Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: UI-2022-003568**
EA/06859/2021

THE IMMIGRATION ACTS

Heard at Birmingham CJC
On the 29 November 2022

Decision & Reasons Promulgated
On the 07 February 2023

Before

UPPER TRIBUNAL JUDGE HANSON

Between

CHARMINE ROSALEE EDMAN
(Anonymity direction not made)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Williams, a Senior Home Office Presenting Officer.
For the Respondent: Ms D Papachristopoulou, Refugee and Migrant Centre.

DECISION AND REASONS

1. The Secretary of State appeals with permission a decision of First-tier Tribunal Judge Moan ('the Judge') promulgated on 13 June 2022 in which the Judge allowed Ms Edman's appeal against the refusal of an

application for EU Settlement on the basis Ms Edman had been granted limited leave to remain until 3 August 2021 as a parent.

2. Ms Edman is a citizen of Jamaica born 11 May 1981 who entered the UK in 2002 as a visitor but overstayed. On 14 December 2020 she made an application for settlement under the EU Settlement Scheme (EUSS) which was refused on 1 April 2021. It is the appeal against that refusal which came before the Judge.

3. The Judge records the fact Ms Edman had been granted a derived right to reside as the sole carer of her British national child, valid from 2 June 2014 until 2 June 2019, as a 'Zambrano' carer. Her son was born in 2011.

4. An application, made in November 2018 for leave to remain under Appendix FM of the Immigration Rules as a parent, was granted valid to 3 August 2021.

5. The Judge is critical of the failure of the Secretary of State to engage with the issues raised in this and similar appeals and it is noted that there was no Presenting Officer available on the day to assist the Judge.

6. Ms Edman's representative referred the Judge to a judgment of Mostyn J in the High Court in R (Akinsanya) v SSHD [2021] EWHC Civ 1535 and the subsequent dismissal of the Secretary of State's appeal to the Court of Appeal against the High Court's construction of the Rules and Guidance in R (Akinsanya) v Secretary of State for the Home Department [2022] EWCA Civ 37. It was submitted before the Judge that the fact Ms Edman had been granted leave under Appendix FM should have no bearing on the application as she relied on another period of continuous residence.

7. Whilst the Judge correctly notes at [25] that 'Zambrano' carers are left unprotected by the Withdrawal Agreement as they are not EU or British citizens, there is provision made in Appendix EU of the Immigration Rules for those so entitled.

8. At [26 – 27] Judge writes:

> 26. The lack of response from the Respondent has left this tribunal and the Appellant in an invidious position. It is impossible for me to determine whether there has been a clear breach of the Immigration Rules noting that it is still guesswork as to whether the Rules as presently drafted reflect the intention of the SSHD. I note the observations of senior Judges that the SSHD has misunderstood the position of Zambrano carers and so I must conclude that there is more likely than not an error in the drafting in Appendix EU. Noting that pre-EUSS sources indicated that Zambrano carers would be included, I find on balance that the Rules do not reflect that intention. At the very least, the Appellant's decision should have been withdrawn by the Respondent pending a clear steer from the SSHD to put in place protection for this Appellant afforded to new applicants as outlined in the consent order.
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> 27. On balance, I allow the appeal on the basis that the current Rules lack clarity to allow a decision to be confidently made that this Appellant has not complied with the necessary Rules or government intention as to the policy on Zambrano carers.

9. The Secretary of State sought permission to appeal on the following grounds:

> The Judge of the First-tier Tribunal has made a material error of law in the Determination. No proper basis has been identified as to how the appeal fell to be allowed by reference to the only relevant statutory ground – that the decision was not in accordance with Scheme Rules, and the Judge purports to make balance of probabilities findings as to whether the Rules intentionally diverged from EU law in the way suggested by the Administrative Court in Akinsanya. The determination also fails to note (although the Secretary of State's failure to engage with the appeal is acknowledged) two material developments. 13 days before the determination was promulgated the Court of Appeal gave judgment in Velaj in which the conclusions in Akinsanya were clarified; and on 13 June (the day the determination was promulgated) the Secretary of State published the result of the review of the rules and indicated that the holding of alternative leave at the relevant time(s) would continue to be a reason to refuse leave under the EU Settlement Scheme.
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> As a consequence the rules had not been and would not now be breached by considering that the alternative leave obtained and held as at 31/12/20 meant that eligibility requirements were not met. The appeal therefore had no basis for success.

10. Permission to appeal was granted by another judge of the First-tier Tribunal on the basis the Judge did not have regard to the judgement in Velaj or the published review of the rules.

Error of law

11. The reference to the case of Velaj is to the decision of the Court of Appeal in Alban Velaj v Secretary of State the Home Department [2022] EWCA Civ 767 in which the judgement was given by Lady Justice Andrews, with which the other members of the Court agreed. In her introduction Lady Justice Andrews highlighted that the appeal concerned the correct interpretation of Regulation 16(5)(c) of the Immigration (European Economic Area) Regulations 2016 (the 2016 Regulations) which defined the circumstances in which a third country national who was the primary carer of a British citizen has a derived right to reside in the UK. It was not disputed the 2016 Regulations ceased to have effect, save for certain transitional purposes, on 31 December 2020.

12. Regulation 16(5) reflected the rights established before the Grand Chamber of the Court of Justice of the European Union in the case of Ruiz Zambrano v Office national de l'emploi (Case C-34/09).

13. It is settled law that the Zambrano jurisprudence is based upon a requirement that the Union citizen will be compelled to leave the territory of the EU if the third country national with whom the Union citizen has a relationship of dependency is removed.

14. The question of whether the dependent EU citizen will be unable to reside in the UK depends upon a fact specific enquiry looking at what is likely to happen in reality.

15. It is a matter of EU law that a Zambrano right is a right of last resort which does not arise if the third country national carer otherwise enjoys a right under domestic law to reside in the member state in question. The simple logic for this is that if the third country national carer does not have to leave the territory of the member state there will be no compulsion upon the EU national who is being cared for to leave either.

16. In relation to the reliance by the Judge of the decision of the Court of Appeal in Akinsanya, it is written in Velaj:

> 65. In *Akinsanya* this court was not required to consider, and did not consider, the requirements of Regulation 16(5) and how 16(5)(c) might be satisfied in practice by a primary carer who had limited leave to remain. The only issue it had to determine was whether Regulation 16(7) acted as a threshold barrier precluding someone like Ms Akinsanya from asserting that she had a derivative right of residence under Regulation 16(5) (or its predecessor) which had survived the subsequent grant to her of limited leave to remain.
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> 66. The Court in *Akinsanya* did not have the benefit of hearing the arguments that were advanced in the present case. Those arguments would have had no bearing on the point of construction of Regulation 16(7) which determined the outcome. In those circumstances, even if I had not been a member of the constitution in that case, and able to gainsay the suggestion from my own personal knowledge of what was and was not considered, it would have been impossible to draw the inference that the Court must have interpreted Regulation 16(5)(c) in a particular way in order to reach the conclusion that it did.
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> 67. Mr Cox submitted that the criteria for the grant of the derivative right could not be met by a sole primary carer with limited leave to remain if the words "if the person left the UK for an indefinite period" in Regulation 16(5)(c) were not construed in the manner for which he contended, i.e. as a purely hypothetical premise. If a carer already had limited leave to remain they would not, in fact, leave the UK for an indefinite period and the child would not be compelled to leave with them.
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> 68. Although I see the force of that argument, the immigration status of a person with limited leave to remain is precarious; leave is likely to be subject to conditions and it is liable to be withdrawn or truncated. It is possible to conceive of situations in which the conditions attached to a limited leave to remain are such as to make it impossible in practice for the primary carer to remain in the UK and look after the child.
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> 69. I can also envisage a *Zambrano* carer whose limited leave to remain is due to expire making an application under Regulation 16(5)(c) and succeeding on the basis that they would have to leave the UK as soon as their limited leave expired and the child would have to go with them. In such a case if the decision-maker asks "what will happen to the child in the event that the primary carer leaves the UK for an indefinite period?" they will not be positing a completely unrealistic scenario. In any event, the practical difficulties of someone with limited leave to remain being able to satisfy the requirements of Regulation 16(5)(c) would not be a justification for construing those requirements in a manner which was clearly unintended.

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

17. The judgement of the Court of Appeal therefore clarified the correct approach to Zambrano cases in that it is a remedy of last resort. The amendment following review of the rules and the indication that the holding of alternative leave at the relevant time would continue to be a reason to refuse leave under the EU Settlement Scheme incorporates the guidance provided by the Court of Appeal.

18. The relevance of the reference in the ground seeking permission to appeal that the Court of Appeal handed down its judgement in Velaj 13 days before the decision of the Judge in this appeal was promulgated and that on the day of promulgation the review of the rules was published, is that a determination speaks from the date it is promulgated. Even if the decision was promulgated before the review was published, for which the Judge cannot be criticised, there is clear merit in the Secretary of State's argument that the fact a decision which provided definitive guidance and which was available 13 days prior to the promulgation of the decision, but which was not considered in that decision, clearly gives rise to an error of law material to the decision to allow the appeal.

19. As noted, is not disputed Ms Edman was granted leave to remain under the Immigration Rules, Appendix FM. It is not disputed that Ms Edman's child, the British citizen, has continued to live in the UK cared for by her as the child's primary carer. It was not suggested before me that Ms Edman is not entitled to continue to remain in the UK under the Rules in such capacity if a valid application is made.

20. In relation to this matter, as at the date of the application under the EUSS Ms Edman had leave to remain in the United Kingdom I find the Judge erred in law in not finding that excluded Ms Edman from meeting the eligibility requirements under the EUSS. I therefore set the decision of the Judge aside.

21. As that is the issue on which this matter turned and in which I find in favour of the Secretary of State, there is only one outcome in relation to this appeal on the facts, that is that the appeal must be dismissed. I therefore substitute a decision to dismiss the appeal.

Decision

22. The Judge materially erred in law. I set the decision aside.
23. I substitute a decision to dismiss the appeal.

Anonymity.

24. The First-tier Tribunal made no order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

I make no such order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Signed…….
Upper Tribunal Judge Hanson

Dated 30 November 2022