are arguable.”

7. The matter comes before us to decide whether the Decision contains a material error of law. If we find it does, we then have to decide whether to set aside the Decision. If we do so, it is then necessary to consider whether to re-make the decision in this Tribunal or remit the appeal to the First-tier Tribunal for that purpose.
8. We had before us a core bundle of documents relating to the appeal as well as the Respondent’s and Appellant’s bundle before the First-tier Tribunal. We do not need to refer to the documents as the issue is one of pure law.
9. Having heard submissions from Mr Kotas and Mr Thompson, we indicated that we would reserve our decision and issue that in writing which we now turn to do.

DISCUSSION AND CONCLUSIONS

10. We begin our consideration by setting out the Judge’s reasons for allowing the appeal as follows:

“10. The core issue in this appeal is whether the respondent has misdirected herself as to the meaning and effect of EEA Regulation 16(5) (c). The Home Office Guidance, *EU Settlement Scheme: person with a Zambrano right to reside* (version 4.0 of 27 April 2021) sets out this interpretation at p.13:

‘A Zambrano right to reside is only available to a person who has no other means to remain lawfully in the UK as the primary carer of a dependent British citizen, or as a dependent of that primary carer.

As set out in sub-paragraph (b) of the definition of ‘a person with a Zambrano right to reside’ in Annex 1 to Appendix EU, an applicant cannot meet that definition if they have (or, as the case may be for the relevant period had) leave to enter or remain in the UK, unless this was granted under Appendix EU.

An applicant cannot therefore meet that definition if they have (or, as the case may be, for the relevant period had) leave to enter or remain granted under another part of the Immigration Rules (such as Appendix FM) or on a discretionary basis outside the Rules.’

11. It is submitted that this Guidance is incorrect and that there is no EU law requiring the respondent to deny that a person who may be eligible for leave to remain under a provision of the Immigration Rules cannot also be given a right to reside by the EEA Regulations. In particular, it is submitted that the respondent in her Guidance is relying on the Court of Appeal decision in this case of *Patel* whereas it is the Supreme Court decision at *Patel v SSHD 2020 1 WLR 228* that must now be followed. The Supreme Court sets out the criteria that an applicant must meet and this does not include the criteria that a prior application must have been made under the immigration rules.

12. It is further submitted that in a consolidated group of appeals before First-tier Tribunal Judge Neville heard on 13 December 2019 and 17 January 2020 it was held that a person has a derivative right of

residence notwithstanding that he or she has not yet made an application under the Immigration Rules or pursuant to Article 8. Further, the recent Court of Appeal decision in *Akinsanya* makes clear that the plain meaning of the words in Regulation 16 does not preclude an applicant who has been granted a limited leave to remain.

Conclusion

13. I have been assisted by the submissions made on behalf of the appellant as referred to above and have reached the conclusion that the current interpretation of Regulation 16(5)(c) of the EEA Regulations by the respondent as set out in the refusal letter is a misdirection for all the reasons given above. I am satisfied that the correct interpretation of Regulation 16(5)(c) is that the appellant has a derivative right of residence notwithstanding that she has not made an application under Appendix FM of the Immigration Rules or an Article 8 claim. As it is accepted that the appellant is the primary carer of her daughter, a British citizen, I am satisfied that she is a person with a Zambrano right to reside in relation to the EU Settlement Scheme.”

11. Before considering whether that analysis contains any error of law, it is necessary to set out what lies behind this appeal both in terms of fact and law. Dealing first with the facts, the Appellant was granted leave to remain on the basis of Article 8 ECHR because she has sole care of her British citizen daughter. She was granted leave to remain (on a 10-year route) in November 2016. That leave continued until 12 May 2021. Therefore, both at the time of the EUSS application and on the specified date under the EUSS (11pm on 31 December 2020) the Appellant had extant leave to remain. True it is that this leave came to an end shortly after the decision under appeal, but it remained open to the Appellant to extend that leave. In fact, Mr Kotas indicated that the Appellant now has further leave until 28 December 2024. That is not however something which can have a bearing on whether the Judge made an error of law in her legal analysis.
12. The Appellant’s appeal is under the Immigration Citizens Rights Appeals (EU Exit) Regulations 2020 (as the Judge noted at [8] of the Decision). Under those Regulations, the only ground of appeal is that the decision under appeal breaches either the Immigration Rules (“the Rules”) under which the decision was made or the withdrawal Agreement between the UK and EU (“Withdrawal Agreement”). We did not understand the Judge to be considering any issue under the Withdrawal Agreement. She does not mention it. Accordingly, her conclusion can only be that the decision was not in accordance with the Rules under which it was made.
13. That then brings us on to the relevant Rules. We did not discern any disagreement between the parties as to the Rules which apply. Those are to be found in Appendix EU to the Rules (“Appendix EU”).
14. The Respondent refused the Appellant’s application because she did not meet the definition of a “person with a Zambrano right to reside” in Annex 1 to Appendix EU. That definition paragraph reads as follows so far as relevant:

“a person who has satisfied the Secretary of State..., that, by the specified date, they are (and for the relevant period have been), or (as

the case may be) for the relevant period in which they rely on having been a person with a Zambrano right to reside (before they then became a person who had a derivative or Zambrano right to reside) they were:

(a) resident for a continuous qualifying period in the UK with a derivative right to reside by virtue of regulation 16(1) of the EEA Regulations, by satisfying:

(i) the criterion in paragraph (1)(a) of that regulation;

and

(ii) the criteria in:

(aa) paragraph (5) of regulation 16 of the EEA Regulations;... or

...; and

(b) without leave to enter or remain in the UK, unless this was granted under this Appendix.”

15. As is there made clear, the definition turns largely on paragraph 16 of the EEA Regulations. Paragraph 16 of the EEA Regulations (“Regulation 16”) reads as follows so far as relevant to our consideration:

“**16.**—(1) A person has a derivative right to reside during any period in which the person—

(a) is not an exempt person; and

(b) satisfies each of the criteria in one or more of paragraphs (2) to (6).

(2) ...

(3) ...

(4) ...

(5) The criteria in this paragraph are that—

(a) the person is the primary carer of a British citizen (“BC”);

(b) BC is residing in the United Kingdom; and

(c) BC would be unable to reside in the United Kingdom or in another EEA State if the person left the United Kingdom for an indefinite period.

(6) ...

(7) In this regulation—

(a)...;

(b)...;

(c) an “exempt person” is a person—

(i) who has a right to reside under another provision of these Regulations;

(ii) who has the right of abode under section 2 of the 1971 Act;

(iii) to whom section 8 of the 1971 Act, or an order made under subsection (2) of that section, applies; or

(iv) who has indefinite leave to enter or remain in the United Kingdom.

(8) A person is the “primary carer” of another person (“AP”) if—

(a) the person is a direct relative or a legal guardian of AP; and

(b) either—

(i) the person has primary responsibility for AP’s care; or

(ii) shares equally the responsibility for AP’s care with one other person who is not an exempt person.”

16. There was disagreement between Mr Kotas and Mr Thompson as to the case-law which applies in a case such as this. We have therefore reviewed the cases which the parties submitted were relevant and those which Judge Colvin considered were relevant.

17. We begin with the case of Akinsanya. In the Administrative Court ([2021] EWHC 1535 (Admin)), Mostyn J held that, when including within the

definition of “a person with a Zambrano right to reside” in Appendix EU the requirement that a person should not have leave to enter or remain in the UK, the Secretary of State had erred both under EU law and in her understanding of Regulation 16. The Judge concluded that both EU law and Regulation 16 would only act as a barrier to a Zambrano right to reside where an individual had indefinite leave to remain.

18. The Secretary of State appealed Mostyn J’s judgment which came before the Court of Appeal on 7 December 2021. By its judgment dated 25 January 2022 ([2022] EWCA Civ 37) the Court allowed the Secretary of State’s appeal so far as that concerned the position under EU law ([57] of the judgment). However, the Court went on to point out that, when framing the definition in Annex 1 to Appendix EU, the Secretary of State may have intended to reflect the pre-existing position under Regulation 16. Accordingly, the Court went on to consider what was the pre-existing position under Regulation 16. This argument turned on the distinction between the reference to “indefinite leave” in the definition under Regulation 16(7) and the reference to “leave to enter or remain” in the Annex 1 definition. As the Court pointed out, it was always open to the Secretary of State to go beyond what EU law requires when formulating the position in domestic law. If that is what she had intended when drafting Regulation 16(7) then the definition in Appendix EU would not reflect the pre-existing position. The Court concluded at [66] of the judgment that “whatever the contextual considerations, the language of regulation 16(7)(c)(iv) is simply too clear to allow it to be construed as covering persons with limited leave to remain”. The conclusion in Akinsanya therefore turned on the Court’s interpretation of Regulation 16(7).
19. Broadly, the outcome of Akinsanya was that the Secretary of State agreed to reconsider the relevant provisions of Appendix EU and agreed that she would not determine any applications under Appendix EU of those claiming a Zambrano right to reside until that reconsideration was complete. That agreement could have no application to the Appellant’s case as her application had by then already been decided. The Court of Appeal judgment led to a declaration that “[t]he Secretary of State erred in law in her understanding of [Regulation 16] when providing in Annex 1 to Appendix EU... that the definition of a ‘person with a Zambrano right to reside’ includes paragraph (b) ‘a personwithout leave to enter or remain in the UK, unless this was granted under this Appendix’”. For completeness, we were told by Mr Kotas that the Secretary of State has completed her reconsideration but has decided that the definition in Appendix EU should not be amended.
20. Mr Kotas drew our attention to the case of Velaj v Secretary of State for the Home Department [2022] EWCA Civ 767 (“Velaj”). Although Velaj could not have been before Judge Colvin as the judgment post-dates the Decision, we consider that it is appropriate to have regard to Velaj as it is potentially relevant both to Akinsanya and to the judgment of the Supreme Court in Patel v Secretary of State for the Home Department [2019] UKSC 59 (“Patel”) upon which reliance was placed by the Appellant in this case and by Judge Colvin in her reasoning.

21. Although we accept Mr Thompson’s submission that the case of Velaj is different on its facts to Akinsanya, what is important is the Court’s consideration of the central issue set out at [35] of the judgment whether “on the true construction of Regulation 16(5) of the 2016 Regulations, he acquired rights under domestic law which go further than the minimum rights guaranteed to *Zambrano* carers”. It will be recalled that the Court of Appeal in Akinsanya considered that the Secretary of State had potentially intended to go further in drafting Regulation 16 than EU law required. This led to the outcome that the Secretary of State had (potentially at least) erred in her understanding of Regulation 16 when enacting Appendix EU. However, as we have already noted, the outcome turned on the Court’s interpretation of Regulation 16(7).
22. We accept as the Court of Appeal indicated at [45] when recording the Secretary of State’s submission, that Velaj was concerned with a different provision of Regulation 16 which was not so clearly worded as that with which the Court was concerned in Akinsanya. However, what is said about the implications of the Akinsanya judgment at [57] to [70] of Velaj is instructive for our purposes:

“57. This Court found for the SSHD on the first issue. After analysing the *Zambrano* jurisprudence...Underhill LJ concluded that as a matter of EU law, a *Zambrano* right is a right of last resort which does not arise if the third-country national carer otherwise enjoys a right under domestic law to reside in the member state in question.

58. However, the conclusion that the definition in Annex 1 to Appendix EU *did* accurately reflect the *Zambrano* jurisprudence was not the end of the matter. As Underhill LJ explained at [57] it was unclear whether in framing that definition the SSHD intended to restrict rights under the EUSS to people whose rights to reside at the relevant dates directly depended on *Zambrano*, or whether her intention was to extend those rights to ‘all those carers whose removal would result in an EU citizen dependant having to leave the UK’. The Court could not, and was not required to, explore the SSHD’s purpose in framing the definition because it accepted Ms Akinsanya’s case on the construction of Regulation 16.

59. It is important to understand what that case was. It is set out at [59] of the of the judgment in Akinsanya:

‘the claimant’s case is that limb (b) of the Annex 1 definition is inconsistent with the definition of ‘exempt person’ in regulation 16 (7). Head (iv) of that definition covers a person ‘who has indefinite leave to enter or remain in the United Kingdom’; but it says nothing about persons with only limited leave. The claimant contends that persons with limited leave are accordingly *not exempt persons* and by virtue of paragraph 1(b) are entitled to a derivative right to reside, alongside their leave to remain, *so long as they satisfy the criteria under one of paragraphs (2)–(6)*.’
[Emphasis added].

60. Thus Ms Akinsanya’s case on Regulation 16 was entirely focused upon Regulation 16(7). She accepted that if she was not exempt, her entitlement to a derivative right to reside would depend on her being able to satisfy the criteria in Regulation 16(5). However the question whether she could or could not do so if she had leave to remain under

some other provision of domestic law did not directly arise, and it was not something which this Court considered on her appeal.

61. Ms Akinsanya had already satisfied those criteria and obtained her derivative rights of residence as a Zambrano carer *before* she was granted limited leave to remain. She met the requirements of Regulation 16(5)(c) or its predecessor, Regulation 15A(4A), at the time when she was granted her derivative right of residence. The only question in her case would be whether the grant of limited leave to remain somehow superseded her *Zambrano* right or meant that she was no longer entitled to it – she was contending that it did not because the two rights could co-exist. It was common ground that if she won on either of her grounds of appeal, the impugned decision to refuse her claim under the EUSS (on the basis that she did not qualify) would have to be reconsidered by the SSHD.

62. As Underhill LJ pointed out at [60] the claimant's case was clearly right on any natural reading of Regulation 16(7), and it also reflected the understanding of the Home Office at the time when the Amendment Regulations, which introduced the concept of 'exempt persons' were made. Guidance issued to UK Border Agency staff in 2012 stated that: 'where someone has limited leave (and so is not listed as one of the exempt categories above) and can demonstrate that they meet all other requirements of regulation 15A, then they can acquire a derivative right of residence.'

63. The focus of the argument thereafter was on whether Regulation 16(7) should be given a construction that was different from its ordinary and natural meaning. Mr Blundell submitted that the SSHD in making the Regulations had not intended to accord rights to carers of EU citizen children that went beyond their entitlement in EU law and that Regulation 16(7) should therefore be construed in such a way as to avoid that result. That submission was rejected.

64. Whilst accepting the likelihood that in making the relevant parts of Regulation 16 the SSHD intended, in a broad sense, to do no more than to implement the minimum requirements of *Zambrano*, Underhill LJ said that this begged further questions. The SSHD may have misunderstood what those requirements were, since *lida* and *A* had not been decided when the Amendment Regulations were made in 2012.

Alternatively,

'it may be that the Secretary of State took the view that allowing a *Zambrano* right to reside to those who already had limited leave to remain was more straightforward than having to consider whether particular forms of leave to remain, and in particular the conditions about working to which they might be subject, were fully consistent with *Zambrano* rights.'

In the end, however, he said that the short answer was that the language of Regulation 16(7)(c)(iv) [which referred specifically to persons with ILR] was simply too clear to allow it to be construed as covering persons with limited leave to remain. That was the *ratio* of the decision in *Akinsanya*.

65. In *Akinsanya* this court was not required to consider, and did not consider, the requirements of Regulation 16(5) and how 16(5)(c) might be satisfied in practice by a primary carer who had limited leave to remain. The only issue it had to determine was whether Regulation 16(7) acted as a threshold barrier precluding someone like Ms Akinsanya from asserting that she had a derivative right of residence under Regulation

16(5) (or its predecessor) which had survived the subsequent grant to her of limited leave to remain.

66. The Court in *Akinsanya* did not have the benefit of hearing the arguments that were advanced in the present case. Those arguments would have had no bearing on the point of construction of Regulation 16(7) which determined the outcome. In those circumstances, even if I had not been a member of the constitution in that case, and able to gainsay the suggestion from my own personal knowledge of what was and was not considered, it would have been impossible to draw the inference that the Court must have interpreted Regulation 16(5)(c) in a particular way in order to reach the conclusion that it did.

67. Mr Cox submitted that the criteria for the grant of the derivative right could not be met by a sole primary carer with limited leave to remain if the words ‘if the person left the UK for an indefinite period’ in Regulation 16(5)(c) were not construed in the manner for which he contended, i.e. as a purely hypothetical premise. If a carer already had limited leave to remain they would not, in fact, leave the UK for an indefinite period and the child would not be compelled to leave with them.

68. Although I see the force of that argument, the immigration status of a person with limited leave to remain is precarious; leave is likely to be subject to conditions and it is liable to be withdrawn or truncated. It is possible to conceive of situations in which the conditions attached to a limited leave to remain are such as to make it impossible in practice for the primary carer to remain in the UK and look after the child.

69. I can also envisage a *Zambrano* carer whose limited leave to remain is due to expire making an application under Regulation 16(5)(c) and succeeding on the basis that they would have to leave the UK as soon as their limited leave expired and the child would have to go with them. In such a case if the decision-maker asks ‘what will happen to the child in the event that the primary carer leaves the UK for an indefinite period?’ they will not be positing a completely unrealistic scenario. In any event, the practical difficulties of someone with limited leave to remain being able to satisfy the requirements of Regulation 16(5)(c) would not be a justification for construing those requirements in a manner which was clearly unintended.

70. Accordingly there is nothing in the decision in *Akinsanya* that precludes Regulation 16(5)(c) from being construed as I consider it should be construed.”

23. As Mr Kotas pointed out, therefore, *Akinsanya* was squarely concerned with the interpretation of Regulation 16(7) whereas *Velaj* was concerned with Regulation 16(5) which, as Judge Colvin noted at [10] of the Decision was the crucial issue in this case.
24. We also record that Mr Thompson accepted that this was not an “*Akinsanya* case” although that was for different reasons. He said that *Akinsanya* had no application to this case because, in *Akinsanya*, the appellant had some leave to remain whereas at the date of the Respondent’s decision at least, the Appellant had very little leave to remain (about eleven days).
25. That factor led to Mr Thompson submitting that the Respondent had erred in relation to her own policy as that indicated that if an applicant had less

than 28 days' leave remaining, that individual would have a Zambrano right to reside. We do not have to consider that submission as it formed no part of Judge Colvin's conclusion. We record however Mr Kotas' reply in that regard taken from the decision letter that the Appellant had failed to show that she would not be entitled to further leave to remain (as indeed she was later granted). He said that the Home Office policy in this regard precluded the Secretary of State from refusing a Zambrano right to reside if a person made an application close to the expiry of their leave. In this case, the application was made several months before expiry of the Appellant's leave (on 29 December 2020).

26. We do not entirely understand this submission since, it seems to us that, if an individual has any extant leave at the time of making an in-time application (at least where that is leave within the Rules), that leave would continue by virtue of section 3C Immigration Act 1971. We do not however have to consider that issue at this juncture. As we say, Judge Colvin did not indicate that she was allowing the appeal by reference to any policy of the Respondent.
27. In addition to that point, Mr Thompson relied on Patel. Judge Colvin referred in this regard to the Appellant's submission that the Respondent had relied on the Court of Appeal's judgment in that case rather than the Supreme Court's judgment. It is therefore necessary to consider the effect of Patel.
28. As Mr Thompson pointed out, Patel was concerned with the factors relevant to a Zambrano right, in particular what was meant by "unable to reside" in the EEA Regulations 2006. The case of Patel involved two conjoined appeals. Mr Patel was the carer of elderly and infirm British citizen parents and so his case has no relevance. Mr Shah whose appeal was considered alongside that of Mr Patel was the father of a British citizen child but his wife, the child's mother, also continued to live with them. Accordingly, the Court was considering the position of joint primary carers. As such, the position of Mr Shah is factually different from the Appellant's case. She is her child's sole carer. However, Mr Thompson prayed in aid the principles which the Supreme Court said applied to the issue whether a child would be compelled to leave the UK if his or her primary carer had to leave. Those are set out succinctly at [30] to [32] of the judgment (where the Supreme Court was considering the error made by the Court of Appeal) as follows:

"30. ...The overarching question is whether the son would be compelled to leave by reason of his relationship of dependency with his father. In answering that question, the court is required to take account, 'in the best interests of the child concerned, of all the specific circumstances, including the age of the child, the child's physical and emotional development, the extent of his emotional ties both to the Union citizen parent and to the third-country national parent, and the risks which separation from the latter might entail for that child's equilibrium' (*Chavez-Vilchez*, para 71). The test of compulsion is thus a practical test to be applied to the actual facts and not to a theoretical set of facts. As explained in para 28 of this judgment, on the FTT's findings, the son would be compelled to leave with his father, who was his primary carer. That was sufficient compulsion for the purposes of

the *Zambrano* test. There is an obvious difference between this situation of compulsion on the child and impermissible reliance on the right to respect for family life or on the desirability of keeping the family together as a ground for obtaining a derivative residence card. It follows that the Court of Appeal was wrong in this case to bring the question of the mother's choice into the assessment of compulsion.

31. It is likewise not relevant, contrary to the submission of Mr Blundell, that, had Mrs Shah remained in the UK with the child, Mr Shah could have had no derivative right of residence. On the facts as found by the FTT, the relevant relationship of dependency with Mr Shah was made out and that was not going to happen.

32. In those circumstances I consider that the Court of Appeal made an error of law when it treated as determinative what could happen to Mr and Mrs Shah's son if the father left the UK, rather than what the FTT had found would happen in that event. In other words, it was not open in law to the Court of Appeal to hold that Mr Shah had no derivative right of residence because the mother could remain with the child in the UK even if the father was removed."

29. Whilst we readily accept that those are the principles which apply to the question whether Regulation 16(5) is met when considered as a whole, as Mr Kotas submitted and we accept, it says nothing about the issue which arises under Regulation 16(5)(c) when considered with Regulation 16(7), still less how that all impacts on the definition in Appendix EU. The issue is whether the primary carer will be compelled to leave. The Respondent's position is that he or she will not be required to do so if he or she has or is entitled to leave to remain based on Article 8 ECHR. As the Supreme Court itself pointed out in Patel, if the Tribunal had found that Mrs Shah would have remained in the UK with the child, Mr Shah could not have succeeded. The issue whether the primary carer will be compelled to leave is largely one of fact but may also be impacted upon by law. That then brings in as relevant the Akinsanya issue as explained in Velaj. The Secretary of State has now indicated, in relation to the issue which arose in Akinsanya, that she intended and intends to maintain the definition in Appendix EU whereby a *Zambrano* carer is precluded from relying on a *Zambrano* right if he or she has limited leave to enter and remain.
30. Ultimately, the only issue which we have to consider at this stage is whether Judge Colvin erred in law when reaching her decision allowing the appeal. As Judge Seelhoff pointed out when granting permission to appeal, it is far from clear under which provision the Judge intended to allow the appeal. If the Judge intended to indicate by [11] of the Decision that the Appellant had a right in EU law to which the Respondent's guidance ran contrary, she erred in law. The Court of Appeal in Akinsanya was clear that no such right exists. Nor do we understand how or why Judge Colvin considered Patel to be relevant to this issue. As we have pointed out, no such issue arose in Patel (or more accurately the appeal of Mr Shah).
31. The Judge could only allow the appeal on the basis that the Respondent's decision was not in accordance with the Rules in relation to the EUSS or not in accordance with the Withdrawal Agreement. The Withdrawal Agreement was not mentioned and therefore the Judge could only have thought that she was allowing the appeal on the basis that the decision was not in accordance with the Rules. However, on the face of the Rules,

the decision was clearly in accordance with them. The Court of Appeal in Akinsanya decided that the definition in Annex 1 to Appendix EU was (or might be) unlawful only because the Secretary of State may have misinterpreted the position under Regulation 16(7) of the EEA Regulations. The Secretary of State has now indicated that she is maintaining her position and the definition in Appendix EU.

32. The Judge also mentions at [12] of the Decision a consolidated group of appeals decided by another First-tier Tribunal Judge. We do not know what those are or were, since no reference is given. In any event, decisions of another First-tier Tribunal Judge are not binding. Without any citation of those cases or reasoning as to how those apply to the facts of this particular case, it is not possible to say how the decision in the consolidated appeals impacts on this case.
33. For all those reasons, we consider that the Judge has erred in law by failing to provide reasons for allowing the appeal and has erred in her understanding of the domestic law relating to the Zambrano right to reside in cases where the primary carer has an alternative basis of stay.
34. We do not go on to re-make the decision. Mr Thompson explained to us that the Appellant's child is also an EU citizen and may have rights which are relevant to the Appellant's basis of stay in the UK in that capacity. There was no consideration of that alternative basis of stay by Judge Colvin and we can find no evidence relating to it, but it is appropriate to allow the Appellant to re-argue her case including on that basis if she so wishes. We have therefore given directions below for further evidence to be filed and for a further hearing with written and oral submissions to be made.

DECISION

The Decision of First-tier Tribunal Judge Colvin promulgated on 10 March 2022 involves the making of errors of law. We therefore set aside the Decision. We make the following directions for a resumed hearing.

[Directions omitted]

Signed: L K Smith
Upper Tribunal Judge Smith

Dated: 21 November 2022