



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

Case No: UI-2023-002629

First-tier Tribunal No: EA/07870/2022

**THE IMMIGRATION ACTS**

**Decision & Reasons Issued:**

7<sup>th</sup> December 2023

**Before**

**UPPER TRIBUNAL JUDGE HANSON**

**Between**

**SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Appellant

**and**

**RUSHELIA JERDINE CROSSDALE  
(NO ANONYMITY ORDER MADE)**

Respondent

**Representation:**

For the Appellant: Mr Bates, a Senior Home Office Presenting Officer.

For the Respondent: In person.

**Heard at Birmingham Civil Justice Centre on 28 November 2023**

**DECISION AND REASONS**

1. The Secretary of State appeals with permission a decision of First-tier Tribunal Judge S.J Clarke ('the Judge'), promulgated on 27 April 2023, in which the Judge allowed Ms Crossdale's appeal against the Secretary of State's refusal, dated 10 August 2022 of her application for permission to remain in the UK as a person with a Zambrano right to reside.
2. The Judge considered the merits of the appeal on the papers, in accordance with Ms Crossdale's request.
3. At [7] the Judge finds the Secretary of State had failed to consider a concession element as confirmed in the Explanatory memorandum to the Statement of Changes in the Immigration Rules HC 1118 published on 15 March 2022, which brought into effect changes for the EUSS in Appendix EU to bring within the rules the current concession arrangements for an EUSS family permit to be issued in place of an EEA family permit (and relied upon in a subsequent EUSS application) where an EEA family permit would have been issued (including on appeal) to a dependent relative extended family member, or a person with a derived right to

reside, had the route not closed after 30 June 2021.

4. At [8] the Judge refers to High Court judgement in R (Akinsanya v Secretary of State the Home Department [2021] EWHC 1535 (Admin) in which it is stated the Secretary of State said that Zambrano applications would continue to be considered after July 2021 and that they would be considered in accordance with the 2016 Regulations as if those regulations had not been revoked.
5. The Judge finds Ms Crossdale made her application within the time limit set out by the Secretary of State and expected the application to have been considered. The Judge finds this did not occur and that it was also clear that the Secretary of State extended the deadline for making such applications from 1 July 2021 to June 2022 in relation to an appellant who has a Zambrano right to reside in accordance with the 2016 Regulations.
6. The Judge refers to Mostyn J finding there was nothing to show that a grant of leave to remain automatically extinguished a claim for Zambrano residence and find at [10] that it had been found by the Court of Justice of the European Union that limited national leave to remain and a wider Zambrano right to remain in many cases can and will coexist.
7. The Judge therefore finds at [11] that regardless of any leave to remain Ms Crossdale met the requirements the EEA Regulations 2016 and in accordance with the jurisprudence laid out in Zambrano was deemed eligible to apply for a Family Permit. On that basis the Judge allowed the appeal.
8. The Secretary of State sought permission to appeal asserting the Judge had made multiple errors of law in the determination in (1) failing to recognise the limited statutory jurisdiction in an appeal under the Citizens Rights Appeals Regulations, (2) misconstruing the difference between applications under the 2016 Regulations and Appendix EU, (3) in misunderstanding and misapplying the dicta of an Administrative Court decision subsequently revisited by the Court of Appeal, and (4) in misconstruing the operation of the concessionary policy not applicable to the application and appeal under consideration, for reasons more fully set out in the grounds dated 9 May 2023 drafted by Peter Deller.
9. Permission to appeal was granted by another judge of the First-Tier Tribunal on the basis it was arguable the Judge erred in law for the reasons set out in the Grounds seeking permission to appeal.

### Discussion and analysis

10. The refusal letter dated 10 August 2022 acknowledges that the application under the EU Settlement Scheme (EUSS) had been made on the basis Ms Crossdale is the primary carer of a British citizen. The individual concerned with the child Joshua, a British citizen, born on 8 August 2012. This is the date at which the decision-maker concluded the qualifying period as a person with a Zambrano right to reside would have started.
11. The qualifying criteria required to enable Ms Crossdale to succeed were:
  - (a) your continuous qualifying period in the UK as a 'person with a Zambrano right to reside' must be continuing at the date of your application to the scheme; or
  - (b) your continuous qualifying period in the UK as a 'person with a Zambrano right to reside' must have been a continuing at the specified date and ended when you completed a five year continuous qualifying period in the UK as such a person (and by the date of your application to the scheme there has been no supervening event); or
  - (c) at the date of your application to the scheme, you must be a 'person who had a derived board Zambrano right to reside', meaning you were a 'person with a Zambrano right to reside' immediately before you met another qualifying category (such as the family member of a relevant EEA citizen) and have since remained in that

or another qualifying category to the date of your application to the scheme.

12. It was found by the decision-maker that as Joshua was born on 8 August 2012 Ms Crossdale did not satisfy (b) of the definition as she was unable to rely upon any period in which she held non-Appendix EU leave. Ms Crossdale was granted leave to enter or remain in the UK on 6 November 2018 valid until 6 May 2021 under the Family and Private life Rules.
13. Consequently, it was not considered by the decision-maker that Ms Crossdale met the eligibility requirements for settled status as set out in rule EU 11 or pre-settled state as set out in rule EU 14 of Appendix EU to the Immigration Rules. It was not made out Ms Crossdale met any other eligibility requirements, leading to refusal under rule EU6 of Appendix EU.
14. In relation to Ground one, it is asserted the Judge failed to note that as an appeal under regulation 5 of the 2020 Regulations the only effective ground of appeal was that the decision was not in accordance with the Scheme rules. No Withdrawal Agreement right was applicable and the refusal under the relevant Scheme rule was correct as the definition of a person with a Zambrano right to reside was not met as Ms Crossdale had leave to remain granted on another basis at both the date of her EUSS application and in the specified date, 31 December 2020.
15. Ground two assert considering the scope of the appeal by reference to regulation 5 of the 2020 Regulations the Judge appears to have treated the appeal as if it had been against a refusal of documentation under the Immigration (EEA) Regulations 2016 having regard to a concession that applied under those regulations which is accepted it would still be considered in light of the Administrative Court's decision in Akinsanya, but this was not an application that was made or could be treated as one having been made under the 2016 Regulations.
16. Ground three asserts the Judge erred when considering Akinsanya and appears to have overlooked the subsequent decision of the Court of Appeal which raises the question of whether the Judge's conclusions were open to him in light of what was said by the Court of Appeal in Akinsanya and Velaj about the Zambrano right being one of last resort. Grounds accept this argument may not be material in any event, in light of the failures recognised in Grounds one - three.
17. On the base of the correct application of the law I find the Judge has erred in law in a manner material to the decision to dismiss the appeal for the reasons set out in the grounds seeking permission to appeal and the correct interpretation of the law.
18. It is of particular relevance that in Akinsanya v Secretary of State the Home Department [2022] EWCA Civ 37 the Court Appeal found that, as a matter of EU law, a Zambrano right to reside does not arise where a person holds leave to remain.
19. In Velaj v Secretary State for the Home Department [2022] EWCA Civ 767 it was found that the third stage of the enquiry, whether in practice the British citizen will be unable to reside in the UK, the EEA (currently 27 EU member states other than the UK when it was a member), together with Iceland, Lichtenstein, Norway or Switzerland, if the applicant were in fact required to leave the UK for an indefinite period, required a fact-based enquiry looking at whether, in practice, the British citizen will be unable to remain in the UK, and EEA Member State or Switzerland if the applicant were in fact required to leave the UK for an indefinite period.
20. The decision of the Judge was promulgated on the 27 April 2023. On 20 April 2023 the Upper Tribunal publish the reported decision in Sonkor (Zambrano and non—EUSS leave) [2023] UKUT 00276 the head note of which reads:

1. The EU Settlement Scheme ("EUSS") makes limited provision for certain Ruiz Zambrano v Office National de l'Emploi [2011] Imm AR 521 carers to be entitled to

leave to remain, as a matter of domestic law.

2.A Zambrano applicant under the EUSS who holds non-EUSS limited or indefinite leave to remain at the relevant date is incapable of being a “person with a Zambrano right to reside”, pursuant to the definition of that term in Annex 1 to Appendix EU of the Immigration Rules.

3.Nothing in R (Akinsanya) v Secretary of State for the Home Department [2022] 2 WLR 681, [2022] EWCA Civ 37 calls for a different approach.

21. A determination speaks from the date of promulgation. Had the correct legal provisions been taken into account by the Judge it is highly unlikely the decision under challenge would have been made, as it is clearly wrong in law.
22. An individual who has been granted leave to remain in the UK, such as Ms Crossdale, will not be required to leave the UK and so neither will her son. At the error of law hearing Ms Crossdale agreed with the statement by Mr Bates that she had been granted a further period of leave to remain in the UK and will not, therefore, be required to leave the UK and so neither will her son.
23. I set the decision of the Judge aside. I find the Judge has materially erred in law in allowing the appeal. Such decision is contrary to the law on the facts of this appeal.
24. I find on the facts there is only one outcome available to me. That is that the appeal must be dismissed. I substitute a decision to this effect.

### **Notice of Decision**

25. The First-tier Tribunal materially erred in law. That decision is set aside.
26. I substitute a decision to dismiss the appeal.

**C J Hanson**

Judge of the Upper  
Tribunal Immigration and  
Asylum Chamber

**28 November 2023**