IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-004190

First-tier Tribunal No:
EU/50093/2023

THE IMMIGRATION ACTS

Decision & Reasons Issued:

16th November 2023

Before

UPPER TRIBUNAL JUDGE SMITH
DEPUTY UPPER TRIBUNAL JUDGE BLACK

Between

HASNA TAFANY
(ANONYMITY ORDER NOT MADE)

Appellant

And

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellants: Mr M Al-Rashid, Counsel instructed via Carlton Law Chambers
For the Respondent: Ms S McKenzie, Senior Home Office Presenting Officer

Heard at Field House on Wednesday 8 November 2023

DECISION AND REASONS

BACKGROUND

1. The Appellant appeals against the decision of First-tier Tribunal Judge S L Farmer dated 5 September 2023 ("the Decision") dismissing the Appellant's appeal against the Respondent's decision dated 4 January 2023 refusing her settled status under the EU Settlement Scheme ("EUSS").

2. The facts of the case are not in issue and can be quite shortly stated. The Appellant is a national of Morocco. She came to the UK in 2012 as a student. She entered into a relationship with a British national and the couple have two children, also British citizens, born in 2012 and 2016.

3. The Appellant applied for and was granted a derivative right of residence as the primary carer of her eldest child ("a Zambrano carer") following a successful appeal, in 2015. Her derivative residence card was valid for 5 years from 26 January 2015. As we understood Mr Al-Rashid to accept, that five years' residence card could not have entitled the Appellant to permanent residence under EU law or under the Immigration (European Economic Area) Regulations 2016 ("the EEA Regulations") (see paragraph 15 of those regulations). It was a derivative right and not an exercise of Treaty rights.

4. In January 2020, the Appellant made an application to remain under Appendix FM to the Immigration Rules. She was granted limited leave to remain until 28 July 2022 which has been further extended until 31 December 2024. We observe that, if the Respondent accepts that the Appellant's residence as a Zambrano carer counts towards a period of lawful residence, the Appellant will have completed ten years' lawful residence in January 2025. That though has no relevance to this appeal.

5. The Appellant applied for settled status under the EUSS on 10 November 2022, based on her status as a Zambrano carer for five years between 2015 and 2020 which was refused by the decision here under appeal.

6. The Appellant's case was argued under the Immigration Rules relating to EUSS ("Appendix EU"). The Appellant argued that she satisfied paragraph EU11(3) of Appendix EU. The Respondent also refused the Appellant pre-settled status under EU14. It does not appear from the skeleton argument submitted to the First-tier Tribunal that the Appellant relied on there being a breach of the agreement between the EU and the UK on the UK's withdrawal from the EU ("the Withdrawal Agreement") but since a point is made in the grounds of appeal challenging the Decision relating to the Withdrawal Agreement, this is also something we will need to consider (albeit it cannot give rise to an error of law in the Decision if the point was not argued before Judge Farmer).

7. Having set out the terms of EU11 and what she considered to be the relevant definition under Annex 1 of Appendix EU, Judge Farmer concluded that the Appellant could not meet those provisions and that therefore the Respondent's decision was in accordance with Appendix EU. We will come to the Judge's reasoning below.

8. The Appellant appeals the Decision on the basis that the Judge has misinterpreted Appendix EU. The Appellant also argues that she is supported in her interpretation by the terms of the Withdrawal Agreement, in particular articles 9(a)(ii) and 15(1) of that agreement.

9. Permission to appeal was granted by First-tier Tribunal Judge Athwal on 26 September 2023 on the basis that the grounds are arguable. The Respondent filed a rule 24 response on 10 October 2023 seeking to uphold the Decision.

10. We had before us an indexed bundle of relevant documents submitted by the Appellant. We do not need to refer to those documents as the issue before us is one of interpretation of Appendix EU and the Withdrawal Agreement.

11. The matter comes before us to determine whether the Decision contains an error of law. If we conclude that it does, we must then consider whether to set aside the Decision. If we set aside the Decision, we must then either re-make the decision or remit the appeal to the First-tier Tribunal to do so.

12. It was agreed during the hearing before us, that there is but one answer to this appeal. If the Appellant is right in her interpretation, she is entitled to settled status. If she is wrong, then she will lose her appeal.

13. Whilst we accepted that what we say about the error of law is therefore also likely to be determinative of the appeal, we agreed with the representatives that, if we considered that the Appellant might be correct in her analysis, then we would list the appeal for a resumed hearing before a panel of this Tribunal with the opportunity for both parties to make written and oral submissions. This was because some of the arguments put forward by Mr Al-Rashid went beyond the grounds of appeal in their analysis and it would not be fair for the Respondent to have to answer them “on the hoof”.

14. However, we also indicated that if we were unpersuaded by those further arguments, we would find there to be no error of law in the Decision. Even if what we say below strays beyond the reasons given by Judge Farmer due to the development of arguments not made to her, those further arguments could not give rise to an error of law. However, in accordance with what we say above, if the Appellant’s interpretation is wrong, she could not succeed in her appeal. It is therefore appropriate that we give full reasons in relation to the further arguments raised.

15. Having heard submissions from Mr Al-Rashid and brief submissions from Ms McKenzie, we indicated that we would reserve our decision and provide that in writing which we now turn to do.

DISCUSSION

16. In order to inform our consideration of the Judge’s reasoning and the arguments put forward by Mr Al-Rashid, it is necessary to set out the provisions of Appendix EU on which Judge Farmer relied. Those are set out at [7] of the Decision and are as follows:

"Persons eligible for indefinite leave to enter or remain as a relevant EEA citizen or their family member, or as a person with a derivative right to reside or with a Zambrano right to reside

EU11. The applicant meets the eligibility requirements for indefinite leave to enter or remain as a **relevant EEA citizen** or their family member (or as a **person with a derivative right to reside** or a **person with a Zambrano right to reside**) where the Secretary of State is satisfied, including (where applicable) by the **required evidence of family relationship**, that, at the date of application, one of conditions 1 to 7 set out in the following table is met:

…

3. (a) The applicant:

(i) is a relevant EEA citizen; or

(ii) is (or, as the case may be, for the relevant period was) a family member of a relevant EEA citizen; or

(iii) is (or, as the case may be, for the relevant period was) a family member who has retained the right of residence by virtue of a relationship with a relevant EEA citizen; or

(iv) is a person with a derivative right to reside; or

(v) is a person with a Zambrano right to reside; or

(vi) is a **person who had a derivative or Zambrano right to reside**; and

(b) The applicant has completed a **continuous qualifying period** of five years in any (or any combination) of those categories; and

(c) Since then no supervening event has occurred in respect of the applicant

Annex 1:

person who had a derivative or Zambrano right to reside	a person who, before the specified date, was a person with a derivative right to reside or a person with a Zambrano right to reside, immediately before they became (whether before or after the specified date): (a) a relevant EEA citizen; or (b) a family member of a relevant EEA citizen; or (c) a person with a derivative right to reside; or (d) a person with a Zambrano right to reside; or (e) a family member of a qualifying British citizen, and who has remained or (as the case may be) remained in any (or any combination) of those categories (including where they subsequently became a family member who has retained the right of residence by virtue of a relationship with a relevant EEA citizen or with a qualifying British citizen) in addition, where a person relies on meeting this definition, the continuous qualifying period in which they rely on doing so must have been continuing at 2300 GMT on 31 December 2020

17. Before considering Mr Al-Rashid's grounds and oral arguments, we set out the submissions made to Judge Farmer and her reasons for finding that the Appellant did not meet those provisions as set out at [13] to [17] of the Decision as follows:

> "13. The appellant's continuous qualifying period is 26/01/2015 to 26/01/2020.
>
> 14. It is submitted that although her continuous period ended in January 2020 she would still satisfy the criteria as a Zambrano carer as she remains in the UK with her British children as their primary carer and no other intervening event has occurred. The relevant provision refers to a person having 'had' a Zambrano right. That does imply that it can be a past right rather than a current one. However I have to read that in the context of the definition of a Zambrano carer as set out in the definitions.
>
> 15. In order to satisfy the definition of a Zambrano carer the definition states that the continuous qualifying period on which the appellant relies must have been continuing at 2300 GMT on 31 December 2020. The continuous period on which the appellant relies had ended on 26/1/2020. It is accepted that she did have a 5 year continuous period on which she can rely. Although she claims that she would still satisfy the criteria of a Zambrano carer her leave had been replaced by leave under Appendix FM. It is clear that the leave she relies on had ended and had been replaced by alternative leave. The continuous period on which she relies had ended by 31/12/2020. She was not having her residence facilitated by Zambrano leave at the specified date. Although the provision refers to having 'had' a Zambrano right, she also had to have this right at the specified date. I find that as that right was no longer in existence and replaced by different leave, she cannot fulfil the definition of Zambrano carer as set out in Annex A [sic] and cited above.
>
> 16. Although I accept the principle of permanent residence that any 5 year continuous period exercising treaty rights would qualify, this is not analogous here as I must look at the specific definition and rules for Zambrano carers which differ to the general principles of exercising treaty rights for 5 years. The appellant is therefore not assisted by these principles.
>
> 17. In addition although the appellant states she continues to qualify as a Zambrano carer in principle, she was granted leave under Appendix FM and was exercising her right to remain in the UK on human rights grounds at the specified date and not Zambrano grounds and so I find she cannot rely on the fact that she might have been able to claim this right, I find she was precluded from this at that time as she had Appendix FM leave.
>
> 18. In all the above circumstances I refuse the appeal under Appendix EU, EU11."

18. Mr Al-Rashid drew our attention to Home Office guidance which he said supported the Appellant's case. Although there is no reference to this in either his skeleton argument before the First-tier Tribunal or the grounds challenging the Decision, and nor did the guidance appear in the Appellant's bundle for the hearing, we permitted him to refer to it without objection from Ms McKenzie. The guidance in question is entitled "EU Settlement Scheme: person with a Zambrano right to reside" Version 8, published 15 August 2023 ("the Guidance").

19. Leaving aside that the Guidance was not before Judge Farmer and that guidance cannot supplant the Immigration Rules, we permitted Mr Al-Rashid to seek to show us how the Guidance assisted the Appellant. Having carefully considered his submissions and the Guidance read as a whole, we do not consider that it assists the Appellant at all. On our

reading of it, it is consistent with the interpretation of EU11 and the definition in Annex 1 relied upon by Judge Farmer. We explain our reasons below.

20. Mr Al-Rashid took us to an extract from the Guidance at page 14 which reads as follows:

> "'Relevant period' means here the continuous qualifying period in which the person relies on meeting this definition. Unless the person relies on being a person who had a derivative or Zambrano right to reside or a relevant EEA family permit case, the relevant period must have been continuing at 11pm GMT on 31 December 2020"

That extract is repeated at page 17 of the Guidance and, as Mr Al-Rashid pointed out, it there goes on to say that "for convenience [the Guidance] generally refers to the requirements in the present tense".

21. Mr Al-Rashid placed great weight on the word "unless" in the extract to which he referred as well as on the reference to requirements being in the present tense. We also note however that the Guidance goes on to say that "it is important that [caseworkers] apply [the Guidance] to the relevant period relied upon". It is also therefore important to note that the extracts to which Mr Al-Rashid referred fall under the general heading of "Overview of Eligibility Requirements". The extract at page 14 falls under the heading of "Who is a person with a Zambrano right to reside". The use of the present tense in that heading does not bring the Appellant within that section. A "person with a Zambrano right to reside" is a separately defined term within Annex 1 of Appendix EU.

22. The Appellant falls within the separate definition of a "person who had a derivative or Zambrano right to reside". That is important because the heading in the Guidance immediately following the extract at page 17 to which we refer is "Who is a 'person who had a derivative or Zambrano right to reside'?". The Guidance continues as follows:

> "Appendix EU allows an applicant to rely on past continuous residence in the UK as a 'person with a Zambrano right to reside' where, before the specified date, they were a person with a Zambrano right to reside immediately before they switched (whether before or after the specified date) into another qualifying category under the scheme."

23. The Guidance then goes on to summarise paragraph EU11(3) and sets out what are the other qualifying categories (EEA citizen, family member of an EEA citizen, or a person with a derivative right to reside or a family member of a qualifying British citizen). It refers also to a person who has retained the right of residence by reason of a relationship with an EEA citizen or qualifying British citizen. It is to be noted that a "Qualifying British citizen" is separately defined in Annex 1 to Appendix EU and is (broadly) a person who previously fell within paragraph 9 of the EEA Regulations (and therefore the "Surrinder Singh" category). That does not apply here. Although we accept that a Zambrano carer is also someone with a derivative right, the two provisions are separately defined in Annex

1 to Appendix EU. Again, broadly, a “person with a derivative right of residence" is someone who has a relationship of primary carer of an EEA citizen where the EEA citizen is a minor in education in the UK.

24. The Appellant cannot therefore say that she has switched to one of the other qualifying categories set out in the Guidance or indeed under Appendix EU. She has to show that she is a ‘person who had a Zambrano right to reside’. We have already set out the definition in that regard in Annex 1 to Appendix EU at [16] above. That definition itself provides that an applicant can rely on the historic right only if he/she has subsequently switched to one of the qualifying categories which this Appellant cannot do.

25. The Guidance is not inconsistent with the definition in Annex 1 to Appendix EU. Indeed, although “relevant period” is not one of the terms separately defined, the reference in other definitions to that period having to continue as at 11pm on 31 December 2020 “unless the applicant relies on being a person who had …a Zambrano right to reside” is identical to the wording in the Guidance (see for example the definition of a “person with a Zambrano right to reside”).

26. The reason why that formulation is used is not difficult to understand when one reads the last two paragraphs of the Guidance under the heading relating to those who had a Zambrano right to reside in the past as follows:

> “Where an applicant relies on meeting this definition, the continuous qualifying period in which they rely on doing so must have been continuing at 11pm GMT on 31 December 2020. <u>However, it does not matter whether at that point they were a ‘person with a Zambrano right to reside’ or were in one of the other categories referred to above.</u>
>
> Where such an applicant relies on having been a ‘person with a Zambrano right to reside’ as part of their continuous qualifying period, you must use this guidance to assess whether they satisfied the requirements throughout that relevant period.”
>
> [our emphasis]

27. The reason why a person does not necessarily have to retain status as a Zambrano carer as at 11pm on 31 December 2020 is because, by that date, the Zambrano carer may have switched into another qualifying category. That is why the relevant period is treated separately and why the word “unless” is used when that “relevant period” is defined both in the Guidance and Appendix EU. This does not assist the Appellant. As Judge Farmer pointed out in her reasoning, by 11pm on 31 December 2020, the Appellant was not relying on any status under or deriving from EU law. She was relying on her human rights.

28. Returning then to paragraph EU(11)(3), the reference at (a)(vi) has to be read with the definition of a “person who had a derivative or Zambrano right to reside” in Annex 1. The Appellant cannot meet that definition

because she had not switched into one of the other qualifying categories either before or after 11pm on 31 December 2020 and nor had she remained in any of those categories as at that time and date.

29. Although no reliance was placed on the Withdrawal Agreement before Judge Farmer, Mr Al-Rashid sought to pray in aid the provisions of that agreement as supporting the Appellant's interpretation of Appendix EU. The Appellant could of course appeal on the ground that the Respondent's decision is contrary to the Withdrawal Agreement. We therefore consider it sensible to deal with Mr Al-Rashid's submission even though this was not part of the Appellant's case before Judge Farmer and cannot therefore disclose any error of law in the Decision.

30. Mr Al-Rashid relies on articles 9(a)(ii) and 15 of the Withdrawal Agreement. We take those provisions in turn. The relevant part of article 9 reads as follows:

> "*Article 9*
> **Definitions**
> (a) 'family members' means the following persons, irrespective of their nationality, who fall within the personal scope provided for in Article 10 of this Agreement:
> (i) family members of Union citizens or family members of United Kingdom nationals as defined in point (2) of Article 2 of Directive 2004/38/EC of the European Parliament and of the Council;
> (ii) persons other than those defined in Article 3(2) of Directive 2004/38/EC whose presence is required by Union citizens or United Kingdom nationals in order not to deprive those Union citizens or United Kingdom nationals of a right of residence granted by this Part;"

31. As that definition makes clear, "family members" can only be those in personal scope provided for in Article 10 of the Withdrawal Agreement. The reference in article 10 to "United Kingdom nationals" is only to those who are exercising rights of residence in other EU member states or rights as frontier workers. Reference to their family members has to be read in that context. It does not extend scope to UK nationals whose status (prior to the UK's exit from the EU) was also that of an EU citizen and from whose status the Zambrano carer status derives. That interpretation is underlined by the reference to the "right of residence granted by this part". The UK nationals in this case are the Appellant's children. Their right of residence was not granted by the Withdrawal Agreement; it is a right of abode by reason of their birth in the UK to a father who is a British citizen.

32. That point is also clear when one looks at article 9(a)(i). It could not sensibly be suggested that the Withdrawal Agreement confers rights on family members of UK nationals whatever the nationality of those family members. Those rights are dealt with by the UK's domestic laws. The Withdrawal Agreement is an agreement between the EU and the UK. Therefore, just as the UK confers certain rights on EU nationals in accordance with the Withdrawal Agreement, other EU member states are

bound by the Withdrawal Agreement to confer the same rights on UK nationals living and working in those states as at the date of the UK's exit from the EU and on their family members. That is how article 9(a)(ii) has to be read and interpreted.

33. For those reasons, article 9(a)(ii) does not avail the Appellant. She can derive no rights from the Withdrawal Agreement.

34. For those reasons, we can deal very briefly with article 15 of the Withdrawal Agreement. Article 15 is concerned with rights of permanent residence. As we have already pointed out, even under the EEA Regulations, Zambrano carers could not claim a right of permanent residence (see paragraph 15 of the EEA Regulations). Article 15 confers a right of permanent residence on "Union citizens and United Kingdom nationals, and their respective family members who have resided legally in the host State in accordance with Union law for a continuous period of 5 years…". The definition goes on to refer to "[p]eriods of legal residence or work in accordance with Union law before and after the end of the transition period" counting towards that period.

35. We have already explained why the Appellant cannot claim to be a family member of an UK national for the purposes of the Withdrawal Agreement. Further and in any event, she could not benefit from article 15 as that provision requires that residence be "in accordance with Union law". "Union law" is defined at article 2(a) as (in broad summary) the EU Treaties, general principles of EU law, acts of the various EU institutions, international agreements entered into by the EU, agreements between member states and declarations made at intergovernmental conferences which adopted the EU Treaties. It does not include any reference to rights derived from those UK nationals who also had status as EU citizens prior to the UK's exit from the EU. In short, therefore, the Withdrawal Agreement does not make provision for Zambrano carers. The Appellant cannot therefore benefit from it.

36. In light of what we say above, we do not need to deal with Mr Al-Rashid's arguments about what constitutes a "continuous qualifying period" or the definition of that term in Annex 1 to Appendix EU. As Judge Farmer found, the Appellant cannot satisfy the definition of a "person who had a Zambrano right to reside" because she no longer had that status (as at 11pm on 31 December 2020) and nor had she switched from that status to one of the other qualifying categories referred to in the definition of that term in Annex 1.

37. The Appellant could not claim either that she was a "person with a Zambrano right to reside" as at 11pm on 31 December 2020. That is because at that time she had leave to remain under Appendix FM to the Immigration Rules.

38. We note that in his skeleton argument before Judge Farmer, Mr Al-Rashid had referred to the High Court's judgment in R (oao Akinsanya) v Secretary

of State for the Home Department [2021] EWHC 1535 (Admin) and to the reference at [38] of the judgment to limited leave to remain not extinguishing a Zambrano right. However, that ignores the Court of Appeal's judgment in Akinsanya v Secretary of State for the Home Department [2022] EWCA Civ 37. The Court of Appeal expressly accepted that the High Court was wrong to conclude that, as a matter of EU law, limited leave to remain did not extinguish a Zambrano right (see [54] to [58] of the judgment). The Court of Appeal did not however allow the Secretary of State's appeal because it was not clear whether the Secretary of State had intended to make more generous provision than EU law required. Subsequently, the Secretary of State has clarified her position which is as in Appendix EU and the definition of a "person with a Zambrano right to reside". That definition is not met where an individual has limited leave to remain as did this Appellant.

39. Judge Farmer was therefore also right to conclude as she did at [17] of the Decision that the Appellant was precluded from relying on a Zambrano right because she had limited leave to remain as at the specified date.

CONCLUSION

40. In conclusion, the grounds and Mr Al-Rashid's very able submissions do not disclose any error in the Decision. Judge Farmer's reasoning is impeccable and fully explains why the Appellant could not succeed in her appeal.

41. We therefore uphold the Decision with the consequence that the Appellant's appeal remains dismissed.

NOTICE OF DECISION

The Decision of Judge Farmer dated 5 September 2023 did not involve the making of an error of law. We therefore uphold the Decision with the consequence that the Appellant's appeal remains dismissed.

L K Smith

Judge of the Upper Tribunal
Immigration and Asylum Chamber
10 November 2023