Upper Tribunal
(Immigration and Asylum Chamber)

Case No: UI-2023-003186

First-tier Tribunal No: EA/11067/2021

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 27 September 2023	9th January 2024

Before

UPPER TRIBUNAL JUDGE KOPIECZEK

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

JOAN MARIE MCLEOD
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Ms A. Nolan, Senior Home Office Presenting Officer
For the Respondent: Mr M. Allison, counsel instructed by Wilson Solicitors LLP

DECISION AND REASONS

1. Although the appellant in these proceedings is the Secretary of State, I refer to the parties as they were before the First-tier Tribunal ("FtT").

2. The appellant is a citizen of Jamaica, born in 1970. She arrived in the UK in December 2002 as a visitor.

3. On 19 October 2020 the appellant made an application for pre-settled or settled status under the EU Settlement Scheme ("EUSS") as a person with a *Zambrano* right to reside. On 5 February 2021 the respondent made a decision to refused the application.

4. The appellant appealed that decision and her appeal came before First-tier Tribunal Judge Spicer at a hearing on 8 August 2022, following which her appeal was allowed in a decision promulgated on 22 August 202. Permission to appeal to the Upper Tribunal ("UT") was granted by a judge of the First-tier Tribunal ("FtT").

5. The further background to the appeal and the appellant's immigration history is to be found in my summary of Judge Spicer's decision.

Judge Spicer's decision

6. Judge Spicer summarised the basis of the refusal decision. Although the respondent accepted that the appellant is the primary carer of a British citizen child, the respondent was not satisfied that the appellant met the requirements of regulation 16(5) of the Immigration (European Economic Area) Regulations 2016 ("the EEA Regulations"). The respondent also decided that refusing the application would not prevent the appellant's British citizen child from residing in the UK because there was a realistic prospect that the appellant would be granted leave to remain under Appendix FM or under Article 8 of the ECHR and there was no reason to believe that such an application would be refused.

7. The respondent also said that the appellant had previously made an application under Appendix FM which resulted in a grant of limited leave to remain in April 2018.

8. Judge Spicer dealt with an application for an adjournment made by the respondent and refused it. Nothing in the appeal before me turns on that issue.

9. After summarising the written evidence before her, there having been no oral evidence, Judge Spicer made a number of findings. She found that the appellant is the mother of a British citizen who was aged 17 years at the date of the application.

10. In terms of the chronology, she found that the appellant arrived in the UK in December 2002 as a visitor and overstayed her leave and that on 27 November 2007 she was arrested on entry to the UK and convicted of unlawful importation of cocaine, following which she was sentenced to 7 years imprisonment.

11. Judge Spicer noted that deportation order was made on 29 September 2011 which was revoked on 15 May 2013. A further deportation order was made in June 2013. In December 2013, the appellant's daughter was naturalised as a British citizen. The appellant's appeal to the FtT in relation to the deportation order was allowed on 14 April 2015 on *Zambrano* principles, with the FtT (Judge Talbot) finding that the practical consequence of the appellant's deportation would be that her daughter would be compelled to join her in Jamaica, contrary to *Ruiz Zambrano v Office National de l'Emploi*]2012] QB 265.

12. Judge Spicer said that in February 2016, the UT refused the respondent's appeal on EU grounds and the appellant's cross appeal on Article 8 grounds. The UT decided that the FtT's finding that the appellant's daughter would have to leave the UK to be with the appellant was "unimpeachable". The respondent appealed to the Court of Appeal but conceded, and a consent order was issued on 23 February 2018.

13. She then noted that the appellant was issued with a residence card on 21 April 2018 granting her limited leave to remain, valid until 21 October 2020. On 19 October 2020 the appellant applied under the EUSS for pre-settled or settled status, on the grounds of a Zambrano right to reside. On 21 May 2021 the appellant made a protective Article 8 claim under the 10-year parent route, and on 19 June 2022 she was granted leave for a period of 30 months on the basis of her family/private life.

14. Judge Spicer considered the assertion in the decision under appeal that the appellant had made an application under Appendix FM and that she was granted leave to remain on 21 April 2018 pursuant to that application. She found that the respondent had not provided any evidence of such an application or grant of leave, noting that the appellant (and her legal representative) had denied making any such application. She found that in the absence of any supporting evidence from the respondent no such application was made under Appendix FM which resulted in a grant of leave on 21 April 2018.

15. She found that the limited leave to remain that was granted by the respondent on 21 April 2018 must have been on the grounds of being a *Zambrano* carer "as clearly found by the First-tier and Upper Tribunals". She further concluded that the Court of Appeal in *Akinsanya* (a reference to *Akinsanya v Secretary of State for the Home Department* [2022] EWCA Civ 37) confirmed that a grant of limited leave to remain does not preclude an application under the EUSS.

16. At para 31 Judge Spicer said that:

> "The issue in this appeal is whether the Appellant has a Zambrano right to reside for a 5 year continuous qualifying period in the United Kingdom, beginning before 23:00 on 31 December 2020, and that an application was made before 1 July 2021."

17. She found that the effect of the recent grant of limited leave to remain under the 10-year parent route was not determinative of the appeal because the appeal was in relation to the refusal of an application made under the EUSS. She concluded that a grant of leave under the 10-year parent route did not bring the appeal to an end.

18. At para 33 Judge Spicer referred to *Akinsanya* and the respondent's policy "EU Settlement Scheme: person with a Zambrano right to reside" Version 5 published on 13 June 2022. She concluded that the appellant needed to demonstrate firstly, that the application under Appendix EU was a valid application made by 1 July 2021, secondly that at the specified date of 23:00 on 31 December 2020 she is able to show that she has had a *Zambrano* right to reside for a 5-year continuous qualifying period, and thirdly that she did not have leave to remain other than on EU grounds.

19. She concluded that because the appellant made her application on 19 October 2020 she met the first condition. She found that appellant had a *Zambrano* right to reside at the time of her application, and therefore met condition 3(v) under paragraph EU11 of the Immigration Rules. She found that the appellant is a person with a derivative right to reside and meets the definition in Annex 1. She also found that it was confirmed by the FtT and UT in 2015 and 2016 that the appellant has been a *Zambrano* carer since her daughter became a British citizen in December 2013. She therefore concluded that the appellant had a right of residence under EU law from December 2013 and thus met the second condition in paragraph EU11 of having a 5-year continuous qualifying period.

20. Considering EU15-16 she found that the application was not refused on the grounds of suitability. She also found that the respondent had not provided evidence of any leave granted on any grounds other than EU grounds, noting that the limited leave granted on 22 March 2022 under the 10-year parent route postdated the respondent's decision of 4 February 2022. Lastly, she repeated her conclusion that the appeal made pursuant to the Immigration (Citizens' Rights Appeals)(EU Exit) Regulations 2021 ("the 2020 Appeal Regulations") does not fall away because of the grant of leave under the 10-year parent route.

21. She therefore found that the appellant meets the eligibility requirements for indefinite leave to remain ("ILR") as a person with a *Zambrano* right to reside in accordance with paragraph EU11 of Appendix EU of the Immigration Rules.

The grounds of appeal and the 'rule 24' response

22. The grounds of appeal contend that under the 2020 Appeal Regulations the only effective ground of appeal is that the decision in not in accordance with the EUSS. Gound 1 asserts that in finding that a *Zambrano* right has existed since 2013, Judge Spicer failed to take into account that the Court of Appeal "has recently offered opinions [on] the nature of the reg 16(5) right which may have unbound the Secretary of

State from the findings in the 2015 determination" in the appellant's deportation appeal (presumably a reference to reg 16(5) of the EEA Regulations). The grounds accept that this was not referred to before the FtT but they were binding authorities nevertheless, it is argued.

23. Ground 2 asserts that Judge Spicer erred in finding that a period of five years with a derivative right would have conferred a right to permanent residence which could be carried forward to the present application, contrary to regulation 15(2) of the EEA Regulations.

24. Ground 3 contends that "a further problem arises with the implementation of the 2015 appeal" once the Secretary of State abandoned her appeal to the Court of Appeal in 2018. Although it was mistakenly said by the Secretary of State that the leave held from 2018 to 2020 was consequent to an application under Appendix FM (emphasis as in original) which it was not, it was in fact leave granted on the basis that removal in consequence of the deportation decision would be contrary to Article 8 rights. It was not, and could not lawfully have been, in recognition of the *Zambrano* right found by the FtT, as it was not possible under the Immigration Act 1988 for a person exercising a European right to reside to be granted leave to remain.

25. Therefore, the grounds continue, whatever the outcome of the allowed appeal might or ought to have been, the appellant had at the time of her EUSS application leave to remain which was not granted under Appendix EU. Thus, she could not meet the definition of person with a *Zambrano* right to reside under Appendix EU. The grounds assert that this situation was exacerbated by the operation of section 3C of the Immigration Act 1971 in that that leave was being extended as at the specified date, 31 December 2020, "in default of another requirement of the same rule".

26. Finally, summarising the position argued in the grounds, it is said that the fact the appellant held leave which had not been granted under Appendix EU (which did not even exist at the time) defeats her claim to status under the EUSS.

27. The appellant's 'rule 24' response to the grounds of appeal contend that the grounds are without merit and at times misrepresent either the law of the findings made by Judge Spicer.

28. As a preliminary matter, the rule 24 response takes issue with the grant of permission on the basis of procedural rigour, in that it is said that none of the matters raised by the respondent in the grounds of appeal were raised before the FtT or were in the decision letter.

29. More specifically, it is said that the respondent had failed to particularise what "opinions" of the Court of Appeal are being referred to in the grounds, none of which were argued before Judge Spicer, contrary to various authorities, and unexplained by the respondent.

30. As regards reg 15(2) of the EEA Regulations, the appellant had applied for settled status as a person with a *Zambrano* right under the EUSS. The argument on behalf of the appellant before Judge Spicer was that the decision to refuse to grant her settled status was in breach of the European Union (Withdrawal Agreement) Act 2020 and/or paragraph EU11 of the Immigration Rules. Judge Spicer was satisfied that the appellant's application met the requirements of Appendix EU, read with the respondent's *Zambrano* policy and the decision in *Akinsanya*. It was open to Judge Spicer to make those findings and no specific issue was taken with any of her findings.

31. In addition, the rule 24 response argues that the respondent had failed to identify where Judge Spicer held that a period of five years with a derivative right would have conferred a permanent right of residence which could be carried forward to the present application. She had also failed to demonstrate what material difference reg 15(2) makes to Judge Spicer's decision in circumstances where she had properly directed herself to the facts and law and reached a conclusion reasonably open to her.

32. Furthermore, for the first time in the proceedings before the UT the respondent sought to argue that following her abandonment of the appeal to the Court of Appeal in 2018 the appellant was granted leave to remain on the basis that removal would breach her Article 8 rights. On the basis of the chronology (including the appeal to the UT and the Court of Appeal), Judge Spicer's finding that leave was granted or a residence card issue on the ground that the appellant was a *Zambrano* carer must be correct because that is the only basis upon which her appeal succeeded, and her Article 8 cross-appeal was dismissed. It is said that it would be "illogical and abusive" for the respondent to grant leave or recognise the appellant's rights on any grounds other than as a *Zambrano* carer.

33. In addition, the rule 24 response contends that it is immaterial how the respondent sought to recognise the appellant's to reside as a *Zambrano* carer and is wrong where she asserts that it was not possible under the Immigration Act 1988 for a person exercising a European right to reside, to be granted leave to remain; that is not what section 7 of the Immigration Act 1988 says.

34. Lastly, it is said that the respondent is wrong to assert in the grounds that the appellant had at the time of her EUSS application leave to remain which was not granted under Appendix EU and could not meet the definition of Person with a *Zambrano* right to reside under Appendix EU.

35. The application for a wasted costs order in the rule 24 response was not pursued before me.

The parties' oral submissions

36. In her submissions Ms Nolan summarised the position as being that the appellant applied for a permanent residence card under Appendix EU on

the basis of a *Zambrano* right to reside as set out at page 16 of the application form. At section 3.01 she refers to the application as being for pre-settled status and states at section 3.02 that she has completed a continuous qualifying period of less than 5 years as a person with a *Zambrano* right to reside. At section 8 she gives the date of 21 April 2018 as the date of the *Zambrano* residence card.

37. Ms Nolan pointed out that the letter to the appellant dated 14 March 2018 in the respondent's bundle says that the appellant is granted leave to remain in the UK but there is no mention of a derivative right of residence. In this respect Ms Nolan referred to para 29 of *Akinsanya* (which refers to the EEA Regulations requiring the Secretary of State to issue residence documentation to persons with derivative rights).

38. Ms Nolan submitted that Judge Spicer found at para 35(b) that the appellant is a person with a derivative right of residence and meets Annex 1 and looks for a definition of a person with a *Zambrano* right, but that is not the same as a derivative right to reside which is an alternative right to reside, with reference to reg 16(5) of the EEA Regulations.

39. However, it was submitted that nowhere does Judge Spicer set out the definition in Annex 1 as it was at the date of the respondent's decision. That definition requires that the applicant has a *Zambrano* right to reside and be without leave to enter or remain except under that Annex. There was much consideration by Judge Spicer about the leave that the appellant was granted but there was no consideration of the definition, it was submitted. The appellant had leave to remain and therefore could not meet the definition, it was submitted.

40. Judge Spicer had referred at para 34 to what she said were the criteria for the appellant to succeed in the appeal but it was submitted that she was wrong at para 34(c) to say that the appellant needed to show that she did not have leave to remain other than on EU grounds because that is not what Annex 1 in its definition says. It was submitted that Judge Spicer needed to ask whether the appellant met the definition of a person with a *Zambrano* right to reside.

41. Ms Nolan further submitted that the error of law in Judge Spicer's decision was she did not apply the terms of the Immigration Rules.

42. Mr Allison relied on the rule 24 response. As regards the respondent's ground 1, as argued in the rule 24 response the basis of that ground was not clear.

43. As regards ground 2, it was submitted that that ground fails to recognise the difference between the EEA Regulations and EUSS leave. Under the former an applicant could not get permanent residence but one could under the EUSS as a *Zambrano* carer. Section 3 of the application form refers to the application as being for pre-settled status and section 8 refers to the date that the *Zambrano* residence card was issued. The covering

letter in support of the application refers to it as an application for settled or pre-settled status. The basis of the application is set out in that letter and in the appellant's skeleton argument that was before the FtT, and sets out the basis upon which the appellant is entitled to settled as distinct from pre-settled status.

44. It was submitted that the appellant was a *Zambrano* carer for a continuous period of five years, since 2013, and was therefore entitled to permanent residence. That was recognised in the 2018 decision by the respondent, it was submitted, even if it was after the abandoned appeal to the Court of Appeal.

45. In relation to ground 3, Mr Allison submitted that this relates to the definition of a *Zambrano* right to reside in Appendix 1 of Appendix EU and whether the appellant meets the definition in the first part on the basis that she was granted limited leave to remain on the basis of Article 8. It was submitted that with reference to para 56 of *Akinsanya* it was clear that if the appellant had even limited leave under the Immigration Rules she would not be regarded as a *Zambrano* carer.

46. It is the date of application that is relevant, it was submitted, which is 19 October 2020. *Akinsaya* is authority for the proposition that if the appellant has leave to remain granted on the basis of Article 8 she would not be a *Zambrano* carer.

47. It was submitted that the Immigration Rules, in particular Annex 1, that were applicable in October 2020 refer to the definition in the EEA Regulations in terms of reg 16(5). It was submitted that Judge Talbot made those reg 16(5) findings in the appeal in 2015.

48. It was submitted that an alternative reason as to why the respondent's grounds have no merit is the basis of the grant of leave to the appellant that arises from the 14 March 2018 letter granting that leave. It was submitted that it was clear that that grant of leave in that letter was intended to reflect the 2015 FtT's decision. Mr Allison referred me to paras 37 and 38 of that decision and pointed out that at para 38 Judge Talbot said that having concluded that the decision would breach the appellant's EU rights he would not go on to consider Article 8 and did *not* go on to allow the appeal on the basis of Article 8. I was reminded that the respondent's appeal to the UT in relation to the appeal being allowed on *Zambrano* grounds was dismissed by Upper Tribunal Judge Perkins and the further appeal to the Court of Appeal was abandoned by the respondent.

Assessment and conclusions

49. I did not understand there to be any dispute between the parties that it is the date of the application that is the relevant date that needs to be considered in terms of the Immigration Rules.

50. Paragraph EU11. as it was at the time of the application which is the subject of this appeal provided as follows (with emphasis as in original):

> "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:
>
> Condition
>
> …
>
> 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"

51. Annex 1 is the other relevant part of the Immigration Rules as they were at the time of the application. I have taken the text from the archived version of the Immigration Rules for the period 5 October 2020 to 30 November 2020 to which I was referred during submissions. The appellant's skeleton argument that was before the FtT sets out different text for the terms of Annex 1, however. The relevant part of Annex 1 defines "person with a *Zambrano* right to reside" as follows:

> "a person who has satisfied the Secretary of State, including (where applicable) by the required evidence of family relationship, that, by the

> specified date, they are (and for the relevant period have been), or (as the case may be) for the relevant period in which they rely on having been a person with a Zambrano right to reside (before they then became a person who had a derivative or Zambrano right to reside) they were:
>
> (a) resident for a continuous qualifying period in the UK with a derivative right to reside by virtue of regulation 16(1) of the EEA Regulations, by satisfying the criteria in:
>
> (i) paragraph (5) of that regulation; or
>
> (ii) paragraph (6) of that regulation where that person's primary carer is, or (as the case may be) was, entitled to a derivative right to reside in the UK under paragraph (5), regardless (where the person was previously granted limited leave to enter or remain under this Appendix as a person with a Zambrano right to reside and was under the age of 18 years at the date of application for that leave) of whether, in respect of the criterion in regulation 16(6)(a) of the EEA Regulations, they are, or (as the case may be) were, under the age of 18 years; and
>
> (b) without leave to enter or remain in the UK granted under another part of these Rules"

52. As regards ground 1, the assertions about unidentified "recently offered opinions" by the Court of Appeal are unsupported and Ms Nolan did not seek to make good that deficit in her oral submissions. I am not satisfied that there is any merit in ground 1, therefore.

53. As regards ground 2, I cannot see in Judge Spicer's decision a conclusion that "a period of five years with a derivative right would have conferred a right to permanent residence which could be carried forward to the present application". Certainly, Judge Spicer referred to a five-year period but that was in the context of a consideration of condition 3 in paragraph EU11. She did not say that such a state of affairs, without more, entitled the appellant to succeed in her appeal.

54. Ms Nolan's preliminary observation prior to the parties' making their oral submissions was that the main point was in relation to the appellant's leave. That is, the leave that she was previously granted. That is indeed the nub of the appeal. The parties' central arguments were in relation to what leave the appellant was granted by the grant letter of 14 March 2018. It appears to be agreed by the parties that if the appellant was granted Article 8 leave in March 2018, she could not succeed in her application for status under the EUSS. That is consistent with Appendix EU and accords with the judgment in *Akinsanya*.

55. I am satisfied that Judge Spicer was entitled to conclude that the leave that was granted to the appellant by virtue of the letter of 14 March 2018 was intended to, and did in fact, give effect to Judge Talbot's decision in the appeal in 2015, upheld on appeal to the UT. The appeal of the UT's decision by the respondent to the Court of Appeal was abandoned. The letter states that leave is granted "In light of your client's allowed appeal

of 14 April 2015". Judge Talbot plainly did not allow the appeal on Article 8 grounds and the appellant's Article 8 cross-appeal to the UT was dismissed. The leave granted, therefore, was leave on the basis of a *Zambrano* right to reside.

56. Furthermore, as was submitted by Mr Allison, the definition of "a person with a *Zambrano* right to reside" cross refers to reg 16(5) of the EEA Regulations, and it is on the basis of reg 16(5) that Judge Talbot allowed the appellant's appeal, and leave was granted in consequence of, and on the basis of, Judge Talbot's findings.

57. In my judgment there is no error of law in Judge Spicer's analysis of the facts or the law. She considered the relevant requirements of the Immigration Rules and found, without legal error, that the appellant met them. I am satisfied that she was correct to allow the appeal on the basis that the appellant meets the requirements of the Immigration Rules in terms of Appendix EU, with specific reference to paragraph EU11 and Annex 1.

Decision

58. The decision of the First-tier Tribunal did not involve the making of an error on a point of law. Its decision to allow the appeal therefore stands.

A.M. Kopieczek

Upper Tribunal Judge Kopieczek 28/12/2023