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Case No: CO/1870/2023; AC-2023-LON-001586
and CO/4846/2022; AC-2022-LON-003676

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 11/03/2024

Before:

Mr. Justice Eyre

- -

Between:

THE KING **on the application of** **(1) OLORUNFUNMILAYO OLUWASEUN AKINSANYA** **(2) NAOMI ANING-ADJEI**	**Claimants**
- and -	
SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Defendant**

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Simon Cox and **Michael Spencer** (instructed by **Hackney Community Law Centre**) for the **1st Claimant**
Benjamin Hawkin (instructed by **TNA Solicitors**) for the **2nd Claimant**

David Blundell KC, Julia Smyth, and **Natasha Jackson** (instructed by **the Government Legal Department**) for the **Defendant**

Hearing dates: 13th and 14th December 2023

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Approved Judgment

This judgment was handed down remotely at 10.00 am on 11th March 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Mr Justice Eyre:

Introduction.

1. The Claimants challenge decisions by the Defendant that they were not eligible for either indefinite or limited leave to remain under Appendix EU ("App EU") of the Immigration Rules.

2. Upon the departure of the United Kingdom from the European Union the Withdrawal Agreement had the effect that EU law[1] ceased to apply in the United Kingdom from 11.00pm on 31st December 2020.

3. Until then the effect of the provisions of EU law had been that persons known as *Zambrano* carers had a right to reside in the United Kingdom. In bald summary that was a right given under EU law to a person who was the carer of an EU citizen where the latter was also a citizen of the country where he or she was residing in circumstances where the absence of that right or the removal of the carer would mean that the EU citizen would have to leave the country in question. The right derives from the decision of the Court of Justice of the European Union ("the CJEU") in *Ruiz Zambrano v Office national de l'emploi* [2012] QB 265. The extent of that right is a matter of dispute between the parties and I will consider it further below.

4. App EU gave effect to the EU Settlement Scheme ("the EUSS") and made provision for certain categories of person to be entitled to leave to remain in this country following the United Kingdom's departure from the European Union. It is common ground that it was intended that App EU should provide a route whereby carers who had a *Zambrano* right to reside at the time the Withdrawal Agreement came into effect could obtain indefinite leave to remain (that is settled status) or limited leave to remain in the United Kingdom. There is a dispute as to the extent to which it achieved that objective. The definition provisions of App EU have the effect that those who have leave to remain by virtue of another provision are not entitled to leave to remain under App EU. The combination of the terms of App EU and the Defendant's guidance to caseworkers, "EU Settlement Scheme: person with a Zambrano right to reside" ("the Guidance") (version 5 of which was issued on 13th June 2022 with version 6 being issued on 14th December 2022 and the current version, version 8, on 15th August 2023) has the effect that those who would have a real prospect of obtaining leave to remain under another provision if they were to apply for it are also excluded from obtaining leave to remain under App EU.

5. The Claimants both applied to be granted indefinite leave to remain under App EU. At the time of their applications and on the date when the Withdrawal Agreement came into effect each of them had leave to remain which had been granted under Appendix FM ("App FM") of the Immigration Rules. In each case their applications were refused. It is those refusals which are the subject of the current challenges.

6. The version of App EU in force at the time of the refusal of the First Claimant's application was that which had been introduced on 7th March 2019. The First Claimant had challenged the application of that earlier version to her. That challenge resulted in the decision of the Court of Appeal in *R (Akinsanya) v Secretary of State*

[1] I will use the term "EU law" to describe the rights and obligations deriving from the various European treaties and from the decisions of the Court of Justice of the European Union and its predecessors.

for the Home Department [2022] EWCA Civ 37, [2022] 2 WLR 681. I will consider the effect of that decision further below but it led to a reconsideration of App EU. The current iteration of the annex to App EU was introduced on 18th October 2022.

7. As a consequence of orders made by Sir Duncan Ouseley, Lang J, and Hill J the matter was before me for a "rolled up hearing" in respect of both claims.

The Parties' Contentions in Summary.

8. For the First Claimant Mr Cox and Mr Spencer submitted that when seen in combination with the Guidance the reconsidered terms of App EU were still based on a misunderstanding as to who was and who was not to be seen as having a *Zambrano* right to reside. This was because it proceeded on the basis that those who had a real prospect of obtaining leave to remain on a different basis did not have such a right. The First Claimant says that this was a misunderstanding of the effect of the EU law which, when correctly understood, provided that only those who actually had leave to remain under another provision were outside the scope of *Zambrano*. She says that this misunderstanding is to be seen as having invalidated the reconsideration of App EU. The First Claimant submits that I should quash the refusal of her application on that basis. The First Claimant does not primarily seek the quashing of App EU: rather her principal objective is that the Defendant be required to reconsider the definition of a *Zambrano* carer in that appendix. She also says that I should order that without moving on then to consider the other grounds of challenge. In that regard the First Claimant says that it is not possible to identify the approach which the Defendant would have taken if her[2] approach to the reconsideration of App EU had not been tainted by that misunderstanding. In particular the court cannot, she says, exclude the possibility that if the Defendant had properly understood the scope of the *Zambrano* right to reside she would have included within the scope of App EU those (such as the Claimants) who had leave to remain by reason of a different provision. The First Claimant's submission is that this would have been appropriate so as to avoid distinguishing between those who had obtained leave to remain under a different provision and those who would have obtained such leave if they had sought it but who had not done so.

9. If the decision and the relevant parts of App EU and the Guidance are not quashed on that basis the First Claimant submits they are nonetheless to be quashed on other grounds. That is by reason of the Defendant's alleged failure to comply with her duties under section 149 of the Equality Act 2010 and section 55 of the Borders, Citizenship and Immigration Act 2009 and/or on the ground of irrationality (with that contention being based in part on the alleged discriminatory effect of the terms). In support of those contentions the First Claimant emphasised that in order to satisfy her obligations under the public sector equality duty and section 55 the Defendant had to engage properly with the issues and she said that this had not been done. In that regard the First Claimant emphasized what she said were the disadvantages of leave to remain granted under App FM when compared with that granted under App EU. In addition the First Claimant said that there was no proper basis for distinguishing between those who had applied for and obtained leave to remain under App FM (or

[2] I will endeavour to refer to the continuing corporation sole of the Defendant by the gender of the postholder at the time in question.

otherwise) and those who would have obtained such leave if they had applied for it but who had not done so.

10. The Second Claimant through Mr Hawkin adopted the submissions which had been made on behalf of the First Claimant. By way of addition Mr Hawkin emphasized his argument based on the fact that his client had made her application on 18th September 2019 at a time when the Immigration (European Economic Area) Regulations 2016 ("the EEA Regulations") and the previous terms of App EU were in force. He says the terms of the EEA Regulations combined with the other circumstances gave rise to a legitimate expectation that the Second Claimant's application would be granted. The changes in App EU and the Guidance operated to thwart that expectation and retrospectively deprived her of accrued rights.

11. Mr Hawkin maintained the Second Claimant's contention that the decision of the Court of Appeal in *Akinsanya* was incorrect. The contention was that the court had been wrong to conclude that a *Zambrano* right to reside did not arise where the relevant carer had been given leave to remain. However, Mr Hawkin accepted that *Akinsanya* is binding on me and that I am to proceed on the basis that it is a correct statement of the law.

12. In addition a number of subsidiary grounds had been included in the Second Claimant's Statement of Facts and Grounds. It was said that the Defendant had erred in failing to consider the exercise of her discretion to grant leave outside the Immigration Rules. Next, it was asserted that the Defendant should have taken account of the fact that by the time of her decision of 4th November 2022 the leave which had been granted to the Second Claimant in March 2019 had expired. There was said to have been a failure to take account of the new evidence which the Second Claimant had provided demonstrating that she was the sole carer of her British citizen daughter. Finally, the decision to refuse the application was said to have amounted to a breach of the rights of the Second Claimant and of her daughter derived from Article 8 of the European Convention of Human Rights. Mr Hawkin did not abandon those but he did not address them in detail in his submissions.

13. In response for the Defendant Mr Blundell KC with Miss Smyth and Miss Jackson submitted that the revised App EU and the Guidance are not based on a misunderstanding. Their contention was that on a proper understanding of EU law it was only those who had neither leave to remain under a different provision nor a real prospect of obtaining such leave who had a *Zambrano* right to reside. The Defendant said, however, that even if that interpretation was wrong and the *Zambrano* right to reside extended to all those who did not in fact have leave to remain under a different route (and so included those who had a real prospect of obtaining such leave but who had not been granted it) that was irrelevant and academic in the cases of the Claimants. That is because both the Claimants did in fact have leave to remain under App FM at the material times and so were outside the scope of *Zambrano*. The purpose of App EU was to provide for those who had a *Zambrano* right to reside but also to uphold the integrity of the Immigration Rules. I was taken to the material which shows the options which were considered before the revision of App EU and the introduction of the Guidance. This demonstrates, the Defendant submitted, that even if her understanding of the scope of the *Zambrano* right was mistaken that mistake did not affect the position of the Claimants. That is because even on what the Claimants say is the correct understanding of that right the Defendant would not have

revised App EU in such a way as to enable those who already had leave under a different provision to obtain leave to remain. In short it is said that as the holders of leave to remain under App FM the Claimants would never have been entitled to leave under App EU even if that appendix had been extended to provide leave for those who had a real prospect of leave under a provision other than App EU. So, even if the Claimants are right to say that there was a misunderstanding as to the scope of the *Zambrano* right that did not affect the Claimants and a correct understanding would not have led to a different outcome in their cases. In light of that Mr Blundell submitted that I should not address the question of whether those without leave to remain under a different provision but with a real prospect of obtaining such leave did or did not have a *Zambrano* right to reside.

14. The Defendant did not accept that the decision that those with leave to remain under App FM were not entitled to leave under App EU was flawed in the other respects advanced by the Claimants. Mr Blundell submitted that the characterisation of leave under App EU as being necessarily more advantageous than leave under App FM was mistaken. They were different provisions for those in different circumstances each of which could lead to a grant of settled status and each of which had benefits and drawbacks. The Defendant denied that in arriving at the provisions of App EU there had been irrationality or any failure to have proper regard to the Defendant's public sector equality duty or to the duty under section 55. Instead the material showed, the Defendant said, proper and careful consideration of the relevant matters.

The Issues.

15. The parties provided a helpful agreed list of issues and the position was further refined in the course of submissions.

16. The first two issues are closely connected. Was the Defendant correct in formulating App EU and the Guidance on the basis that under EU law a *Zambrano* right to reside did not extend to those who had a real prospect of obtaining leave to remain under a different route (even if those persons had not actually obtained such leave)? Is that question academic in relation to the Claimants with the consequence that the court should decline to consider it? Alternatively, if the question is academic in relation to the Claimants does that preclude a grant of the relief sought?

17. The questions of whether that exclusion was irrational or unlawfully discriminatory are closely connected and I will address them together. Whether it is necessary to consider this and the other issues will depend on the conclusion I reach on the first two issues and whether as a consequence App EU is to be quashed and the Defendant directed to reconsider its terms. As I noted above Mr Cox says that in those circumstances it will be neither necessary nor appropriate to consider the other issues. The questions of whether in excluding from leave to remain under App EU those with leave to remain under App FM the Defendant complied with her duties under the public sector equality duty and section 55 are logically prior to the issue of rationality. However, some elements of the Claimants' contentions relate to all of these questions and are most conveniently considered in the context of the rationality challenge.

18. Finally, the Second Claimant's contention that the decision to refuse her application thwarted her legitimate expectation and that the revision of App EU and the Guidance

retrospectively deprived her of accrued rights will fall to be considered along with her other subsidiary contentions.

The Background in more Detail.

19. As I will explain more fully below while the United Kingdom was a member of the European Union those who were *Chen* carers and *Ibrahim* and *Teixeira* carers had a right of residence in the United Kingdom. A similar right was extended to *Zambrano* carers in the circumstances I will consider below.

20. The EUSS and App EU made provision for the rights of such persons after the United Kingdom's departure from the European Union. They provided for the grant of leave to remain to such persons and for a route to settled status. The Withdrawal Agreement had addressed the rights of *Chen* and *Ibrahim* and *Teixeira* carers but did not provide for *Zambrano* carers (unsurprisingly given that such persons were the carers of British citizens who ceased to be EU citizens when the United Kingdom left the European Union). However, provision was made for *Zambrano* carers in App EU.

The Development of the Rules.

21. The original iteration of App EU had been introduced on 7th March 2019 by the Statement of Changes in Immigration Rules (HC 1919) of that date. At para 3.2 the Explanatory Memorandum said:

> "The EU Settlement Scheme – contained in Appendix EU to the Immigration Rules – provides the basis for resident EU citizens and their family members, and the family members of certain British Citizens, to apply for UK immigration status, which they will require in order to remain here permanently after the UK's withdrawal from the European Union."

22. The scope of the EUSS was described at para 7.65 which included the following:

> "The scheme will also be open to others lawfully resident in the UK by virtue of a 'derivative right' to reside, based on wider EU law. These are 'Chen carers' (the primary carer of a self-sufficient EEA citizen child) and 'Ibrahim and Teixeira' cases (a child of a former EEA citizen worker who is in education in the UK and their primary carer), which are protected by the draft Withdrawal Agreement with the EU in terms of their current rights, and 'Zambrano carers' (the primary carer of a British citizen child or dependent adult). The Government has decided that, in light of the particular circumstances of these cases, it is appropriate that their long term status in the UK should be protected by bringing them within the scope of the EU Settlement Scheme;"

23. App EU provided for the grant of leave to remain to those who had a *Zambrano* right to reside and to those who had had such a right when the Withdrawal Agreement came into effect. It also provided for the grant of indefinite leave to remain to such persons if they had completed a continuous period of 5 years in that category (or in a combination of applicable categories). Underhill LJ addressed the definition of the holder of a *Zambrano* right to reside thus in *Akinsanya* at [19]:

> "Annex 1 to Appendix EU (which applies by virtue of paragraph EU7 (1)) contains various definitions. The definition of "person with a Zambrano right to reside" is elaborate to the point of impenetrability, but the relevant parts for our purposes read:
>
> > "a person who has satisfied the Secretary of State that . . . they are . . . (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 (bb) . . . ; and (b) without leave to enter or remain in the UK, unless this was granted under this Appendix."

24. That definition cross-referred to regulation 16 of the EEA Regulations the relevant parts of which provided thus:

> "(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)
>
> (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) The criteria in this paragraph are that—
> (a) the person is under the age of 18;
> (b) the person does not have leave to enter, or remain in, the United Kingdom under the 1971 Act [(but see paragraph (7A))]
> (c) the person's primary carer is entitled to a derivative right to reside in the United Kingdom under paragraph (2), (4) or (5); and
> (d) the primary carer would be prevented from residing in the United Kingdom if the person left the United Kingdom for an indefinite period.
>
> (7) In this regulation -
> (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 3, or an order made under subsection (2) of that section 4 , applies; or
> (iv) who has indefinite leave to enter or remain in the United Kingdom [(but see paragraph (7A))]
>
> (7A) Leave to enter, or remain in, the United Kingdom under the 1971 Act which has been granted by virtue of Appendix EU to the immigration rules is not to be treated as leave for the purposes of paragraph (6)(b) or (7)(c)(iv)."

25. The EEA Regulations were revoked with effect from the end of the transition period on 31st December 2020 though some elements were carried over into other regulations.

26. The decision of the Court of Appeal in *Akinsanya* was handed down on 25th January 2022.

27. On 28th March 2022 the Defendant received a submission from her officials addressing the reconsideration of the *Zambrano* provisions in the EUSS in light of the decision in *Akinsanya*. The submission identified three options:

> "Option 1: Allow any applicant who met the Zambrano requirements of the EEA Regulations, as interpreted by the Court of Appeal, at the end of the transition period to qualify for EUSS status.

> Option 2: Do not allow an applicant with, at the end of the transition period, limited leave under another route or a realistic prospect of obtaining it to qualify for EUSS status as a Zambrano primary carer.
>
> Option 3: Continue to exclude from EUSS eligibility under the Zambrano category those with, at the end of the transition period, limited leave under another route, but include those with, at that point, a realistic prospect of obtaining such leave."

28. Option 3 was recommended. It will be noted that option 1 made the widest provision for inclusion of applicants in the scope of App EU. As the submission noted implementation of that option would have meant that both those with leave under a different route from App EU and also those with a reasonable prospect of obtaining such leave would be eligible for leave under App EU. Adoption of that option would have meant that the Claimants would be able to apply under App EU. Adoption of either of the other two options would exclude the Claimants.

29. At paragraph 20 under the heading "public sector equality duty and vulnerable individuals" the submission said:

> "It is not considered that these proposals have a disproportionate impact on any category of the applicant. Under the recommended approach, applicants will either be able to obtain limited leave under an alternative route such as Appendix FM or, where they have reasonable grounds for missing the 30 June 2021 deadline, be able to make a late application under the EUSS Zambrano provision, protecting the rights of the applicant and any children affected. In both scenarios, the person will be able to work in the UK and continue their family life here. In cases of destitution, holders of limited leave under Appendix FM can apply for the "no recourse to public funds" condition to be lifted; limited leave holders under the EUSS Zambrano provisions cannot access welfare benefits in line with pre-exit restrictions on those with a Zambrano right to ride. Both types of limited leave provide a route to settlement, which provides access to welfare benefits on the same basis as a British citizen"

30. The submission was accompanied by a "detailed analysis of the policy options" setting out factors said to be relevant to the different options and referring, *inter alia*, to the differences between leave under App FM and leave under App EU.

31. In addition there was an Equality Impact Assessment. This identified as "a key consideration with respect to options 2 and 3" the question of whether certain people would have to rely on their Article 8 rights by making an application under App FM or would qualify under the EUSS. It then set out as "significant differences" the position in respect of fees and the immigration health surcharge; access to benefits; and the length of the route to settlement (differences to which I will return below).

32. In its treatment of the issues of discrimination on the basis of race or religion and belief that assessment said:

> "We consider that any disadvantage (as described above) arising from options 2 and 3 is justified in that they are a proportionate means of achieving the legitimate aim of ensuring access to the EUSS to those with a relevant EU law right to reside in the UK by the end of the transition period."

33. Again in the context of race the assessment contained the following passage (which was substantially repeated in the treatment of the issue of sex):

> "With respect to proportionality, the fact that an affected person may be on a 10-year route to settlement under Appendix FM is not considered to be a material disadvantage as they would not be required to leave the UK and could continue their family life here. Also, a person with limited leave on an alternative basis, such as Appendix FM, was never intended to benefit from a right to reside by virtue of regulation 16 of the EEA Regulations. The drafting was intended to reflect EU law under which this cohort would not have had a right to reside. Further, consistent with EU law, the EEA Regulations did not provide for the acquisition of the right to reside permanently for those relying on regulation 16, so a longer, 10-year route to settlement under the Immigration Rules has always been their sole route to permanent residence in the UK."

34. The assessment noted the consequence of the fact that the fee for applications for indefinite leave to remain under App FM cannot be waived thus:

> "Where an applicant for limited leave under Appendix FM cannot afford the application fee or IHS, it is open to them to apply for a waiver. However, there is no such waiver available for indefinite leave applications under Appendix FM, so a person may continue on limited leave under Appendix FM for a significant period if they cannot afford the fee and IHS for an application for indefinite leave under Appendix FM."

35. On 6th April 2022 the Defendant received representations concerning the reconsideration of the EUSS *Zambrano* provisions from the Hackney Law Centre on behalf of the First Claimant and others. On 21st April 2022 the Defendant's officials sent her those representations together with a summary of them. In their covering letter the Defendant's officials invited her to have regard to the representations when considering the 28th March 2022 submissions. That letter noted that the representations focused on the impact on children of the policy as to no recourse to public funds. They said that the representations did not give rise to vulnerability or equality considerations in addition to those already identified in the Equality Impact Assessment. The officials suggested that the representations did not warrant any change in the proposals in the earlier submissions. They said that the representations did not alter the facts that:

> "The proposals reflect the scope of the *Zambrano* right to reside under EU law, as per the Court of Appeal judgment in *Akinsanya*, and as per the original published policy intention behind the inclusion of this non-Withdrawal Agreement category in the EUSS from 1 May 2019.
>
> Those with a *Zambrano* right to reside under EU law had no right to acquire the right of permanent residence in the UK, so, before the EUSS, the 10-year parent route to settlement under Appendix FM was their sole route to settlement in the UK.
>
> In line with pre-EU exit restrictions on those with a *Zambrano* right to reside under EU law, pre-settled status under the EUSS granted to this cohort does <u>not</u> allow them to access non-contributory/income-related welfare benefits. Whereas the 10-year parent route under Appendix FM permits recourse to public funds in accordance with the published NRPF policy, so switching into that route from an EU law basis of stay has always been the means by which they can access such welfare benefits.
>
> The scope of the EUSS where those with a *Zambrano* right to reside under EU law are concerned is simply a reflection of that status quo position. The representations are, however, germane to the consideration Ministers have asked us to undertake of possible changes to the 10-year parent route to settlement, and the impact lifting the NRPF condition may have on the right to settle under Appendix FM. Family Policy colleagues will look at them further in that context. We suggest that adjusting the scope of our definition of an EU law concept (which will become defunct in the UK) is not the place

> to deal with concerns about the mainstream route for the foreign national parents of British citizen children."

36. On 31st May 2022 the Court of Appeal's decision in *Velaj v Secretary of State for the Home Department* [2022] EWCA Civ 767, [2023] QB 271 was handed down.

37. On 13th June 2022 the Defendant published her "Guidance: EU Settlement Scheme: Zambrano primary carers". In this the Defendant said that in the light of *Akinsanya* she had reconsidered the EUSS requirements for those applicants who invoked their *Zambrano* rights. The Defendant summarised her understanding of the Court of Appeal decision and the result of her reconsideration thus:

> "The Court of Appeal judgment in *Akinsanya* held that the Home Office had erred in its understanding of regulation 16(7) of the Immigration (European Economic Area) Regulations 2016 in defining 'a person with a *Zambrano* right to reside' in the Immigration Rules for the EUSS in Appendix EU. However, the Court of Appeal found that, as a matter of EU law, a *Zambrano* right to reside does not arise where a person holds leave to remain.
>
> The Home Secretary has carefully considered the Court of Appeal judgment and has decided that she no longer wishes that definition in Appendix EU to reflect the scope of the 2016 Regulations (which have now been revoked) but wishes it to reflect the scope of those who, by the end of the transition period, had an EU law right to reside in the UK as a *Zambrano* primary carer, in line with the originally stated policy intention. She therefore intends to maintain the requirement in sub paragraph (b) of the definition that the applicant did not, by the end of the transition period and during the relevant period relied upon, have leave to enter or remain in the UK (unless this was under the EUSS)."

38. On the same date the Defendant published version 5 of the Guidance. Under the heading "Who is a `person with Zambrano right to reside?'" this included the following:

> "In principle, an applicant is not prevented from qualifying under the scheme as a 'person with a Zambrano right to reside' where they had a realistic prospect of obtaining alternative leave to remain (such as under Appendix FM), had they applied for it. In these circumstances, a fact-based enquiry is required looking at whether, in practice, the British citizen would be (or, as the case may be, for the relevant period in which the applicant relies on having been a 'person with a Zambrano right to reside' the British citizen would have been) unable to remain in the UK, or an EEA Member State or Switzerland, if the applicant (or, as the case may be, both primary carers) were (or, as the case may be, had been) in fact required to leave the UK for an indefinite period."

39. Under the heading "Leave to enter or remain the UK, other than leave granted under Appendix EU" the Guidance referred to the decision in *Akinsanya* and said:

> "Following *Akinsanya*, the SSHD reconsidered her policy in this area and decided to maintain sub-paragraph (b) of the definition of a 'person with a Zambrano right to reside' in Annex 1 to Appendix EU. This provides that an applicant cannot meet that definition if they have for the relevant period had (or, as the case may be, for the relevant period they 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".

40. Under the heading "Eligibility - Zambrano Primary Carers" the Guidance provided for the following four-stage test:

> "Where the applicant both:
>
> - is not and for the relevant period has not 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' they were not) an 'exempt person'
> - does not have and for the relevant period has not had (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' they did not have) leave to enter or remain in the UK, other than leave granted under Appendix EU
>
> there are 4 stages you must consider when assessing whether, by the specified date, the applicant is and for the relevant period has been (or, as the case may be, for the relevant period they were) resident with a derivative right to reside by virtue of regulation 16(1) of the EEA Regulations by satisfying the criteria in regulation 16(5).
>
> These are:
>
> - stage 1: assessing British citizenship: assessing whether the person for whom the applicant claims to be and for the relevant period to have been (or, as the case may be, for the relevant period to have been) the primary carer of is (or, as the case may be, was) a British citizen
> - stage 2: direct relatives or legal guardians: assessing whether the applicant is and for the relevant period has been (or, as the case may be, for the relevant period they were) the direct relative or legal guardian of the British citizen
> - stage 3: primary carer: assessing whether the applicant is and for the relevant period has been (or, as the case may be, for the relevant period they were) the primary carer of the British citizen
> - stage 4: British citizen unable to reside in the UK, the EEA or Switzerland: assessing whether, in practice, the British citizen would be and for the relevant period would have been (or, as the case may be, for the relevant period they would have been) unable to reside in the UK, the EEA or Switzerland if the applicant was (or, as the case may be, had been) required to leave the UK for an indefinite period"

41. Then after reference had been made to the decision in *Velaj* the following guidance was given in respect of the application of the fourth stage of that test:

> "You must consider whether the relevant British citizen could go and for the relevant period could have gone (or, as the case may be, for the relevant period they could have gone) to live in an EEA Member State or Switzerland.
>
> If the applicant is and for the relevant period was (or, as the case may be, for the relevant period they were) an EEA citizen, or has (or had) a right to reside in an EEA Member State or Switzerland (either as the family member of an EEA citizen or under the domestic immigration system of that country), you must consider whether the British citizen would be and for the relevant period would have been (or, as the case may be, for the relevant period they would have been) able to reside in that country with the applicant. Where this is (or was) so, the applicant will not be a 'person with a Zambrano right to reside'.

> In particular, there was scope, before the specified date, for an EEA citizen and a British citizen family member to reside elsewhere in the EEA or in Switzerland under EU free movement law. The British citizen's right to begin doing so ended at the specified date. This does not alter the fact that the applicant must meet the criteria as a 'person with a Zambrano right to reside' by the specified date. An EEA citizen applicant is unlikely to do so, given that before the specified date they were able to reside with a British citizen family member elsewhere in the EEA or in Switzerland.
>
> Alternative care arrangements
>
> To assess whether, in practice, the relevant British citizen would be and for the relevant period would have been (or, as the case may be, for the relevant period they would have been) unable to reside in the UK, the EEA or Switzerland if the applicant were (or had been) required to leave the UK for an indefinite period, you must consider whether there are (or were) alternative care arrangements which could be (or could have been) made for the British citizen in those circumstances.
>
> If there are (or were) such alternative care arrangements, you must then consider whether such arrangements are (or were) appropriate, including, in particular, in light of the best interests of the child (where the British citizen is a child) or of any other child of the applicant affected by the decision. For further guidance see: Alternative care arrangements.
>
> If there are (or were) appropriate alternative care arrangements for the British citizen, the applicant will not be a 'person with a Zambrano right to reside'.
>
> Conclusion on stage 4
>
> Where you are satisfied that, in practice, the British citizen would be and for the relevant period would have been (or, as the case may be, for the relevant period they would have been) unable to reside in the UK, the EEA or Switzerland if the applicant were (or, as the case may be, had been) required to leave the UK for an indefinite period, you must move on to the overall conclusion below.
>
> Where you are not satisfied of this, you must not move on to that stage, but must instead consider the applicant's eligibility for leave on another basis under rule EU11 and, where relevant, EU12) and EU14 of Appendix EU: see EU Settlement Scheme: EU, other EEA and Swiss citizens and their family members.
>
> If the applicant does not meet any of these other requirements, you must refuse the application under rule EU6 of Appendix EU."

42. The revised version of App EU was introduced by the Statement of Changes in Immigration Rules (HC 719) of 18th October 2022. In describing the "main changes" made by that statement to the EUSS the Explanatory Memorandum included the following at para 7.32:

> "to uncouple from reliance on the Immigration (European Economic Area) Regulations 2016, and to reflect the Court of Appeal judgments in *Akinsanya* and *Velaj* in, the EUSS definitions for certain derivative rights cases under EU law: *Zambrano* (the primary carer of a British citizen), Chen (the primary carer of a self-sufficient EU citizen child) and *Ibrahim* & *Teixeira* (a child in education in the UK of an EU citizen former worker in the UK and the child's primary carer)."

43. As a consequence of those changes App EU provided at EU11 and EU14 respectively for the grant of indefinite leave to remain and leave to remain to those who had or who had had a *Zambrano* right to reside. At Annex 1 it defined a "person with a *Zambrano* right to reside" providing in respect of adult applicants that such a person was:

> "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,
>
> unless this:
>
> (aa) was granted under this Appendix; or
>
> (bb) is in effect by virtue of section 3C of the Immigration Act 1971; or
>
> (cc) is leave to enter granted by virtue of having arrived in the UK with an entry clearance in the form of an EU Settlement Scheme Family Permit granted under Appendix EU (Family Permit) to these Rules on the basis they met sub-paragraph (a)(ii) of the definition of 'specified EEA family permit case' in Annex 1 to that Appendix; and
>
> (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, unless that decision has been set aside or otherwise no longer has effect;"

44. It will be apparent that the definition remained elaborate. Two aspects of the definition are of note for current purposes. The first is the provision at (a)(iii) requiring that the relevant British citizen would in practice be unable to reside in the specified places if the applicant in fact left the United Kingdom for an indefinite period. The second is that at (a)(iv) which excluded those who had leave to remain save where that leave had been granted in ways which are not applicable to the Claimants.

45. The effect of these measures was to implement option 3 of the three options identified in the March 2022 submission albeit with emphasis placed on the need for a fact-based enquiry in the determination of whether the relevant British citizen would in fact have to leave the United Kingdom, the European Economic Area, or Switzerland.

46. A further submission had been made to the Defendant on 4th July 2022. The purpose of this was, in part, to consider how the effect of the decision in *Velaj* was to be reflected in the Guidance.

47. These submissions recommended a change in the Guidance so as to provide for a case by case assessment in respect of those who did not already have leave under a different provision but with that assessment to include consideration of whether the applicant had a realistic prospect of obtaining leave under a provision other than App EU.

48. Clive Peckover is an official in the Defendant's department who was involved in the preparation of the submissions of March and July 2022. In his statement in these proceedings he says that if the judgment in *Velaj* had been to hand at the time of the March 2022 submission the recommendation would have been for the adoption of option 2 rather than option 3.

49. The July 2022 submission resulted in a revision of the Guidance and Version 6 was published on 14th December 2022. At "Section 3: Eligibility – Zambrano primary carer" this set out a three-stage test as follows:

> "Where the applicant relies on being a *Zambrano* primary carer and meets the initial eligibility requirements in section 2 of this guidance, you must then consider the following 3 additional stages.
>
> These are:
>
> • stage 1: British citizen resides in the UK: assessing whether the person for whom the applicant claims to be the primary carer is a British citizen who resides in the UK
>
> • stage 2: primary carer: assessing whether the applicant is the primary carer of the British citizen
>
> • stage 3: British citizen unable to reside in the UK, the EEA or Switzerland: assessing whether, in practice, the British citizen would be unable to reside in the UK, the EEA or Switzerland if the applicant was in fact required to leave the UK for an indefinite period
>
> The applicant must meet these 3 stages for the whole continuous qualifying period in the UK, which began before the specified date, in which they rely on having been a 'person with a *Zambrano* right to reside' in order to be eligible for leave under the scheme as such a person."

50. The document then gave guidance on the application of the third stage of the process: the determination of whether if the applicant were required to leave the United Kingdom the British citizen would be unable to reside in the United Kingdom, the EEA, or Switzerland reflecting (a)(iii) of the Annex 1 definition. The introduction to this part of the Guidance said:

> "As held by the Court of Appeal in *Velaj v SSHD* [2022] EWCA Civ 767, this assessment requires a fact-based enquiry looking at whether, in practice, the British citizen would be unable to remain in the UK, an EEA Member State or Switzerland, if the applicant were in fact required to leave the UK for an indefinite period."

51. The Guidance provided for the following approach where the applicant had been granted leave to remain under App FM after the continuous qualifying period:

> "If the applicant did not have non-Appendix EU leave during the continuous qualifying period on which they rely on being a 'person with a Zambrano right to reside', but they have since been granted leave under Appendix FM (regardless of which application was made first), you must consider whether, on the balance of probabilities, it is likely they would have been granted that Appendix FM leave earlier if they had applied for it earlier, before they applied to the EU Settlement Scheme and/or before the specified date"

52. The following passages addressed the situation where the applicant had not previously applied for leave under App FM or by reference to Article 8 of the European Convention on Human Rights.

> "The applicant has never applied under Appendix FM or Article 8 ECHR.
>
> If the applicant has never made an application under Appendix FM or a claim that their removal from the UK would breach their right to respect for private or family life as protected by Article 8 ECHR, you must consider whether, on the balance of probabilities, an applicant is likely to qualify for Appendix FM leave such that the applicant has failed to show that they would in fact leave the UK for an indefinite period: see Considering the prospects of making a successful Appendix FM, private life or long residence application.

> Considering the prospects of making a successful Appendix FM, private life or long residence application
>
> This is not an exercise to assess whether the applicant qualifies for leave to remain under Appendix FM or based on their private life or long residence, as this can only be done by the relevant caseworker following the making of a valid application under that route, but to consider whether there is a realistic prospect that they would do so (or would have done so), such that they cannot satisfy you that they would (or would have) in fact left the UK for an indefinite period.
>
> If the applicant cannot satisfy you of this on the balance of probabilities, then the British citizen would be able to continue to live in the UK. As a result, the applicant will not meet the requirements to be a 'person with a Zambrano right to reside'.
>
> If the applicant submits any information or evidence about whether or not they meet the relevant requirements, this must be taken into account when you make the decision.
>
> You must not argue that an applicant could have obtained leave under a route before that route existed. Therefore, please note:
>
> • Appendix FM came into force on 9 July 2012. Before that, parent and partner routes were in Part 8 of the Immigration Rules
>
> • Appendix Private Life came into force on 20 June 2022 for applications made on or after that date, replacing paragraphs 276ADE to 276DH in Part 7 of the Immigration Rules
>
> You must base your assessment on the applicant's individual circumstances and consider any relevant information or evidence provided. Some guidance is set out below on some of the scenarios you may see:
>
> • the applicant claims to be the parent (including adoptive parent) or legal guardian of a British citizen child
>
> • the applicant claims to be the primary carer of their British citizen spouse or civil partner
>
> • the applicant claims to be the primary carer of a British citizen direct relative who is not their spouse, civil partner, or minor child
>
> • the applicant claims long residence in the UK"

53. Thus both version 5 and version 6 of the Guidance referred to *Velaj* as the source of the requirement for a fact-based enquiry into whether the relevant British citizen would in practice be unable to remain in the United Kingdom or the other relevant locations. However, version 6 introduced the approach of considering whether the relevant carer would have been likely to have obtained leave to remain under App FM if that carer had applied for it. It thereby gave effect to option 2 of the March 2022 submission options.

54. A further Equality Impact Assessment was submitted to the Defendant in July 2023. This substantially replicated the treatment in the earlier assessment although the passage addressed indirect discrimination on the basis of age was expanded and included the following:

> "Indirect discrimination: Having to apply under Appendix FM rather than qualifying under Appendix EU may put some people at a disadvantage (as described above) on the basis of the protected characteristic of age. For example, a young primary carer of a

> British citizen may have had less earning potential than an older primary carer and so may have more difficulty paying the fee and IHS for an Appendix FM application.
>
> Although this may amount to indirect discrimination, this is considered to be justified because it is proportionate to the legitimate aim of ensuring that those who had a *Zambrano* right to reside under EU law at the end of the transition period have access to the EUSS but that those who did not, do not. It also maintains the integrity of the UK's domestic family Immigration Rules in Appendix FM: if some people without an EU law *Zambrano* right to reside at the end of the transition period were given EUSS status and others were not, it risks challenges on grounds of fairness from the latter (particularly other parents of British citizen children) who would prefer access to the EUSS access instead of meeting the requirements of Appendix FM. Such challenges which would be harder to defend on fairness grounds if one out-of- scope group has already been brought in scope.
>
> In addition, the Secretary of State operates a fee waiver policy for limited leave applications under Appendix FM, which mitigates this disadvantage to an extent, as does the Secretary of State's policy for lifting the 'no recourse to public funds' condition on limited leave granted under Appendix FM. By comparison, limited leave granted under the EUSS to *Zambrano* primary carers does not provide access to benefits, in line with pre-EU exit restrictions on that group."

55. The current version of the Guidance **(**Version 8) was published on 15th August 2023. This continues to give effect to the option 2 approach.

<u>The Circumstances of the First Claimant.</u>

56. The First Claimant is a Nigerian national who entered the United Kingdom in 2005. She is the mother of and sole carer for four children, the eldest of whom was born in 2011 and is a British citizen.

57. On 15th September 2014 the First Claimant was granted a "derivative residence card" under the Immigration (European Economic Area) Regulations 2006 on the basis that she was the *Zambrano* carer of her eldest child. That card was valid until 15th September 2019. However, on 4th April 2019 the First Claimant applied for leave to remain under App FM. On 12th July 2019 this was granted for 30 months. In *Akinsanya* at [31] Underhill LJ explained why the First Claimant had made that application saying:

> "...The only additional point that it is necessary to record is that the reason why the claimant chose to apply for leave to remain, rather than continuing to rely on her derivative residence right as a Zambrano carer, was that as a result of illness she was unable to work and needed to claim benefits. As a person with a derivative residence right she had only a limited entitlement to social assistance (see para 50 below), whereas once she had leave to remain she became entitled to claim mainstream benefits (the Secretary of State not having imposed a "no recourse to public funds condition)."

58. On 29th January 2020 the First Claimant applied for indefinite leave to remain under App EU as a *Zambrano* carer. That application was refused on 29th September 2020.

59. The First Claimant challenged that refusal and her challenge resulted in the decision of the Court of Appeal quashing the refusal of the First Claimant's application.

60. The Defendant reconsidered her refusal of the First Claimant's application. Her decision of 22nd July 2022 again refused the application by reason of the fact that the First Claimant had leave to remain under App FM.

The Circumstances of the Second Claimant.

61. The Second Claimant is a Ghanaian citizen who entered the United Kingdom in 2010. She is the mother of and sole carer for a British citizen who was born in 2017. On 20th March 2019 the Second Claimant was granted leave to remain under App FM lasting to 20th September 2021.

62. On 18th September 2019 the Second Claimant applied for indefinite leave to remain under App EU as a *Zambrano* carer. That application was refused on 29th June 2020 on the basis of the Second Claimant's existing leave to remain.

63. The Second Claimant commenced judicial review proceedings on 28th September 2020. Following the decision of the Court of Appeal in *Akinsanya* the parties agreed that the Second Claimant's judicial review claim would be withdrawn and that the Defendant would make a fresh decision on the Second Claimant's application. That decision was made on 4th November 2022 (replacing an earlier decision of 28th July 2022). That decision again refused the Second Claimant's application on the basis that she had held leave to remain under App FM and so had not been a *Zambrano* carer throughout the necessary continuous five year qualifying period.

The Contrasting Leave to Remain Provisions.

64. Under App FM leave to remain is granted for periods of 30 months. Such leave is renewable on payment of a fee (or the obtaining of a waiver of fees). The holder of such leave is able to apply for settled status after a continuous period of ten years' leave to remain. However, on such an application a non-waivable fee is payable and the applicant also has to pay the Immigration Health Surcharge. Although those fees cannot be waived the Secretary of State can lift the requirement that the holders of leave to remain under App FM have no recourse to public funds and where that requirement has been lifted the holder of such leave is able to access mainstream social security benefits including income support.

65. The holder of limited leave under App EU can apply for settled status after holding such leave for a continuous period of five years. No fee is payable on such an application and the Immigration Health Surcharge is not payable. However, the holder of such leave is not able to access mainstream social security benefits and the requirement that there be no recourse to public funds cannot be lifted in favour of such a person. The state benefits available to the holder of limited leave under App EU as "a person with a *Zambrano* right to reside" are primarily limited to those payable under the Children Act 1989. In this respect the provisions mirror the rules which applied to *Zambrano* carers before the United Kingdom's departure from the European Union (see per Underhill LJ in *Akinsanya* at [50]).

Issues 1 and 2: Is App EU based on a Misunderstanding of the Law and is this Academic?

66. Mr Blundell submitted that I need not consider the question of whether the Defendant's understanding of the scope of the *Zambrano* right was mistaken. The contention was that it could so clearly be seen that this question was academic in relation to the Claimants that the court did not even need to consider it. There are two reasons why I do not accept that submission. The first is that if the Defendant's understanding of the scope of the *Zambrano* right is correct then a substantial part of the Claimants' case falls away and it is artificial to determine the case without addressing the issue. The second and more important is that if there was a misunderstanding it will be necessary to consider the nature and effect of that misunderstanding. That will be necessary in order properly to consider whether the misunderstanding had any effect on the positions of the Claimants. In my judgement this is not a case where the court can properly consider whether the alleged misunderstanding was immaterial to the Claimants without addressing whether there was in fact a misunderstanding and how it impacted on the terms of App EU and of the Guidance. That will necessarily involve an assessment of whether there was a misunderstanding; when and how it arose; and when and how it affected the approach of the Defendant.

The Correct Understanding of the *Zambrano* right to reside.

67. The issue can be shortly stated though less shortly answered. Before the Withdrawal Agreement came into effect did the *Zambrano* right to reside extend to persons who had not been granted leave to remain under the Immigration Rules but who would have had a real prospect of obtaining such leave if they had applied for it?

68. The *Zambrano* jurisprudence was analysed by the Court of Appeal in *Akinsanya* and that analysis is binding on me. I will return to *Akinsanya* below but it suffices to say here that it does not directly address the question with which I am concerned although, as will be seen, it does throw considerable light on it. The Court of Appeal was concerned with the question of whether the *Zambrano* right was excluded by a grant of limited leave to remain or only by indefinite leave to remain. It held that the presence of either form of leave operated to prevent the right arising.

69. The Claimants say that the effect of the authorities is that the *Zambrano* right was only excluded where the person in question has actually been granted leave to remain. The Defendant says that the *Zambrano* right was regarded as a remedy of last resort (adopting the expression of Andrews LJ in *Velaj v Secretary of State for the Home Department* [2022] EWCA Civ 767, [2023] QB 271 at [57]). As such it only came into play when its invocation was necessary to protect the interests of an EU citizen and where, in the absence of the right, the carer of such a citizen would have to leave the country in question with the consequence that the EU citizen for whom he or she was the carer would also have to leave that country. The purpose of the right was to protect the interests of the EU citizen and only provided protection for that citizen's carer to the extent that it was necessary to achieve that purpose. The focus was, the Defendant said, to be on the particular circumstances of the EU citizen and of the carer in question and consideration was to be given to the actual circumstances rather than to hypothetical possibilities. Where a carer has a realistic prospect of obtaining leave to remain that carer will not in practice be required to leave the country in question and, therefore, there will be no need for the carer to rely on the *Zambrano* right to reside. As the right only arises as a last resort and where it is necessary then it will not arise in such circumstances.

70. Which of those analyses is borne out by the authorities?

71. Certain carers had derivative rights of residence under EU law by virtue of the decisions of the CJEU in *Zhu & Chen v Secretary of State for the Home Department* [2005] QB 325, *Ibrahim v Harrow LBC* and *Teixeira v Lambeth LBC* [2010] PTSR 1913.

72. The issue in *Zambrano* was whether that approach was to be applied to the carer of an EU citizen who was living in a country of which that citizen was a national. That citizen was entitled to be resident in that country by reason of his or her rights as a national and not as the result of the exercise of free movement rights under EU law. In *Zambrano* the claimant and his wife were Columbian nationals living in Belgium, two of whose children had acquired Belgian citizenship by birth. It is relevant for current purposes to note that, although the application of the claimant and his wife for asylum had been refused, the Belgian authorities had at least at one stage confirmed that they would not be returned to Columbia. The claimant sought regularisation of his position by the grant of a right of residence and of a work permit.

73. The CJEU held that the approach taken to carers within the scope of *Chen, Ibrahim,* and *Teixeira* was indeed to be applied to a carer in the position of the claimant and that a right of residence could arise in such circumstances. It did so because citizenship of the European Union was to be seen as the fundamental status of a national of a member state and the focus was to be on that rather than the status of the children as Belgian nationals. The court proceeded from that proposition to say:

> "In those circumstances, Article 20 TFEU precludes national measures which have the effect of depriving citizens of the Union of the genuine enjoyment of the substance of the rights conferred by virtue of their status as citizens of the Union (see, to that effect, *Rottman*, paragraph 42)
>
> A refusal to grant a right of residence to a third country national with dependent minor children in the Member State where those children are nationals and reside, and also a refusal to grant such a person a work permit, has such an effect.
>
> It must be assumed that such a refusal would lead to a situation where those children, citizens of the Union, would have to leave the territory of the Union in order to accompany their parents. Similarly, if a work permit were not granted to such a person, he would risk not having sufficient resources to provide for himself and his family, which would also result in the children, citizens of the Union, having to leave the territory of the Union. In those circumstances, those citizens of the Union would, as a result, be unable to exercise the substance of the rights conferred on them by virtue of their status as citizens of the Union..."

74. The court was not intervening to stop a removal or a threatened removal (as just noted the Belgian authorities had confirmed they would not return the claimant and his wife to Columbia) but was acting in the context of the refusals to grant a right of residence and a work permit to the relevant carer. It was those refusals which were seen as potentially interfering with the rights of the relevant EU citizen. The court was, moreover, intervening and granting the derivative right of residence on the footing that the refusal of a work permit would cause the claimant as carer to leave because he would be at risk of having insufficient resources to care for his family. Thus the court was concerned with the risk that the EU citizens would ultimately be compelled to leave where that risk flowed from the practical consequences of a failure to grant formal rights to the claimant carer.

75. The approach of the CJEU in *Zambrano* is strongly indicative that it was the absence of formal regularisation of the carer's position which was seen as the trigger for the right of the carer under EU law. Does the position change when the domestic authorities are considered?

76. In *Sanneh v Secretary of State for Work and Pensions* [2015] EWCA Civ 49, [2016] QB 453 the Court of Appeal was concerned with the time at which the *Zambrano* right arose. It concluded that the right did not arise only when the relevant carer was at the point of removal or threatened removal but instead arose when circumstances, such as the birth of a child or the loss of leave, giving rise to the *Zambrano* right first arose.

77. It is of note that as summarised by Arden LJ at [38] the defendant's submission had been that:

> "that the *Zambrano* carer has no right to reside until prohibited national measures are imminent. He submits that the right to reside of a *Zambrano* carer arises only at the point of removal or threatened removal. Prior to that date, the carer is physically here but has no right to reside. In the immigration context, it is possible for a person to be resident here without having the right to reside required to qualify him for social assistance purposes (*Abdirahman v Secretary of State for Work and Pensions* [2007] EWCA Civ 657). On his submission, it is at the point of removal or imminent removal that EU law intervenes to prevent removal. The *Zambrano* right is, on his submission, negative rather than positive in nature. It is an immunity from national measures which destroy the substance the citizenship right of the EU citizen child."

78. At [23] Arden LJ identified the issue as to timing thus:

> "As to (1), the choice is between the date ("the Last Date") when prohibited national measures are taken (or are imminent) and the time when the carer ceases to be liable to be removed, i.e. the first date ("the First Date"), from which the *Zambrano* carer ceases to be liable to prohibited national measures. This may be on the birth of the child or a later date, for example, the date on which any leave which the carer had to be within the jurisdiction expires."

79. The answer to the issue was given at [25] in this way:

> "In my judgment, for the reasons given below, the effective citizenship principle means that EU law confers a right to reside on a *Zambrano* carer from the First Date. As Elias LJ expressed the position in argument, the *Zambrano* carer has under EU law a positive right to work and reside in the member state in which the EU citizen child is resident, and a negative right not to have prohibited measures taken against him. I agree, though this may not be an exhaustive statement of the *Zambrano* carer's EU law rights."

80. The core of Arden LJ's explanation for that conclusion was set out at [72] – [74] as follows:

> "The wider principle, in my judgment, informs the answer to the Main Issues. In my judgment, it is clear that the principle is concerned with creating rights to reside where that is necessary to make a person's EU citizenship status meaningful and effective.
>
> That right to reside stems from Article 20 TFEU and so it is also a right to work. We are told that the Home Office issues those who apply as *Zambrano* carers on request with a certificate of application which will entitle them to live and work here. That practice is entirely consistent with the EU law position as I see it to be.

> Given that the *Zambrano* carer's right is to reside so as to support the status of the EU citizen child, it makes no sense that the right should arise only from the Last Date. The fact that presence in the UK without a right to reside would also put the *Zambrano* carer in breach of the criminal law, even if it were to be an abuse for a prosecution to be brought, confirms this conclusion."

81. At [166] Elias LJ summarised the issue and the defendant's case as follows:

> "This appeal raises questions about the full implications of the *Zambrano* decision as a matter of EU law. The Secretary of State submits that they are extremely limited. Indeed, on his analysis there is no right to reside as such until the point where removal of the carer is imminent; at that moment, but not before, the carer can claim the benefit of a right - more accurately described as an immunity - which provides the carer with a defence to any attempt to remove her from the country. The argument is that until steps to remove her are taken, the carer's presence in the country is de facto tolerated and therefore her charge, the EU citizen from whose right to reside the carer's right is derived, is not in jeopardy of being removed. The child is not at risk of being deprived of "the genuine enjoyment of the substance of the right" conferred by virtue of the child's status as an EU citizen, to use the language in paragraph [42] of *Zambrano*. Accordingly, if no steps are taken against the carer (and assuming there is no issue of the carer being forced to leave for financial reasons) no *Zambrano* status ever arises and therefore there can be no question of any benefits being acquired by virtue of that status. Any benefits to which the carer is entitled must be derived from some other legal source."

82. The rejection of that argument was in the following strong terms:

> "167. I wholly reject this analysis of the nature of the *Zambrano* right. In my view, it is barely coherent. The logic appears to be that although the State at all times has the right to take action to remove the TCN [Third Country National] in practical terms it is necessarily and always meaningless. At the very same moment as the State takes steps to exercise it, a countervailing right magically springs into being which enables the carer to claim to be immune from the process. Presumably on this analysis if the State then agrees not to take removal action, the need to invoke the *Zambrano* principle disappears and the carer returns to the status of someone whose presence is simply tolerated but who has no right as such to remain in the country.
>
> 168. I cannot accept that this would be a proper implementation of the EU right. The right lawfully to remain and work in the UK can only sensibly mean that no action can be taken by the State to defeat those rights. Of course, the right to remain need only be asserted when the State seeks to interfere with it; that is so with all rights which confer freedom from State interference. It does not follow that the right arises only at the point when it is being asserted. At all times whilst the *Zambrano* conditions are met, the carer has the right not to have action taken to remove her from the country if the effect would be to deprive the child of his or her right, as a citizen of the EU, to remain within the EU.
>
> 169. The Secretary of State's submission is made all the more bizarre given that someone not lawfully present in the UK is under a duty to leave, and indeed is committing a criminal offence by remaining: see section 24 of the Immigration Act 1971. As I understand the response to this point of Mr Coppel QC, counsel for the Secretary of State, it is that in practice no proceedings are ever instituted against those illegally present, and if they were there would be an immunity from the criminal process. But to be effective the immunity must have the effect that at no time when the carer has been performing her role as a *Zambrano* carer has she been acting illegally by remaining in the country. The carer's presence in the circumstances must be lawful, not merely tolerated, and that can only be on the premise that there is at all times a right to stay."

83. Before me Mr Blundell submitted that the court in *Sanneh* had been concerned only with the question of the time when the *Zambrano* right arose and not with that of the circumstances which gave rise to the right. I find that an artificial distinction. In order to know when a right arises it is necessary to identify the circumstances which can give rise to the right. It is significant that both Arden and Elias LJJ emphasised that for the *Zambrano* right to be excluded the carer's presence in the United Kingdom must be lawful and not merely tolerated. As Arden LJ pointed out a person who is present without leave to remain commits a criminal offence in the absence of any other right to be in the country. I do not understand it to be suggested by the Defendant that the existence of a reasonable prospect of obtaining leave if an application were to be made would operate as a defence to a prosecution for such offending.

84. The Defendant's argument before me that the *Zambrano* right does not arise if the carer has a real prospect of obtaining leave to remain is not different in effect from the contention rejected in *Sanneh* that the right only arose when removal was threatened or imminent. Indeed it is essentially a reformulation of that argument. It follows that although the argument now being raised was not addressed in terms in *Sanneh* it is inconsistent with the approach taken by the Court of Appeal. In my judgement the decision in *Sanneh* is incompatible with the Defendant's argument on this point and is fatal to that argument unless the approach taken there can properly be said to have been modified by later authority.

85. Although reference was made to the decision of the Supreme Court in *Patel & Shah v Secretary of State for the Home Department* [2019] UKSC 59, [2020] 1 WLR 228 it does not advance matters greatly for current purposes and can be addressed shortly.

86. The Supreme Court was concerned with two unrelated cases in each of which the defendant had refused an application for a derivative residence card which had been sought on the basis that the applicant was a *Zambrano* carer. In each case the outcome turned on the conclusion as to whether the relevant British citizen would in fact be compelled to leave the country if that citizen's carer left.

87. At [1] Lady Arden summarised the nature of the *Zambrano* right and said:

> "The right of residence is a derivative right, that is, one derived from the dependent Union citizen. A key to this derivative right is the deprivation of the benefits of the Union citizenship as a result of the Union citizen being compelled, by the TCN's [Third Country National's] departure, to leave Union territory. This case is about the nature or intensity of that compulsion."

88. Thus right at the outset it was clear that the court was addressing compulsion of the British citizen not compulsion of the carer. It was in that context that Lady Arden said at [22]:

> "What lies at the heart of the *Zambrano* jurisprudence is the requirement that the Union citizen would be compelled to leave Union territory if the TCN, with whom the Union citizen has a relationship of dependency, is removed. As the CJEU held in *O v Maahanmuuttovirasto* (Joined Cases C-356/11 and C-357/11) [2013] Fam 203, it is the role of the national court to determine whether the removal of the TCN carer would actually cause the Union citizen to leave the Union..."

And at [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* [2018] QB 103, 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..."

89. Those references in the judgment to compulsion and to a practical test applied to the actual facts were addressing the question of whether the British citizen would be compelled to leave if that person's carer left the country. The court was not considering whether or not there was a risk that the carer would have to leave the United Kingdom. Instead it proceeded on the assumption that the carer would depart in the absence of a derivative residence card and then turned to consider as a practical test to be applied to the actual facts whether the British citizen would then have to leave. That assumption was not in issue in the case and was not considered by the court. The decision does assist to the limited extent of making it clear that position of the British citizen is to be the focus of attention and of demonstrating that it is necessary to analyse references to compulsion with care.

90. The decision in *Akinsanya* arose from the First Claimant's challenge to the decision of 29th September 2020. The First Claimant had contended that in the formulation and application of App EU and the EEA Regulations the Defendant had misunderstood the scope of the *Zambrano* right under EU law.

91. At first instance Mostyn J had held that the grant of limited leave to remain did not automatically extinguish a carer's *Zambrano* right to reside and also that the effect of regulation 16(7) of the EEA Regulations was that in any event only the holders of indefinite leave to remain were excluded from applying for a right to reside under that regulation.

92. Underhill LJ (with whom Bean and Andrews LJJ agreed) explained that on a true understanding of the jurisprudence of the CJEU the *Zambrano* right only arose where the relevant carer had no right to reside and so was excluded by a limited grant of leave to remain as well as by indefinite leave to remain and that there had been no misunderstanding in that regard. However, he went on to explain that the reference in regulation 16 to those with indefinite leave to remain was too clear and explicit to be construed as covering those with a limited leave to remain and that the Defendant had erred in her understanding in that regard.

93. The correct understanding of the *Zambrano* right under EU law was relevant because as explained at [34] and [35]:

> *"*...in advance of the hearing below the Secretary of State accepted that her intention in framing the Annex 1 definition was that it should accurately state the actual right to reside enjoyed by *Zambrano* carers in the UK. It followed that if the claimant in fact enjoyed such a right notwithstanding the grant of leave to remain the Secretary of State had in framing limb (b) proceeded under a misunderstanding, and she accepted that it would be unlawful for her to make her decision on that basis.

> Accordingly, as Mr Blundell put it at para 28 of his skeleton argument before us, the only issue before Mostyn J was whether the Secretary of State had, in formulating the Annex 1 definition, "erred . . . in her understanding of (a) the *Zambrano* jurisprudence and (b) regulation 16 of the 2016 Regulations" - that is, by proceeding on the basis that the *Zambrano* right did not arise in circumstances where the carer in question had any form of leave to enter or remain. If she had, it was agreed that her decision would have to be quashed, and that she would be required to reconsider the terms of the definition..."

94. At [10] Underhill LJ identified the essence of the reasoning in *Zambrano* saying:

> "It will be seen that the essence of that reasoning, as it applied in the actual case, is that unless the father enjoyed the right to live in Belgium, and the right to work, he would have to leave the EU, and the children would in practice have to go with him, and that that would deprive them of the substance of their rights as EU citizens under articles 20 and 21..."

95. It is of note that at [45] Underhill LJ adopted the Defendant's counsel's characterisation of the effect of the decision of the CJEU in *Iida v Stadt Ulm* [2013] Fam 121 which he summarised thus at [44]:

> "The significance of that can only, he submitted, be that the court did not regard the *Zambrano* jurisprudence as being engaged in circumstances where the carer already enjoyed residence rights and where accordingly there was no current risk of them, or therefore their EU citizen dependants, having to leave the EU. Even if the domestic right in question might in principle lapse or be removed, leading to the potential "obstruction" of the dependants' article 21 rights, that did not engage *Zambrano* so long as that possibility was purely hypothetical..."

96. At [54] and [55] Underhill LJ rejected the First Claimant's argument that the *Zambrano* right could exist independently of any domestic right which was to the same effect saying:

> "...It is clear from *Iida* and *NA* that the court does not regard *Zambrano* rights as arising as long as domestic law accords to *Zambrano* carers the necessary right to reside (or to work or to receive social assistance). To put it another way, where those rights are accorded what I have called the "*Zambrano* circumstances" do not obtain.
>
> That analysis is perfectly sustainable at the theoretical level. As the court recognises (see para 72 of the judgment in *Iida*) the right of third country nationals to reside in a member state is normally a matter for that state. *Zambrano* rights are for that reason exceptional. They are not typical Treaty rights, since they arise only indirectly and contingently in order to prevent a situation where EU citizen dependants are compelled to leave the EU. That being so, it makes sense to treat them as arising only in circumstances where the carer has no domestic (or other EU) right to reside (or to work, or to receive necessary social assistance)."

97. At [56] Underhill LJ addressed *Sanneh* explaining that the court there "was not considering a case where the claimant enjoyed leave to remain as a matter of domestic law".

98. At [57] the judge said:

> "...Notwithstanding the analysis above, the fact remains that if at any time a *Zambrano* carer loses their right to reside as a matter of domestic law, the *Zambrano* right will arise (assuming, that is, that the effect of the carer leaving will be that the EU citizen child also has to do so): *Zambrano* is always waiting in the wings, and so long as the *Zambrano*

> circumstances obtain the carer can never be put in a position where their residence is unlawful..."

99. Underhill LJ then proceeded to analyse regulation 16 concluding that regulation 16(7) could only be read as providing that a person with limited leave to remain could still obtain a derivative right to reside.

100. As I have explained above in this case the Court of Appeal was not considering the position of a person who had no leave to remain but who did have a realistic prospect of obtaining such leave. It is, however, significant that the court did not contemplate the possibility that anything less than an actual and existing right would preclude the *Zambrano* right arising and also that it regarded *Sanneh* as addressing the position where there was no leave to remain. The passage at [57] is of particular note for current purposes. Underhill LJ was clearly contemplating a bright-line division between circumstances in which a carer has a domestic right (in which case the *Zambrano* right does not arise) and those where the carer has no such right whether by the loss of an existing right or the absence of any right (and in which case the *Zambrano* right would come into effect). It is inherent in this approach (and in that in *Sanneh*) that there is not a further category of those who have neither leave to remain nor a *Zambrano* right. The contention that the existence of a real prospect of obtaining a right excludes the *Zambrano* right is inconsistent with that understanding.

101. The Defendant placed considerable weight on the decision of the Court of Appeal in *Velaj*. There the claimant contended that he had a derivative right of residence by virtue of regulation 16 of the EEA Regulations. The claimant was a Kosovan national married to a British citizen. He and his wife were the carers of a British citizen child. The significant feature of the case was that the claimant's wife had said that if the claimant were to be deported to Kosovo she would not accompany him. It followed that in practice the deportation of the claimant would not cause the departure of the child from the United Kingdom. The issue was whether the First Tier Tribunal had erred in proceeding on the basis of a theoretical assumption that on the deportation of the claimant both parents would leave this country. Andrews LJ (with whom King and Whipple LJJ agreed) rejected that approach and upheld the decision of the Upper Tribunal allowing the appeal against that decision.

102. Andrews LJ identified the issue in the case thus at [13]:

> "The issue which arises on this appeal is whether a person deciding whether the requirements of Regulation 16(5)(c) are fulfilled must consider whether the British Citizen dependant would be unable to reside in the UK on the assumption that the primary carer (or both primary carers, as the case may be) will leave the UK for an indefinite period (irrespective of whether the assumption is correct); or whether the decision-maker must consider what the impact on the British Citizen would be if in fact the primary carer (or both primary carers) would leave the UK for an indefinite period."

103. For present purposes it is very significant that the case proceeded on the basis that (per Andrews LJ at [34]):

> "It was common ground that Mr Velaj would not qualify for a *Zambrano* right under the European jurisprudence because as a matter of fact, his son would not be compelled to leave the EU if Mr Velaj were denied a derivative right of residence. He would be able to stay in the UK with his British Citizen mother, who shared primary caring

> responsibilities with his father and who would not leave the UK if he were returned to Kosovo."

104. The key to the court's reasoning was the conclusion at [52] that the relevant regulation:

> "...must mean that the decision maker is required to look at matters on a factual basis, i.e. from the perspective of what would happen to the child if in fact, in the circumstances of that specific case, both primary carers would leave the UK..."

105. The decision in *Velaj* simply does not bear the weight which the Defendant sought to place on it in this case. As I have just explained it was common ground that the claimant did not have a *Zambrano* right under EU law and the question turned on the application of regulations which have now been revoked. It is correct that the court said that the focus was to be on the actual facts of the particular case rather than on assumptions but the facts which were to be considered were those in relation to the child in question not the carer. The analysis was being conducted on the assumption that the claimant (the carer in question) was leaving the United Kingdom with the analysis of whether such departure would in fact compel the departure of the British citizen following from that. The exercise was not one of considering whether the person claiming the derivative right would in fact be removed. The approach taken by the Court of Appeal echoes that taken in *Patel and Shah* and does not detract from the conclusions which I have found follow from *Sanneh.*

106. In the light of that analysis, I can deal shortly with the two Upper Tribunal decisions to which I was referred.

107. In *Secretary of State for the Home Department v Sonkor* [2023] UKUT 00276 (IAC) the appellant had leave to remain under App FM. She applied before the expiry of that leave for leave under App EU. The Secretary of State refused that application on the basis that the appellant had a realistic prospect of obtaining a further grant of leave under App FM. The Upper Tribunal did not engage with that issue because it regarded the primary question as being whether the appellant met the definition of a person with a *Zambrano* right to reside within the meaning of App EU as it then stood. It held that she did not because the definition excluded those with leave under another part of the Immigration Rules and the appellant had such leave.

108. In the unreported case of *Secretary of State for the Home Department v Osinubi* (UI-2022-0005765) the application for indefinite leave to remain under App EU had been refused on the basis that the appellant had a realistic prospect of obtaining leave to remain under App FM or otherwise by reference to Article 8 of the European Convention. However, the decision in the Upper Tribunal turned on the interpretation of the EEA Regulations. Upper Tribunal Judge Rintoul rejected the Secretary of State's argument in short terms. He held, applying *Sanneh*, that the appellant's *Zambrano* right had already "crystallised" and that the effect of the decision in *Akinsanya* was that the Secretary of State's interpretation of regulation 16 was "simply wrong". Save as an illustration of the application of *Sanneh* this does not advance matters.

109. The effect of the authorities is clear. It would have been possible for there to be a regime in which the test was whether there was a real prospect of the carer obtaining leave to remain (or, seeing the same test from the other side, a real likelihood that the

carer would be removed). The application of such a regime would have involved looking at the likely outcomes for the carer rather than the carer's existing rights and considering whether in practice the carer would be required to leave by the relevant authorities. Although such a regime would have been possible and might be regarded as sufficient to protect the relevant rights of EU citizens the authorities show that was not the approach which was adopted. Instead the authorities make it clear that regard is to be had to the rights actually enjoyed by the carer in question and that the *Zambrano* right is only excluded where the carer has been granted leave to remain. The question of whether the existence of a realistic prospect of obtaining leave prevents there being a *Zambrano* right to reside was not considered in those terms in the cases. However, the conclusion that such a prospect does not have that effect follows from the approach which has been taken in the cases and in particular from the analysis in *Sanneh*. It is true that there is to be regard to practicalities and to the actual facts but that is for the purpose of considering whether the absence of the right for the carer would actually cause the cared-for British citizen to leave the country. It is in that context there is to be consideration of whether there will in fact be a compulsion to leave and it is the potential compulsion of the British citizen and not that of the carer which is to be considered.

110. The consequence, therefore, is that to the extent that the revised App EU and the Guidance were based on the view that a realistic prospect of obtaining leave excluded the *Zambrano* right they were based on a misunderstanding of the law applicable before the departure of the United Kingdom from the European Union.

<u>The Consequence of the Correct Understanding for the Provisions of App EU and for the Positions of the Claimants.</u>

111. In issuing version 6 of the Guidance the Defendant was proceeding on the basis of a mistaken belief that a person who did not have leave to remain but had a realistic prospect of obtaining such leave could not be a *Zambrano* carer for the purposes of EU law. That misunderstanding was combined with and flowed from a flawed understanding of the effect of the decision in *Velaj*. That misunderstanding affected the terms of version 6 of the Guidance and the way in which paragraph (a)(iii) of the Annex 1 definition was applied.

112. The misunderstanding did not, however, affect the terms of the definition in App EU of a person with a *Zambrano* right to reside. Those terms were entirely consistent with the position under EU law and as matters had been before the Withdrawal Agreement came into effect. In particular paragraph (a)(iv) of the definition was entirely consistent with EU law in excluding from those with a *Zambrano* right those who already had leave to remain under a different provision. Similarly, the terms of paragraph (a)(iii) of the definition were entirely consistent with the *Zambrano* jurisprudence.

113. What, then, is the effect of the misunderstanding and what relevance does it have to the Claimants?

114. The Claimants say that the Defendant's misunderstanding in this regard should cause the court to quash the decisions in their cases and to require the Defendant to reconsider the terms of App EU and of the Guidance. This is because it is said that the Defendant proceeded on the basis of a mistaken view as to the underlying EU law and

that the maintenance of paragraph (a)(iv) was tainted by that misunderstanding. Alternatively, it is said that the court cannot be confident that the misunderstanding did not affect the approach which the Defendant took to the formulation of App EU. In particular, it is said that the misunderstanding meant that the Defendant did not appreciate that there was a difference between those who had leave to remain under a different provision (as a result of having applied for such leave and having paid any appropriate fees) and those who had chosen not to seek leave to remain. The Defendant did not appreciate that a simple carrying over of the *Zambrano* jurisprudence would continue a distinction between those categories. The court cannot be confident, the Claimants say, that if the Defendant had properly understood the position she would not have removed that distinction and brought those who would otherwise be *Zambrano* carers but who had leave under App FM into the category of those who could seek App EU leave.

115. I reject that contention for the following reasons.

116. The Defendant's misunderstanding affected version 6 of the Guidance and the application in accordance with that guidance of paragraph (a)(iii) of the definition of a person with a *Zambrano* right to reside. As I have noted above it had no impact on the terms of the definition and in particular no impact of the terms of paragraph (a)(iv) of the definition.

117. The decisions in the Claimants' cases turned on an application of paragraph (a)(iv) of the definition and the exclusion of those who already had leave to remain under a provision other than App EU. Both the Claimants had leave under App FM. It follows that at the time of their applications (and at the time the Withdrawal Agreement took effect) neither Claimant was a *Zambrano* carer on a correct understanding of EU law. Neither of them was in the category of persons who did not have leave under a different provision but who had a realistic prospect of obtaining such leave if they were to apply for it. It follows that the decisions affecting the Claimants were not affected by the Defendant's misunderstanding as to who was and who was not a *Zambrano* carer which arose as a result of the reflection on the decision in *Velaj* and which was articulated in version 6 of the Guidance. At the risk of repetition the position in short is that the misunderstanding potentially affected version 6 and the subsequent versions of the Guidance and the approach taken to those who did not have leave to remain under a different provision but had no impact on the Claimants (the decisions in respect of both of whom were made before the publication of version 6).

118. Moreover, the contention that the Defendant might have taken a different approach to the definition of those with a *Zambrano* right to reside but for the misunderstanding is not tenable. The terms of the definition correctly reflected the *Zambrano* jurisprudence. The purpose of App EU was to continue after the withdrawal of the United Kingdom from the European Union the rights which *Zambrano* carers had enjoyed in the United Kingdom by reason of EU law until then. The replacement of the provisions of App EU with other provisions having the effect that those in the position of the Claimants were to be treated as having *Zambrano* rights would have had a different effect. It would have meant that those (such as the Claimants) who did not have *Zambrano* rights while the United Kingdom was in the European Union were nonetheless to be given such rights (or strictly speaking their equivalent) after this country's departure from that Union. They were, moreover, to be given such

rights by App EU which had an avowedly different purpose. The material before me demonstrates that there was simply no prospect that such a course would have been adopted. It would have amounted to the adoption of option 1 of the three options which were presented. On behalf of the Claimants the point was made that as that course was presented as an option it follows that it was a course which it was open to the Defendant to adopt and that the court cannot be confident that the option would not have been chosen. That is a forensically attractive argument but it is one which is artificial when the material leading up to the revision of App EU and of the Guidance is seen as a whole. The clear intention was to replicate the rights which had been enjoyed under EU law but not to proceed further nor to grant additional rights. The fact that adoption of option 1 would involve such a course was expressly identified in the submission as a factor against it and as a matter meaning that it was "not consistent with the original policy intention". The rejection of option 1 was not affected by any misunderstanding as to the scope of the *Zambrano* right. The acceptance and implementation of option 1 on a true understanding of the *Zambrano* jurisprudence would have required an express acceptance of the fact that the *Zambrano* rights were being extended to those who had not enjoyed those rights under EU law and the material makes it clear that there was no prospect of such a step. It is highly relevant in this regard that the effect of the revision of App EU and the publication of version 5 of the Guidance was to implement option 3 and to exclude those, such as the Claimants who had leave to remain under a different provision, even while including the reasonable prospect cohort amongst those potentially entitled to be treated as *Zambrano* carers.

119. Whether the failure to adopt option 1 was irrational and/or discriminatory is a different question which I will address below.

120. The matter can be put more shortly. The terms of App EU were not affected by the misunderstanding which I have found the Defendant formed. The decisions affected the Claimants were based on the terms of App EU. It follows that the misunderstanding as to the position under EU law which caused the Defendant to draw up version 6 of the Guidance was entirely irrelevant to the decisions affecting the Claimants and had no impact on them. A misunderstanding as to a matter of law which arose after the terms of App EU were drawn up; which was not reflected in the version of the Guidance which was current at the time of the decisions affecting the Claimants; and which had no relevance to the circumstances of those decisions cannot provide a ground of challenge to those decisions.

121. In those circumstances it is not necessary for the Defendant to invoke section 31(2A) or (3D) of the Senior Courts Act 1981. However, even if the Defendant's misunderstanding is to be seen as potentially giving rise to a public law ground of challenge to the decisions here then those provisions preclude the granting of relief. I bear in mind the high hurdle imposed by the requirement that the court must conclude that it is "highly likely" that the outcome for the Claimants would not have been substantially different. Nonetheless, in the circumstances here that hurdle is surmounted. For the reasons I have already explained it is not credible to contend that but for the misunderstanding by the Defendant either the definition in App EU of a person with a *Zambrano* right to reside or the decisions affecting the Claimants would have been different still less that any difference would have been such as to result in the grant of indefinite leave to remain to either claimant.

Rationality.

122. The Claimants say that it is irrational for those in their position (the holders of leave to remain under App FM) to be treated differently from (a) those who had not obtained such leave but who would have done if they had sought it and (b) from *Chen, Ibrahim,* and *Teixeira* carers all of whom would be entitled to leave under App EU. The irrationality is principally said to be by reason of the discriminatory nature of this approach and it is, therefore, sensible to address the alleged irrationality and discrimination together. The Claimants' argument was combined with and, indeed, based on the contention that the holder of leave under App FM was in a worse position that the holder of leave under App EU. The Claimants emphasised the differences I have set out above between leave under App FM and leave under App EU characterizing the former as disadvantageous when compared to the latter and saying that it was irrational and discriminatory for those in their position to be confined to App FM.

123. There are a number of reasons why this line of argument fails. I am satisfied that the maintenance of the distinction and the confining of those in the Claimants' positions to App FM was rationally open to the Defendant and that it did not involve unlawful discrimination.

124. By way of preamble it is of central importance to remember that before the Withdrawal Agreement came into effect the Claimants did not have a *Zambrano* right to reside. As the holders of leave to remain they were not *Zambrano* carers for the purposes of EU law. The purpose of the EUSS and of the introduction of App EU into the Immigration Rules was to provide for those who had a right to be in the United Kingdom by virtue of EU law and by reason of this country's membership of the European Union but not for others (such as the Claimants). Subject to the discrimination argument that was an approach which was rationally open to the Defendant. This is particularly so when regard is had to the context of the withdrawal of the United Kingdom from the European Union. As Singh LJ (with whom Baker and Elizabth Laing LJJ agreed) explained in *R(SWP) v Secretary of State for the Home Department* [2023] EWCA Civ 439, [2023] 4 WLR 37 at [50] that context meant that the formulation of the EUSS was "clearly an area where a wide margin of judgement should be afforded to the Government". In addition the points made in the 2023 Equality Impact Assessment as to the importance of maintaining the integrity of the provisions of App FM and the need to treat all those covered by that appendix in a consistent way, quoted at [54], above had considerable force and was at the very lowest a consideration to which the Defendant was entitled to give considerable weight.

125. The Claimants' argument in support of this ground amounts to an attack on the provisions of App FM. As Miss Smyth put it for the Defendant the Claimants are in reality saying that App EU is better than App FM and that it is wrong that only some applicants for leave are eligible for leave under the former provision. The Claimants' argument, if accepted, would mean that anyone who was entitled to leave under App FM should be entitled to be treated as if they had leave under App EU. The difficulty for the Claimants' argument is that the provisions governing leave under App EU and leave under App FM have different advantages and different drawbacks and are intended for persons in different circumstances. It is not possible to say that one is necessarily worse than the other let alone that those entitled to leave under one should

be entitled to leave under the other. Whether one or other of the provisions is more advantageous will depend on the circumstances of the particular applicant for leave and may vary over time. For some applicants at some times the App EU provision (with a quicker route to settled status and the absence of fees at that stage) will be more advantageous but for others at different times the App FM route (with the scope for recourse to mainstream social security benefits) will be better. The First Claimant's history demonstrates that point. Her move from holding a derivative residence card to App FM leave to remain was a response to her wish to access social security benefits. The Defendant was entitled to regard the provision of different routes to leave and to settled status which were subject to different qualifications and requirements and intended for persons in different circumstances as appropriate and the maintenance of the different routes was well within the range of conclusions rationally open to her.

126. The Claimants contended that by being required to remain subject to the restrictions of App FM they were being penalised for having regularised their positions. It was said that it was irrational and unfairly discriminatory to preclude them from obtaining leave under App EU if those who could have obtained App FM leave but had not done so were able to obtain the former leave. In part this was an aspect of the argument that it was not possible to rule out the possibility that if the *Zambrano* jurisprudence had been properly understood the Defendant would have adopted option 1. Alternatively it was being said that any failure to adopt option 1 and the adoption of option 3 would have been irrational and discriminatory. The Claimants' argument depends on characterising those who regularised their position by seeking and obtaining leave as having acted properly in a way which was to their detriment when compared to those who had not applied for such leave. However, that characterisation is untenable. The Claimants and those in a similar position were not being in some way penalised for having regularised their position. When that is appreciated this argument falls away. The obtaining of leave under App FM brought benefits (hence the move by the First Claimant in 2019). Setting aside the point that it was a gateway to social security benefits the obtaining of leave brought other benefits. Not least of those was the grant of leave with the consequence that the recipient had a legal entitlement to remain in the United Kingdom. Moreover, the grant of limited leave to remain provided a route to settled status (with the calculation of the period after which settled status could be sought starting with the date of the grant of leave). A person who had not sought leave under App FM did not have the protection of the grant of leave and had not yet started on the route to settled status. In addition on a proper analysis of EU law those who had not obtained leave under App FM potentially had rights of residence as *Zambrano* carers before the Withdrawal Agreement came into effect whereas the Claimants and those in their position did not have such rights. As already explained it was properly open to the Defendant to distinguish between persons in those different positions when drawing up App EU.

127. The last point is also an answer to the argument based on the distinction between those in the position of the Claimants and those who had rights under EU law as *Chen* carers and *Ibrahim* and *Teixeira* carers. The latter had rights deriving from EU law before the withdrawal of the United Kingdom from the European Union and it was properly open to the Defendant to treat them differently for the purposes of the EUSS and App EU from those such as the Claimants who did not have such rights when the United Kingdom was in the European Union.

Did the Defendant comply with the Public Sector Equality Duty?

128. Section 149 of the Equality Act 2010 required the Defendant to have due regard to the matters set out at section 149(1)(a) – (c) when formulating App EU. The Claimants and the Defendant were agreed as to how the requirement was to be interpreted but differed as to whether there had been compliance here.

129. In order to meet her duty under section 149 the Defendant had to have considered the requisite matters and provided she did that then the 2010 Act did not prescribe any particular outcome. The conclusion as to the approach to be taken once there had been regard to the necessary factors was a matter for the Defendant subject to the requirement of rationality. However, there had to be due regard to the relevant considerations. This meant that there had to be a rigorous analysis involving a proper engagement with the issues and a genuine confrontation of the potential difficulties.

130. The issue between the parties was whether the Defendant's consideration of the relevant issues had been conducted with the necessary degree of rigour.

131. The relevant Equality Impact Assessment was that of 28th March 2022 although reference has also been made to that of 13th July 2023. However, it is of note that, as explained at [35] above, before the Defendant reconsidered App EU or published the documents of 13th June 2022 she was provided with the detailed representations made on behalf of the First Claimant and others. The Defendant was provided with the representations themselves and with a summary and was invited to have regard to them. I proceed on the basis that those representations were considered by the Defendant in good faith. Account also is to be taken of the analysis set out in the body of the submissions to the Defendant and the other accompanying material which I have noted at [29] and [30] above.

132. The Equality Impact Assessment was a detailed document. It set out the differences between leave under App FM and under App EU; addressed discrimination by reference to the protected characteristics listed at section 149(7) of the 2010 Act; and considered proportionality.

133. The Claimants say that nonetheless there was not a sufficient engagement with the issues. In the way in which it was put there was considerable overlap between this argument and the assertion of irrationality.

134. I am satisfied that there was sufficient engagement with the issues and that there was compliance with the section 149 duty. There was a detailed assessment in the Equality Impact Assessment (which as already noted did not stand alone). It cannot legitimately be said that there was not proper engagement with the issues.

135. Mr Cox subjected parts of the Equality Impact Assessment to a detailed critique saying that the language used showed that there was in truth a failure properly to identify and engage with the equality considerations. I do not accept that is the result of a proper reading of the Assessment. Illustrative of this critique was Mr Cox's attack on the passage considering proportionality in relation to race (and which was repeated in substantially the same terms in the context of sex) which said that:

> "With respect to proportionality, the fact that an affected person may be on a 10-year route to settlement under Appendix FM is not considered to be a material disadvantage

as they would not be required to leave the UK and could continue their family life here."

136. Mr Cox submitted that it was irrational to say that the requirement of a ten-year route to settled status was not a material disadvantage. Rather in order properly to engage with the equality considerations the Assessment should, Mr Cox says, have acknowledged that the ten-year route was a material disadvantage but then considered whether the disadvantage could be justified. In my judgement this criticism involved an artificial reading of the Equality Impact Assessment. When the document is read realistically and as a whole it is clear that the Assessment identified the differences between leave under App FM and under App EU and considered whether they amounted to disadvantages and if so whether the differences were justified. Thus the passage I have just quoted is avowedly having regard to proportionality and is immediately followed by an explanation of the considerations which would justify treating those who had rights under EU law differently from those who did not. Moreover, the analysis that the longer period to settlement was not a material disadvantage because the purpose of App FM was to protect the Article 8 right to family life and limited leave under App FM would adequately protect that right is a rationally tenable position. It is not the only view which could be taken but it was a rationally tenable analysis. Indeed I am satisfied that underlying the Claimants' critique of the Equality Impact Assessment is a disagreement with the results of the analysis. Moreover, the critique is influenced by the view that having leave under App EU was inherently more desirable than having leave under App FM. Although it was not expressed in this way the Claimants' contention was really that an assessment which failed to proceed on that basis was necessarily flawed. However, as I have explained above it was not the case that it was always preferable to have leave under App EU and so the assessment which proceeded on the footing that leave under the different provisions had both advantages and disadvantages was not deficient.

Compliance with the Section 55 Duty.

137. The contention that the Defendant had failed properly to have regard to the need to safeguard and protect the welfare of the Claimants' children (and the children of those in a similar position) is closely connected to the rationality and equality challenges and fails for substantially the same reasons.

138. The Defendant said in terms that the need to safeguard and promote the welfare of the Claimants' children had been considered. The Claimants' case boils down to the contention that the disadvantages of App FM as opposed to App EU are such that proper regard to the children's welfare would necessarily lead to the grant of settled status under App EU in these circumstances and that the refusal of the Claimants' applications must, therefore, have involved a failure to have the proper regard to that welfare. The Defendant was right to say that this argument was unsustainable. I have already explained why I do not accept that obtaining leave under App EU is necessarily to be seen as preferable to leave under App FM. The position is even stronger when considering whether there was proper regard to the welfare of the children. The Claimants' relevant children are British citizens and their right to family life with the Claimants was protected by the fact that the Claimants had leave under App FM (the provision in the Immigration Rules designed to protect such rights). It cannot properly be said that regard to the safeguarding and promotion of the welfare of those children required the grant of settled status to the Claimants under App EU in those circumstances.

Legitimate Expectation and Retrospectivity.

139. For the Second Claimant Mr Hawkin advanced two closely related contentions. He submitted that the effect of the revocation of the EEA Regulations and the maintenance in App EU of a definition of a *Zambrano* carer which excluded those with leave to remain under a different provision was retrospectively to remove rights which the Second Claimant already had and/or to act contrary to a legitimate expectation which had been created in her favour. That expectation was said to be that there would be no change of the Immigration Rules or of policy which would adversely affect the rights which it is said that the Second Claimant had by virtue of the earlier iteration of App EU and the EEA Regulations. It is said that the expectation arose by reason of a combination of factors around the withdrawal of the United Kingdom from the European Union including the terms of the EUSS and of the EEA Regulations and the statements of intent made on behalf of the Government.

140. The two pillars of this argument are the terms of the EEA Regulations and the assurances which were given particularly in the Statement of Intent of 21st June 2018 that provision would be made for those with rights under EU law (and in particular *Zambrano* carers) after the Withdrawal Agreement came into effect. When properly analysed neither of those matters assists the Second Claimant.

141. In respect of the EEA Regulations the Second Claimant's argument is that she would have met the requirements of regulation 16 because she was not exempt by reason of the definition in regulation 16(7)(c) and she satisfied the criteria contained in regulation 16(5). It is said that she had an accrued right alternatively a legitimate expectation that she would be granted leave under App EU. The effect of the revocation of the EEA Regulations combined with the terms of the App EU definition of those with a *Zambrano* right to reside (and exclusion there of those with leave to remain) was to remove her right retrospectively or to act contrary to that expectation.

142. The analysis of the nature of the EEA Regulations set out by Underhill LJ in *Akinsanya* at [30] is a complete answer to this point. Underhill LJ said:

> "Both the 2016 Regulations and the 2006 Regulations (and the Amendment Regulations) were, in the relevant respects, made under section 2(2) of the European Communities Act 1972. Since the rights recognised by them derive from EU law they do not form part of the scheme under the Immigration Act 1971: see para 20 above. Specifically, a derivative right to reside does not constitute a form of leave to remain. One consequence of that is that it does not provide a "route to settlement"."

143. These proceedings result from the refusal of the Second Claimant's application for indefinite leave to remain. She did not have a right to and could not have obtained such leave under the EEA Regulations and so the revocation of those regulations neither removed an existing right nor thwarted the expectation that settled status would be granted.

144. Similarly, the argument that the alteration of the definition in App EU to remove the reference to the EEA Regulations defeated a legitimate expectation or removed an accrued right cannot stand in light of the decision in *Akinsanya*. The effect of that decision was that it was appropriate for the Defendant to reconsider the terms of App EU. If the Second Claimant's argument is right then such reconsideration would have been unnecessary or rather a reconsideration which excluded those in the position of

the Claimants would have been impermissible but there is no suggestion of that being the position in the decision.

145. The difficulty in the Second Claimant's argument from the assurances given to those who had rights under EU law before the Withdrawal Agreement came into effect is that the Second Claimant was not a *Zambrano* carer under EU law. The Second Claimant contends that the Court of Appeal was wrong to say in *Akinsanya* that the effect of the Zambrano jurisprudence was a person with limited leave to remain was not a *Zambrano* carer. That decision is nonetheless binding on me. It follows that the Second Claimant did not have a *Zambrano* right to reside before the Withdrawal Agreement came into effect and assurances that the position of those with such a right would be protected are of no assistance to her.

146. This ground, therefore, fails.

The Second Claimant's Other Grounds.

147. I have already explained that although Mr Hawkin made it clear that these grounds were not abandoned he did not expand in his oral submissions on the points made in the Statement of Facts and Grounds and in the skeleton submissions. None of them advances matters for the following reasons.

148. The issue of whether the Defendant should have considered granting the Second Claimant leave outside the Immigration Rules has to be seen in the light of two matters. The first is that the Immigration Rules are to be seen as laying down the approach which is normally to be adopted in the circumstances which the Rules address. For the grant of discretionary leave outside the Rules something warranting taking a different approach in the particular case is required. It cannot be said that there was anything exceptional in the case of the Second Claimant. The second is that the Second Claimant's application was for indefinite leave to remain and so for settled status. The grant of such leave outside the Rules would be even more markedly exceptional than the grant of limited leave outside the Rules and the Second Claimant has not identified any circumstance warranting taking such a step.

149. It is correct that the leave granted to the Second Claimant had expired on 20th September 2021. However, entitlement or otherwise to the grant of indefinite leave to remain under App EU was to be determined by reference to the applicant's circumstances at the time when the Withdrawal Agreement came into effect. On that date the Second Claimant had leave to remain under App FM and so did not satisfy the definition of a *Zambrano* carer. The fact that her leave subsequently expired was not a consideration in favour of the grant of indefinite leave to remain when that was sought under App EU.

150. Similarly the fact that the Second Claimant provided further evidence that she was the sole carer of her daughter does not advance matters. This was confirmation of the position which the Second Claimant had set out earlier and was not in issue. The refusal of the Second Claimant's application turned on the fact of her leave under App FM and not on any question of whether she was her daughter's sole carer.

151. The invocation of the Article 8 rights of the Second Claimant and her daughter takes matters no further. It cannot realistically be argued that a refusal to grant settled status

under App EU was an interference with those rights in circumstances where App FM not only provided a way for those rights to be addressed but was the part of the Immigration Rules expressly designed to provide for such rights.

Conclusion.

152. I grant the First Claimant permission for the grounds of challenge based on the misunderstanding of the nature of the *Zambrano* jurisprudence; rationality; the public sector equality duty; and the duty under section 55 on the footing that those grounds are arguable. I grant the Second Claimant permission on those grounds and also for the ground asserting legitimate expectation and/or the retrospective removal of rights. However, I refuse her permission in relation to the challenges contending that the decision of the Court of Appeal in *Akinsanya* was wrong; that leave outside the Rules should have been considered; that the expiry of the Second Claimant's leave to remain was relevant; that account should have been taken of her further evidence; and that leave should have been granted by reference to Article 8. However, in the case of both Claimants the grounds for which permission has been granted fail for the reasons I have rehearsed above.