IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-001960

First-tier Tribunal No:
EA/53214/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 2nd of July 2024

Before

UPPER TRIBUNAL JUDGE SMITH

Between

RAHILA MOMAND

Appellant

and

ENTRY CLEARANCE OFFICER

Respondent

Representation:
For the Appellant: Mr M Osmani, legal representative, Times PBS
For the Respondent: Mrs A Nolan, Senior Home Office Presenting Officer

Heard at Field House on Thursday 20 June 2024

DECISION

INTRODUCTION

1. By a decision issued on 23 February 2024, I found an error of law in the decision of First-tier Tribunal Judge Wolfson dated 24 February 2023 allowing the Appellant's appeal against the Respondent's decision refusing her application to enter the UK as the primary carer of a British citizen child. My error of law decision is annexed hereto for ease of reference.

2. In consequence of the errors found, I set aside Judge Wolfson's decision and gave directions for a resumed hearing before me after three months from the date when my decision was sent.

3. I also gave directions for the filing and service of skeleton arguments. Those were to be filed and served sequentially beginning with the Respondent's skeleton argument. Mrs Nolan's skeleton argument was duly filed and served on 27 February 2024. However, the Appellant's skeleton argument due 28 days after my decision was sent was not filed by Mr Osmani until the day before the resumed hearing. Mrs Nolan did not however take objection to me considering what was there said.

4. I had before me a composite bundle which had been filed for the error of law hearing running to 329 pages to which I refer as necessary below as [B/xx].

5. Following submissions from Mr Osmani and Mrs Nolan, I indicated that I would reserve my decision and provide that in writing in due course, both as to the EU law issue and also the issue of the Tribunal's jurisdiction to consider Article 8 ECHR and any observations I might decide to make in relation to Article 8 whether or not I had jurisdiction.

6. As noted at [56] of the error of law decision, the Appellant's husband ("the Sponsor") was to consider whether she should make another application to join him relying on the Article 8 rights of herself and their two children. I was informed that this had only reached the stage of the Appellant seeking a fee waiver prior to making an application.

7. With that introduction, I therefore turn to provide my reasons for concluding that the Appellant's appeal must fail on EU law grounds and that I have no jurisdiction to consider an Article 8 claim within this appeal.

EU LAW: THE ZAMBRANO ISSUE

8. I set out at [42] to [49] of my error of law decision, some observations about the Appellant's case under EU law in an attempt to clarify the legal position for Mr Osmani so that he could tailor his submissions at the resumed hearing accordingly. Despite those observations, Mr Osmani's written submissions were largely as set out at the error of law hearing.

9. The first point to be made about those is that the content of the Zambrano right as it existed prior to the UK's departure from the EU is not at issue. As such, I am not assisted by the references to the CJEU case law cited at [17] and [18] of the submissions.

10. However, the second point to make is that the UK has since left the EU and the issue is therefore whether and to what extent the rights of a Zambrano carer continue.

11. Mr Osmani's submissions continue to refer to the Immigration (European Economic Area) Regulations 2016 ("the EEA Regulations"). However, as I set out at [23] to [34] of the error of law decision, the EEA Regulations were revoked as at 11pm on 31 December 2020 subject only to saving provisions which do not apply to this case.

12. Whilst this Tribunal in MA and SM (Zambrano: EU children outside EU) [2013] UKUT 00380 (IAC) and Campbell (exclusion) Zambrano [2013] UKUT 00147 accepted that Zambrano rights could in principle arise in entry clearance cases, the guidance in those cases applies the rights as set out in the EEA Regulations which no longer apply. As such, they cannot affect the position of the Appellant here.

13. Mr Osmani continued to rely on the case of Akinsanya v Secretary of State for the Home Department [2021] EWHC 1535 ("Akinsanya") and the Court of Appeal's judgment in that case ([2022] EWCA Civ 37). However, as I explained at [42] and [43] of the error of law decision, those judgments have no real relevance to this case.

14. Mr Osmani's submissions in relation to Akinsanya at [9], [11], [12] and [16] continue to misunderstand in particular the Court of Appeal's judgment in that case. As the Court of Appeal confirmed at [54] to [57] of its judgment, the Secretary of State may not have misdirected himself as to the applicability of the Zambrano carer provisions where an individual has leave to remain under domestic rules. However, whether he had in fact done so depended on what he intended to achieve. The Respondent was therefore left to determine that issue and did so, concluding that a person claiming to be a Zambrano carer could not benefit under Appendix EU if that person had any leave to remain under the Immigration Rules ("the Rules").

15. There is no "declaratory principle" in relation to the right to reside which emerges from the judgment in Akinsanya as is asserted at [16] of the submissions nor has the Respondent been found to have misinterpreted the EEA Regulations which are in any event now revoked. That is also the answer to the somewhat startling proposition at [30] of the submissions that the EEA Regulations had the effect of vesting a right in the Appellant and her children whereby they must be deemed to have been in the UK even though they were and are not.

16. Mr Osmani appeared to suggest however that the Respondent's actions following Akinsanya had in some way discriminated against the Appellant. He initially put forward the somewhat surprising proposition that the Respondent had not initially formulated the rules under the EU Settlement Scheme ("EUSS") in relation to in-country and entry clearance cases at the same time. This was puzzling since the

Respondent had done so, making rules for in-country cases under Appendix EU and for entry clearance cases under Appendix EU (FP).

17. In fact, as I later understood Mr Osmani's submission, it was that the Respondent had amended the rules under Appendix EU in response to Akinsanya but had not done so in relation to Appendix EU (FP). There is however an easy answer to that submission: Appendix EU (FP) does not and never has made provision for a right for Zambrano carers ([19] of the error of law decision). Further, the changes made to Appendix EU following Akinsanya were to confirm the restriction on a Zambrano right where the parent concerned had limited leave (in accordance with Appendix EU as originally formulated and which was challenged in Akinsanya). Since the Appellant in this case has never had leave, Akinsanya can be of no relevance.

18. As I understood Mr Osmani to accept, subject to the Article 8 issue which I deal with below, the only grounds available to the Appellant are that the Respondent's refusal of entry clearance is not in accordance with Appendix EU (FP) or is not in accordance with the agreement reached between the UK and the EU on the former's withdrawal from the EU ("the Withdrawal Agreement").

19. As I noted at [45] of the error of law decision, the view of this Tribunal as expressed in Sonkor (Zambrano and non-EUSS leave) [2023] UKUT 276 (IAC) ("Sonkor") ([7] of the decision) was that there is no provision for the rights of Zambrano carers in the Withdrawal Agreement. As I there accepted, that is not part of the guidance for which Sonkor is reported. I therefore set out below why it is said that this is the position.

20. Mr Osmani did not take me to Article 10 of the Withdrawal Agreement. That sets out the "personal scope" of the Withdrawal Agreement. The Appellant cannot fall within the personal scope for the following reasons.

21. I accept that certain United Kingdom nationals are one of the categories to whom rights are conferred or preserved by the Withdrawal Agreement. However, that relates only to those UK nationals who have exercised their right to reside under EU law in another member state prior to the UK's withdrawal from the EU. That is the mirror image of the rights of EU nationals who are only within the personal scope of the agreement if they have exercised their EU law rights in the UK prior to withdrawal.

22. The other categories are family or extended family members of those EU or UK nationals who fall under Article 10(1)(e) and (f) or Articles 10(2), (3) and (4). Articles 10(2) and (3) relate to extended family members or durable partners who had made an application for facilitation of residence prior to date of the UK's withdrawal from the EU or had their residence facilitated before then. For completeness, Article

10(4) relates to the durable partners of EU or UK nationals who are within personal scope where those partners were outside the member state or UK at the time of withdrawal but enjoyed a durable relationship at that time. The right is only to have entry and residence facilitated in accordance with national legislation.

23. The difficulty for the Appellant in placing reliance on the position of her British citizen child is that he was not in the UK at the time of withdrawal. Indeed, he has never lived here. Accordingly, the Appellant cannot rely on being the family member of a person who is within personal scope under Article 10 of the Withdrawal Agreement.

24. Mr Osmani suggested that the Appellant's child's right as a citizen also of the EU subsisted after withdrawal (see [14] of the submissions). For the reasons set out at [47] of the error of law decision, that submission is without merit.

25. Mr Osmani's reliance on Article 13(2) of the Withdrawal Agreement ([20] of the submissions) is similarly misconceived. The reference there to "United Kingdom nationals" and "Union citizens" has to be read in the context of Article 10(1)(a) and (b). Those persons only have the right to reside if that arose prior to 31 December 2020 and continued thereafter. The Appellant's British citizen child has never lived in the UK. Even if he had, he could only benefit under the Withdrawal Agreement as a UK national if living in another member state which is not the case. He is not a Union citizen and certainly could not be following withdrawal. Further, he has never lived in the UK in any event.

26. Mr Osmani also relied expressly on Article 5 of the Withdrawal Agreement which reads as follows:

> "*Article 5*
> **Good faith**
> The Union and the United Kingdom shall, in full mutual respect and good faith, assist each other in carrying out tasks which flow from this Agreement.
> They shall take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising from this Agreement and shall refrain from any measures which could jeopardise the attainment of the objectives of this Agreement.
> This Article is without prejudice to the application of Union law pursuant to this Agreement, in particular the principle of sincere cooperation.

27. Mr Osmani's reliance on this article is misconceived. The article is concerned with the obligations as between States and has nothing to do with the rights of individuals.

28. Mr Osmani submitted that the Respondent had discriminated against persons in the Appellant's position by distinguishing between those who were residing in the UK on 31 December 2020 and those who were

not. However, that arises directly from the Withdrawal Agreement. As explained above, UK nationals and Union citizens who continued to benefit from the right to reside in another member state and the UK respectively following withdrawal were only those who had resided in accordance with EU law prior to withdrawal and continued to do so. The Appellant and her children have always lived outside the EU and the UK. They cannot benefit directly or by way of any derivative right.

29. Mr Osmani also drew my attention to a notice of immigration decision headed "Grant of Leave Outside the Rules" which was annexed to his submissions. Both the name of the person to whom that grant was directed, and the date are redacted, and it is not therefore possible to ascertain the facts of that case. However, that document does not assist the Appellant for the following reasons.

30. The content of the grant is consistent with the Respondent's position in this case. The person concerned had not made an application under the EEA Regulations prior to 31 December 2020 and the application made thereafter was therefore refused. However, it appears that the First-tier Tribunal allowed that appellant's appeal and for whatever reason the Respondent did not bring an onward appeal (as he did here). The grant letter goes on to make the point that the appellant could not be given an EEA family permit, first because the EEA Regulations had been revoked and there were no saving provisions relevant to that appellant's case and secondly because it would not be valid for travel after 30 June 2021.

31. The grant letter goes on to refer to the EUSS. The Respondent did not agree to grant an EU (Family Permit) because the appellant could not meet the definition having failed to make an application under the EEA Regulations prior to 31 December 2020. That is the same position as here.

32. The Respondent accepted however that he was bound to implement the allowed appeal. Accordingly, leave was granted outside the Rules. The recipient of that grant was no doubt fortunate that the Respondent did not seek to appeal the First-tier Tribunal's decision as it appears that he/she was not entitled to any rights under the EUSS. For whatever reason, however, the Tribunal's decision was not challenged by the Respondent. It was because the Tribunal's decision had to be implemented that leave outside the Rules was granted.

33. This led Mr Osmani to suggest that I might encourage the Respondent to grant leave outside the Rules in this case or even determine that the Respondent should grant leave outside the Rules. He pointed out that the Appellant had a positive appeal decision. However, that was challenged, and I have set it aside.

34. The existence of the grant outside the Rules in the other case however then led to a discussion about the Article 8 issue and whether I had jurisdiction to determine that issue. I therefore turn to deal with that.

ARTICLE 8 ECHR

Jurisdiction

35. I set out the guidance in Dani (non-removal human rights submissions) [2023] UKUT 00293 ("Dani") at [50] of the error of law decision and it is not therefore necessary to repeat what is there said.

36. Dani is relevant to the issue whether there is a right of appeal in an EUSS case based on Article 8 ECHR. I accept that Dani was concerned with leave to remain and not entry clearance. However, the underlying rationale for what is said at [5] of the headnote is underpinned by what is said at [35] of the decision as follows:

> "Secondly, even if the appellant *had* maintained or implied to the Secretary of State that he was entitled to Article 8-based leave in the course of making an EUSS application, his primary application to the Secretary of State was for leave under the EUSS. His EUSS application would have been framed by reference to EUSS criteria, which are based on the EU Withdrawal Agreement, not the ECHR. Neither the EUSS nor the EU Withdrawal Agreement feature criteria commensurate with the general Article 8-based submissions the appellant sought to rely upon before the judge. Appendix EU of the Immigration Rules, which establishes the EUSS, has not been framed to give effect to the UK's ECHR obligations. The ECHR is, of course, an entirely different international treaty from the EU Withdrawal Agreement. The Secretary of State has made quite separate provision under the Immigration Rules, for example in Appendix FM, to give effect to the UK's Article 8 ECHR obligations. Mr Toal's attempt to achieve cross-pollination between two entirely separate regimes is misconceived. "

37. The fact that an application under EUSS does not give rise to Article 8 considerations because of the separate regimes applies equally to entry clearance. Further, the fact that an application under EUSS is not also an application relying on Article 8 means that a refusal of entry clearance or leave to remain is not also a refusal of a human rights claim.

38. This case is slightly different as the Appellant did raise Article 8 expressly in the covering letter to her application (letter at [B/310-326] at [19] onwards). The difficulty in that regard is that, although I accept that it might be said that the Appellant there made a "human rights claim" as defined by section 113 Nationality, Immigration and Asylum Act 2002 ("the 2002 Act"), there is no refusal of that claim in order to give rise to a separate right of appeal under section 82 of the 2002 Act.

39. The Court of Appeal in MY (Pakistan) v Secretary of State for the Home Department [2021] EWCA Civ 1500 confirmed that there is no right of

appeal against a decision which is appealable under section 82 of the 2002 Act where no such decision has been made. That case arose in a different context but confirms the position that the Tribunal has no jurisdiction to deal with an appeal absent a relevant appealable decision. There is no such decision here.

40. Mr Osmani made reference in his oral submissions to Smith (appealable decisions; PTA requirements; anonymity) [2019] UKUT 216 (IAC) ("Smith"). However, that is reported on the issue of the extent of decisions of the First-tier Tribunal and the interaction of those decisions with the appellate jurisdiction of this Tribunal. It says nothing in the guidance about the decisions of the Respondent which are the subject of the appeal.

41. What is said at [43] of Smith on which I understand the Appellant to rely has to be seen in the context of the facts of that case. The Respondent had refused a human rights claim by considering Article 8 ECHR when refusing to revoke a deportation order. The Tribunal therefore accepted that the appellant's human rights could be considered. The issue which arose was whether the Tribunal had jurisdiction to deal with an appeal under the EEA Regulations. The Tribunal concluded that it had no jurisdiction in that regard. The case says nothing about the position where there is no refusal of a human rights claim as is the case here.

42. There is also no ground of appeal in relation to a refusal of entry clearance under the EUSS that the decision breaches an appellant's human rights. The only two grounds of appeal are that the decision is not in accordance with the immigration rules which relate to the scheme (here Appendix EU (FP)) or not in accordance with the Withdrawal Agreement. As was said at [31] of the decision in Dani "[this] means that the tribunal simply does not have the jurisdiction to consider such matters in the first place, for there is no permitted ground of appeal pursuant to which such submissions may be advanced".

43. The position is also made plain by paragraph 9 of The Immigration (Citizens' Rights Appeals) (EU Exit) Regulations 2020 ("the 2020 Regulations"). By paragraph 9(1) of the 2020 Regulations, even if the Appellant had made a section 120 statement raising Article 8 ECHR, the "relevant authority" can only consider a matter raised in that statement if is "constitutes a specified ground of appeal against the decision appealed against". There is no human rights ground of appeal against a refusal of a family permit under the EUSS.

44. If the Appellant were to seek to rely on paragraph 9(4) which permits the "relevant authority" to consider "any matter which it thinks relevant to the substance of the decision appealed against", that then brings me back full circle to what is said in Dani. Article 8 ECHR is not relevant to the substance of a refusal of entry clearance under the

EUSS (see [32] to [36] of the decision). The Appellant did not in any event place any reliance on paragraph 9(4) of the 2020 Regulations either in the written submissions or orally.

45. Finally, I deal with the "new matters" regime. As stated at [28] of Dani, any "human rights claim" cannot be considered under the "new matters" regime. That is because there is no ground of appeal that the decision being appealed against is unlawful as contrary to section 6 of the Human Rights Act 1998 (see above). Further and in any event, Mrs Nolan made plain that the Respondent would not consent to this being raised as a new matter. The Appellant would be expected to make an application under Appendix FM as had been urged upon her at the previous hearing.

46. For the foregoing reasons, the Tribunal does not have jurisdiction to deal with any argument that the Appellant's Article 8 rights and those of her family are breached by the refusal of entry clearance.

The Claim

47. As was made plain in the error of law decision, it is of course open to the Appellant to make an application to enter as the spouse of the Sponsor (with their children as dependents). I make some brief observations about the Appellant's case to reflect the submissions made to me in case that course is followed. It would not however be appropriate for me to reach any concluded view about the claim given that I have no jurisdiction to deal with it. That will be a matter for the Respondent to consider if and when any application is made for entry on human rights grounds.

48. Mr Osmani made clear that the Appellant will not be able to meet either the financial requirements or the English language requirements. Accordingly, she will not be able to succeed within the Rules (Appendix FM).

49. Outside the Rules, I also accept Ms Nolan's submissions that those are factors which will not favour the Appellant (section 117B (2) and (3) of the 2002 Act).

50. On the other side of the balance, however, the Appellant and her children are undoubtedly living in very difficult circumstances in Afghanistan. That is reflected in the fact that they were called forward for evacuation. That factor cannot bind the Respondent – it was a decision of the Secretary of State for Defence. However, it does indicate the predicament of the Appellant and her children.

51. As Ms Nolan pointed out, however, I do not have before me any evidence about the precise circumstances of the Appellant and her children in Afghanistan at the present time. That is something which would need to be rectified in any application to explain for example

whether there are other family members in Afghanistan who are able to support the family.

52. I accept that it may well be difficult for the Sponsor to visit as often as he has in the past or indeed at all. It is not clear to me how the Sponsor derived his British citizenship and Mr Osmani's submission that he would be put at risk by travelling to Afghanistan is not borne out by any evidence. Again, that is something which would need to be explained in any application.

53. I accept that the best interests of the two children would need to be considered as a primary factor. One of those children is a British citizen which is relevant to what those interests require. I also accept that it is likely that their best interests favour being with both parents wherever their parents are. However, as Ms Nolan pointed out, the family unit has been living apart even prior to the UK's withdrawal from the EU. The eldest child was born in May 2015 and the youngest (the British citizen) in June 2020. The children have never known any country other than Afghanistan. Both are male. It is not suggested in any evidence at present that either is at risk from the Taliban.

CONCLUSION

54. For the reasons set out above, the appeal must fail. The Respondent's decision is not contrary to the rules relating to the EUSS which apply here (Appendix EU (FP)). Nor is it contrary to the Withdrawal Agreement. I have no jurisdiction to entertain an appeal on any other grounds.

NOTICE OF DECISION

The Appellant's appeal is dismissed.

L K Smith
Upper Tribunal Judge Smith
Judge of the Upper Tribunal
Immigration and Asylum Chamber

27 June 2024

APPENDIX: ERROR OF LAW DECISION

IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-001960

First-tier Tribunal No:
EA/53214/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:

.....23 February 2024.....

Before

UPPER TRIBUNAL JUDGE SMITH

Between

ENTRY CLEARANCE OFFICER

Appellant

and

RAHILA MOMAND

Respondent

Representation:
For the Appellant: Ms A Nolan, Senior Home Office Presenting Officer
For the Respondent: Mr M Osmani, legal representative, Times PBS

Heard at Field House on Thursday 8 February 2024

DECISION AND DIRECTIONS

BACKGROUND

1. This is an appeal brought by the Entry Clearance Officer. For ease of reference, I refer to the parties as they were before the First-tier Tribunal. The Respondent appeals against the decision of First-tier Tribunal Judge Wolfson dated 24 February 2023 ("the Decision") allowing the Appellant's appeal against the Respondent's decision

refusing her application to enter the UK as the primary carer of a British citizen child.

2. I begin by noting that the Respondent's decision is in fact two decisions. By a decision dated 8 August 2021, the Respondent refused the Appellant's application to enter under the EU Settlement Scheme ("EUSS") which is in this instance governed by Appendix EU(FP) to the Immigration Rules ("Appendix EU (FP)"). The second is one dated 11 August 2021 purporting to refuse the Appellant's application to enter under the Immigration (European Economic Area) Regulations 2016 ("EEA Regulations").

3. The factual background is relatively straightforward. The Appellant is the spouse of a British citizen in the UK who is of Afghan origin. She remains in Afghanistan. They have two children. The eldest is an Afghan national. However, as a result of the status of the Appellant's husband, their youngest child is a British citizen. The Appellant seeks to enter the UK as the primary carer of that child (relying on the "Zambrano" principle). Both children remain living with the Appellant in Afghanistan.

4. As was common ground before me, the Appellant made her application to enter on 30 June 2021. The covering letter and the application itself make clear that the Appellant was seeking to enter under the EEA Regulations. For reasons I will come to, however, the application was made on the form for an EU Family Permit (therefore under the EUSS).

5. The application was, as I have already noted, refused by two decisions. The first refused the application on the basis that the Appellant could not meet the requirements under Appendix EU (FP) as she was not the family member of an EU national and there was no provision for entry as the primary carer of a British citizen child under Appendix EU(FP). Very unfortunately, as I will come to, that decision did not find its way into the Respondent's bundle for the appeal. I was able to obtain a copy from Ms Nolan at the hearing before me.

6. The second decision was the one in the Respondent's bundle and before Judge Wolfson. That refused the application under the EEA Regulations. It did so on the basis that the Appellant had not shown that she was the primary carer of the British citizen child.

7. The Respondent was not represented at the hearing before Judge Wolfson. As such, she received no assistance from the Respondent as to the legal position. Although the Appellant was represented by Counsel before Judge Wolfson, he proceeded on the basis that, following the Respondent's decision and review, the only issue was whether the Appellant met the requirements of paragraph 16(5)(c) of the EEA Regulations. The Respondent bears the main responsibility for that state of affairs having given that as the only reason for refusal of the application under the EEA Regulations and having failed to provide

to the Tribunal the decision refusing the application under Appendix EU(FP). The Judge was not assisted by either the basis of the refusal or the review.

8. Judge Wolfson concluded that the Appellant did meet paragraph 16(5)(c) of the EEA Regulations and therefore allowed the appeal. I will come to her reasoning below.

9. The Respondent appealed the Decision on the basis that the Judge had no jurisdiction to allow the appeal under the EEA Regulations. The reason for this was that the EEA Regulations were revoked prior to the date of the Appellant's application. It was therefore not open to her to make an application on that basis when she did. Nor was it open to the ECO to refuse the application for the reasons given. The application should have been rejected as invalid or considered only under the EUSS (which was the application form used). As there was no valid application or decision, and appeal rights in relation to such a decision no longer existed, the Respondent argued that there was no jurisdiction to allow the appeal on the basis that the Judge had.

10. Permission to appeal was refused by First-tier Tribunal Judge Monaghan on 13 April 2023 as follows:

> "..2. The grounds taken as a whole do not disclose an arguable error of law. Even if the Judge has arguably fallen into error in relation to the 2016 Regulations, the Judge has made a finding that on the same basis the Appellant was entitled to be granted an EUSS Family Permit. It is noted that the refusal letter also set out that the application was treated as made and refused under the EUSS Regulations. The Judge was entitled therefore to consider this as an issue in the Appeal before him [sic] and reach findings thereon.
> 3. There is therefore no material error of law arising."

11. Following renewal of the application for permission to this Tribunal on the same grounds, permission to appeal was granted by Upper Tribunal Judge Kopieczek on 30 December 2023 for the following reasons:

> "..2. The grounds contend that the First-tier Tribunal ('FtT') had no jurisdiction to consider the appeal because the European Union (Withdrawal Agreement) Act 2020 repealed the Immigration (European Economic Area) Regulations 2016 at 11pm on 31 December 2020, more than six months before the application made on 6 July 2021. It is argued that in any event the preserved EEA Regulations did not include regulation 16, upon which the application was founded. It is also said that there was no provision by which the appeal could have succeeded under Appendix EU.
> 3. It is further argued that the fact that the ECO considered the application and refused it could not confer jurisdiction where there was none.
> 4. The grounds are arguable.
> 5. Given the nature of this appeal it is appropriate to give the following direction.
> No later than 7 days before the date of the hearing in the Upper Tribunal, both parties must file and serve a skeleton argument."

12. Contrary to the direction given, I did not receive the Respondent's skeleton argument until the day before the hearing before me and I did not receive the Appellant's submissions until the day of the hearing. Nevertheless, those were helpful in elucidating the issues and various misunderstandings as to the legal position.

13. I also had before me a bundle including the core documents for the appeal, as well as the Appellant's and Respondent's bundles before the First-tier Tribunal. As noted above, I also received from Ms Nolan in the course of the hearing the Respondent's decision refusing the Appellant's application under the EUSS. At this stage, the issues are very much ones of law and I do not need to refer to documents.

14. The matter comes before me strictly as an error of law hearing. As such, the only issue for me to determine at this stage is whether there is an error of law in the Decision. If I conclude that there is, I have to consider whether to set aside the Decision in consequence. If I do so, I either have to remit the appeal to the First-tier Tribunal or re-make the decision in this Tribunal, if necessary at an adjourned resumed hearing. Given the nature of the Respondent's grounds, the submissions and discussion at the hearing were predominantly concerned with what is the correct legal position in relation to the EEA Regulations and Appendix EU (FP) as those apply or do not apply to the Appellant's case.

15. Following discussions with the parties, the substance of which are set out below, I indicated that I found an error of law in the Decision and would set that aside and give directions for a resumed hearing before me. As I also note below, there was much discussion about other options available to the Appellant to resolve the predicament in which she and the children find themselves and what assistance the Respondent may be able to give her in that regard.

16. I indicated that I would set out my reasons in writing to assist both parties in their consideration of next steps which I now turn to do.

DISCUSSION

The Decision

17. Although much of the discussion before me was concerned with the law surrounding the Appellant's application and Respondent's decisions, it is appropriate to start with the Judge's short reasoning for allowing the appeal as I am concerned at this juncture with whether the Decision contains an error of law.

18. The Judge gave her reasons at [12] to [14] of the Decision as follows:

> "12. It was accepted by the respondent in the Review that the appellant is the primary carer of a British citizen child, [M]. I also find that the appellant is the mother and primary carer of her first-born son, [E]. I find that if the

appellant is refused permission to accompany the sponsor child to the UK, the sponsor child would be unable to reside in the United Kingdom or in another EEA State. Mr Sabahudin is not a primary carer of the sponsor child or [E]. I have taken into account the best interests of [M], in light of his specific circumstances including his young age, the limited emotional ties he will have formed with his father and the risks which separation of [M] from the appellant might entail to his mental health and well-being. Accordingly, I find that the appellant has established her position as a person with a 'Zambrano right to reside' and her EU family permit application should accordingly have been allowed (or, alternatively, she should have been granted an EUSS family permit).

13. There was no appeal before me in relation to [E] as he did not form part of the appellant's application and the respondent had failed to engage with the issue as to whether [E] could be added to her application, which was highly regrettable. However, I have found that the appellant is the mother and primary carer of [E]. [E] is accordingly, based on my findings at paragraph 13 above, a dependent of a person with a 'Zambrano right to reside' and any application for leave which is made on his behalf should be considered accordingly.

14. Accordingly, I allowed the appeal."

19. Whilst I accept that the Judge's reasoning would appear to be tied to the EUSS in terms of definition, there is no recognition that there is no provision for persons with a "Zambrano right to reside" or the dependent of such within Appendix EU (FP). The definition of a person with a "Zambrano right to reside" arises only under Appendix EU (in other words in relation to applications by those already in the UK). The Judge fails to explain how the Appellant can succeed on the basis of a "Zambrano right to reside" under either Appendix EU (FP) (which are the relevant Immigration Rules in this case) or under the agreement on the withdrawal of the UK from the EU ("the Withdrawal Agreement").

20. The Judge cannot be blamed for failing to realise this given the way in which the case was presented on both sides and that she did not have before her the Respondent's decision under the EUSS which would have made the position clearer. As I have already said, the Respondent must bear much of the blame for the way in which this appeal has gone awry. However, the Judge's reasons for allowing the appeal simply cannot stand or at least cannot do so without some basis being shown why the appeal could be allowed under the EUSS.

The Respondent's grounds of appeal

21. I turn next to the Respondent's grounds of appeal as the parties need clarity on the way in which the appeal could proceed.

22. In Mr Osmani's outline submissions, much focus was placed on the EEA Regulations and the case-law in relation to "Zambrano carers" under the provisions of those regulations. Reference was also made to EU law in relation to "Zambrano carers".

23. As I explained to Mr Osmani at the outset of the hearing, much of what is there said is now irrelevant to this appeal. The UK is no longer a member of the EU. As I come to below, the EEA Regulations were revoked on 31 December 2020 subject only to certain savings and transitional provisions.

24. I need to turn first to SI No 1309 of 2020 entitled "The Immigration and Social Security Co-ordination (EU Withdrawal) Act 2020 (Consequential, Saving, Transitional and Transitory Provisions) (EU Exit) Regulations 2020" ("The ISCE Regulations").

25. Paragraph 2(2) of the ISCE Regulations states that those regulations come into force when paragraph 2(2) of Schedule 1 to the Immigration and Social Security Co-ordination (EU Withdrawal) Act 2020 ("the 2020 Act") comes into force.

26. Paragraph 2(2) of Schedule 1 to the 2020 Act came into force on 31 December 2020 by virtue of SI No 1279 of 2020. That is therefore the date when the ISCE Regulations came into force subject to certain exceptions set out in paragraph 2 which have no relevance to the issues in this appeal.

27. The purpose of the ISCE Regulations was to make changes to existing primary and secondary legislation subject to transitional arrangements. One piece of secondary legislation affected was the EEA Regulations. The changes to the EEA Regulations appear in Schedule 3.

28. Paragraph 3 of Schedule 3 of the ISCE Regulations deals with pending applications. Relevant to this appeal is paragraph 3(6) which continues regulation 20 of the EEA Regulations for the purposes of granting an application for a derivative residence card which was validly made in accordance with the EEA Regulations 2016 before commencement day (ie 31 December 2020).

29. Paragraph 4 of Schedule 3 to the ISCE Regulations then continues certain provisions of the EEA Regulations as set out in paragraph 6, notwithstanding the revocation of the EEA Regulations. Regulation 16 (relied upon by the Appellant in this case) is not one of the provisions which is saved.

30. Finally as relevant to this appeal, under the ISCE Regulations, paragraph 5 of Schedule 3 deals with "[e]xisting appeal rights and appeals". Paragraph 5(1) applies the EEA Regulations to four categories of case. Paragraphs 5(1)(a) and (b) apply to appeals brought under the EEA Regulations (or the earlier EEA regulations) prior to commencement day which had not been finally determined by that date. Paragraph 5(1)(c) applies to a decision taken prior to 31 December 2020 but not yet appealed. Paragraph 5(1)(d) applies to a decision taken after 31 December 2020 in relation to the EEA Regulations as those are continued by the ISCE Regulations or the

"Citizens' Rights (Application Deadline and Temporary Protection (EU Exit) Regulations 2020".

31. The next port of all is therefore the "Citizens' Rights (Application Deadline and Temporary Protection) (EU Exit) Regulations 2020" ("the Citizens' Rights Regulations") (SI No 1209 of 2020).

32. The Citizens' Rights Regulations begin with paragraph 3 which provides for a "grace period" if the EEA Regulations are revoked on IP completion day (also 31 December 2020) as they were. In those circumstances, the grace period is stated to be a period between 31 December 2020 and the application deadline (which was 30 June 2021). Certain provisions of the EEA Regulations were saved for the purposes of applications within that grace period.

33. The difficulty for the Appellant in this case is that the provisions of the EEA Regulations as continued apply only to a "relevant person". A "relevant person" is defined in the Citizens' Rights Regulations as follows:

> "'relevant person' means a person who does not have (and who has not, during the grace period, had) leave to enter or remain in the United Kingdom by virtue of residence scheme immigration rules and who –
> (j) immediately before IP completion day –
> (i) was lawfully resident in the United Kingdom by virtue of the EEA Regulations 2016, or
> (ii) had a right of permanent residence in the United Kingdom under those Regulations (see regulation 15), or
> (k) is not a person who falls within sub-paragraph (a) but is a relevant family member of a person who immediately before IP completion day –
> (i) did not have leave to enter or remain in the United Kingdom by virtue of residence scheme immigration rules; and
> (ii) either –
> (aa) was lawfully resident in the United Kingdom by virtue of the EEA Regulations 2016, or
> (bb) had a right of permanent residence in the United Kingdom under those regulations (see regulation 15)."

34. That definition cannot apply to the Appellant as she was not in the UK as of 31 December 2020. There was therefore no grace period applicable to any application made by the Appellant under the EEA Regulations.

35. I refer to the Citizens Rights Regulations only because of the reference to a grace period. It was accepted by Ms Nolan that the Appellant's application under the EUSS (Appendix EU (FP)) was a valid one and there continues to be an appeal against the refusal of that application. What there is not though is any grace period in relation to the application under the EEA Regulations.

36. In relation to appeal rights against the Respondent's decision under the EEA Regulations, Mr Osmani drew attention to this Tribunal's

guidance in Osunneye (Zambrano; transitional appeal rights) [2023] UKUT 00162 (IAC) ("Osunneye"). That provides as follows:

> "1. Following the UK's withdrawal from the EU, the Immigration (European Economic Area) Regulations 2016 are continued for transitional purposes by statutory instruments including the Immigration and Social Security Coordination (EU Withdrawal) Act 2020 (Consequential, Saving, Transitional and Transitory Provisions) (EU Exit) Regulations 2020 (SI 1309/2020).
> 2. Paragraph 5 of Schedule 3 to the 2020 Regulations deals with 'Existing appeal rights and appeals'. Paragraph 6 of Schedule 3 then sets out the specified provisions of the EEA Regulations 2016. Neither regulation 16 nor 20 of the EEA Regulations are included in that schedule. Regulation 36 relating to appeal rights is. Schedule 2 to the EEA Regulations is also amongst the provisions continued as modified. At paragraph 6(cc), the modifications to that schedule are set out.
> 3. Those provisions draw a distinction between appeals which arise before or are against decisions taken before 31 December 2020 (paragraphs 5(1)(a) to (c)) and those against decisions taken after 31 December 2020 (paragraph 5(1)(d)).
> 4. Contrary to the unreported decision in Secretary of State for the Home Department v Oluwayemisi Janet James (UI-2021-000631; EA/05622/2020), the right of appeal against a decision made prior to 31 December 2020 therefore continues in force until finally determined (see in that regard paragraph 5(2) of Schedule 3 to the 2020 Regulations).
> 5. Part Four of the Withdrawal Agreement is concerned with transitional provisions which apply during the transition or implementation period between the date of the Withdrawal Agreement and 31 December 2020.
> 6. Part Four of the Withdrawal Agreement applies 'Union law' during the transition period. The Zambrano right is a derivative one which depends on Article 20 Treaty for the Functioning of the European Union (TFEU). The TFEU is part of 'the EU Treaties'. It is continued in force during the transition period."

37. The difficulty for the Appellant is that, unlike Mr Osunneye, she had not made an application prior to 31 December 2020. Had she done so, she could have appealed the decision made under the EEA Regulations under either paragraph 5(1)(c) or (d) of Schedule 3 to the ISCE Regulations. As it is, though, the ISCE Regulations and the guidance in Osunneye cannot avail her.

38. For the foregoing reasons, the Respondent's ground of appeal is made out in relation to the appeal against the Respondent's decision purporting to refuse the application under the EEA Regulations. The answer in that regard is that there was no valid application and therefore no valid refusal and no right of appeal as a matter of law. The Judge had no jurisdiction to determine any appeal against the refusal under the EEA Regulations.

39. As I have already pointed out, the Respondent is largely if not entirely to blame for the Appellant and Judge being misled in this regard. However, as the Respondent points out, jurisdiction either exists or

does not as a matter of law. A party cannot confer jurisdiction where none exists whether by mistake or otherwise.

The Appellant's application under Appendix EU (FP)

40. I do not wish to say too much about this aspect of the Appellant's appeal for fear of pre-judging the arguments which the Appellant may wish to make at a resumed hearing. Ms Nolan accepted that the Appellant retains the right to appeal the refusal of an EU Family Permit. I have explained why the Judge erred in finding that the Appellant could meet Appendix EU (FP) but I do not wish to constrain the Appellant in any arguments she wishes to make at a resumed hearing in this regard. What follows therefore reflects my provisional views based on the law as it appears to me to stand at the present time.

41. It is however necessary for me to clear up a few misconceptions under which Mr Osmani appeared to be harbouring.

42. First, I deal with the case of Akinsanya v Secretary of State for the Home Department ("Akinsanya"). Mr Osmani referred me to the High Court judgment of Mostyn J dated 9 June 2021 ([2021] EWHC 1535 (Admin)). However, as I pointed out to Mr Osmani, that judgment was appealed to the Court of Appeal and resolved by a judgment dated 25 January 2022 ([2022] EWCA Civ 37). True it is that the Court of Appeal did not allow the Secretary of State's appeal. That was on the basis that the Secretary of State's purpose in framing the definition of "a person with a Zambrano right to reside" as he had was not clear. That was tied to paragraph 16 of the EEA Regulations but narrowed the definition to those who had no leave to enter or remain as a matter of domestic law rather than those who did not have indefinite leave to enter or remain as was the position under the EEA Regulations.

43. As I pointed out to Mr Osmani, Akinsanya is of no real relevance to the Appellant here. It concerned an application under the EUSS and not the EEA Regulations so has nothing to say about an application made after 31 December 2020 in the latter regard. It is also concerned with applications under Appendix EU and not Appendix EU (FP). There is provision for persons with a Zambrano right to reside in the former but not the latter (as Ms Nolan pointed out). The central question in Akinsanya concerned those who had leave to enter or remain under domestic scheme Immigration Rules which is not the Appellant's position. For completeness, I observe that since the Court of Appeal's judgment the Respondent has published guidance which confirms that a person with a "Zambrano right to reside" applies only to those who have no leave to remain under domestic scheme Immigration Rules.

44. Second and in case the position in relation to Akinsanya needs clarifying further in relation to this case, I referred Mr Osmani to this Tribunal's guidance in Sonkor (Zambrano and non-EUSS leave) [2023] UKUT 276 (IAC) ("Sonkor") as follows:

> "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."

45. Whilst it is not part of the guidance for which Sonkor is reported, the Appellant may wish to consider [7] of the decision in relation to "Zambrano rights" under the Withdrawal Agreement. The Appellant should note that the only grounds of appeal available to her are that the decision (refusing her application under the EUSS) are that the decision is contrary to the relevant Immigration Rules (here Appendix EU (FP)) or contrary to the Withdrawal Agreement.

46. Third, the Appellant may also wish to have regard to what was said by the Court of Appeal in Akinsanya regarding "Zambrano rights" as a matter of EU law.

47. In that regard, Mr Osmani made submissions regarding the rights which he said exist as a matter of EU law. However, "Zambrano rights" are rights which derive from the rights of EU citizens. Mr Osmani suggested that [M] (the Appellant's British citizen child) had such rights which continued notwithstanding the UK's departure from the EU because he was born prior to 31 December 2020. However, the rights of EU nationals as a matter of EU law are concerned with a right of free movement as EU nationals and not with nationality rights acquired as a matter of domestic law. The difficulty for the Appellant is that, after 31 December 2020, the Appellant's son ceased to be also an EU citizen and did not have continuing rights of free movement under EU law save insofar as he was already exercising those rights which he was not as he was living outside the EU.

48. Fourth, I indicated to Mr Osmani that, although the Tribunal had not reported as guidance the position of Zambrano carers under the Withdrawal Agreement, the Tribunal was due to revisit that issue in a case which had been stayed behind Sonkor (Ayoola v Secretary of State for the Home Department: UI-2022-003001). That case is due to be heard on 4 March 2024. Any guidance emerging in that case (if the decision is reported) may be only peripherally relevant to this case as it concerns a child who may also be an EU national. Moreover, it is concerned with Appendix EU and not Appendix EU (FP). For that reason, I have not thought it appropriate to stay this appeal behind that case. If the Appellant wishes to apply for that to be done, I can consider that application but I am concerned about any unnecessary further delay in this appeal.

49. Although not a reported decision, the Appellant may wish also to have regard to the unreported decision in Tafany v Secretary of State for the Home Department (UI-2023-004190) for what it has to say about "Zambrano rights" under the Withdrawal Agreement. Again, that is a case concerned with an appellant who was already living in the UK. It was also a case where the point was not fully argued before me. It may though clarify the issues for the Appellant.

Article 8 ECHR

50. There was a good deal of debate at the hearing before me about alternative avenues which the Appellant might be able to pursue in order to secure entry clearance for her and her children, based on their Article 8 ECHR rights. Mr Osmani suggested that this might be raised in this appeal if the Respondent did not block such a course. However, Ms Nolan pointed me to the decision in Dani (non-removal human rights submissions) [2023] UKUT 00293 ("Dani"). The guidance in Dani reads as follows:

> "1) The mere refusal of leave to remain under the EUSS is not, without more, a 'human rights claim' under section 113(1) of the 2002 Act.
> 2) Consequently, the 'new matter' regime does not regulate the Tribunal's consideration of non-removal human rights submissions.
> 3) But the Tribunal may only consider matters which it thinks are 'relevant to the substance of the decision appealed against'.
> 4) Whether Article 8 is engaged by a decision to refuse an EUSS application is not 'relevant to the substance of the decision appealed against'; the Tribunal cannot consider it. The Tribunal does not enjoy a broad, unencumbered jurisdiction to consider non-removal human rights submissions at large.
> 5) In any event, Article 8 will not, without more, be engaged by a decision to refuse leave to remain under the EUSS.
> 6) Section 7(1)(b) of the Human Rights Act 1998 does not permit an appellant to advance a free-standing Article 8 claim in proceedings before the First-tier Tribunal."

51. The guidance in Dani may not be precisely on point as it is, once again, a case involving an appellant in the UK who was not being removed in consequence of the EUSS decision. Of course, the Appellant in this case is not threatened with removal either but is being refused entry clearance. I have not considered whether that would make any difference to the legal position. As I understood Mr Osmani to accept, there is no decision refusing a human rights claim at the present time and therefore no decision which could generate a right of appeal on human rights grounds.

52. It was suggested by Mr Osmani that it was not possible for the Appellant to make an application based on her Article 8 ECHR rights as there is no prescribed form in that regard. However, as Ms Nolan pointed out, she can make an application as the partner of her British citizen husband. He could also sponsor an application by their eldest

child. Their youngest child is already a British citizen and does not need leave to enter.

53. That led to a discussion about enrolment of biometrics. This Tribunal is well aware of the problems which have arisen in relation to applications from Afghanistan and other areas affected by conflicts or where there are no entry clearance posts for the enrolment of biometrics. Mr Osmani made the very valid point that the Appellant had already had to make a hazardous journey in order to enrol biometrics for the application which had led to the decisions under appeal at the present time.

54. Ms Nolan referred to a now published policy regarding pre-determination of applications where biometrics could not be enrolled or for waiver of requirement for enrolment until arrival in the UK. As she accepted, the Appellant here has already enrolled her biometrics and could seek to rely on that in a further application. Although she would not usually be entitled to rely on biometrics enrolled for a previous application in a new application, as Ms Nolan accepted, that prior enrolment could be relied upon in an application seeking to waive the requirement at least until arrival in the UK. I point out that the Appellant in this case is living in Kabul as a single woman with two very young children.

55. Mr Osmani was also naturally concerned with how long such an application might take to process, particularly in light of the delays thus far. It is worthy of note that the application which led to the decision under appeal was made by the Appellant nearly three years ago. It is not clear why the appeal lodged in 2021 took quite so long to be heard. However, as I have already pointed out, the reason why there has been an error of law found in the Decision is largely of the Respondent's making and the delays to this point are not the fault of the Appellant. I would very much hope therefore that any application made for entry under domestic Immigration Rules would be processed as quickly as practically possible. Ms Nolan agreed that, if she were kept updated in relation to any application which the Appellant wished to make under the domestic scheme, she would seek to have it moved forward as quickly as practically possible.

<u>This appeal and next steps</u>

56. Mr Osmani took instructions from the Sponsor in the course of the hearing before me. He agreed that the Appellant would consider making an application for entry clearance under domestic scheme Immigration Rules.

57. Initially, Mr Osmani asked me not to set aside the Decision but instead to adjourn to a later hearing. However, as I pointed out to him, if I were to do that he would not have the benefit of having set out fully (as I have done) the legal position in relation to the Decision and the

right of appeal which remains available to his client. Having considered the position, he agreed that it was appropriate for me to determine the error of law issue as I have done but to adjourn the hearing for re-making (as I would have done in any event) to allow him to consider next steps with the Appellant and the Sponsor. I hope that the setting out of the legal position will also make it easier for Counsel to be instructed for any further hearing.

58. I have given directions below for a resumed hearing in order to re-make the decision. Those directions are made in order to keep the appeal moving in case the Appellant wishes to continue with it rather than making a different application. If she does make an application relying on her human rights and the timescales given are unrealistic for that or any other reason, the parties may apply to the Tribunal for variation of those directions.

NOTICE OF DECISION

The Decision of First-tier Tribunal Judge Wolfson dated 24 February 2023 involves the making of an error of law. I set aside the Decision. I make the following directions for the rehearing of this appeal:

DIRECTIONS

1. **Within 28 days from the date when this decision is sent, the Respondent shall file with the Tribunal and serve a skeleton argument (marked for the attention of Mr Osmani) setting out his position in relation to the appeal against the refusal of a family permit under Appendix EU(FP), it being accepted by the Tribunal that there is no appeal against the purported refusal of an application under the EEA Regulations.**

2. **Within 56 days from the date when this decision is sent, the Appellant shall file with the Tribunal and serve a skeleton argument (marked for the attention of Ms Nolan) setting out her position on those issues.**

3. **The appeal will be relisted for a resumed hearing before UTJ L Smith on the first available date after 3 months from the date when this decision is sent. The appeal shall be relisted to the convenience of both Mr Osmani and Ms Nolan and Counsel if the Appellant wishes to instruct one to represent her at the next hearing. The resumed hearing shall be listed face-to-face with a time estimate of one day. No interpreter will be booked unless requested by the Appellant within 28 days from the date when this decision is sent.**

4. **The parties have liberty to apply for amended directions, particularly in relation to any extension of time required. Such application shall be made on written notice to the other party and addressed for the attention of UTJ L Smith.**

L K Smith
Upper Tribunal Judge Smith
Judge of the Upper Tribunal
Immigration and Asylum Chamber

13 February 2024