IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case Nos.: UI-2023-004504

First-tier Tribunal Nos:
EA/09419/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:

On 21st of March 2024

Before

UPPER TRIBUNAL JUDGE SMITH

Between

MRS SPOZHMAY ZAHIR

Appellant

And

THE ENTRY CLEARANCE OFFICER

Respondent

Representation:
For the Appellant: Mr M Osmani, Legal Representative, Times PBS
For the Respondent: Mr D Clarke, Senior Home Office Presenting Officer

Heard at Field House on Wednesday 13 March 2024

DECISION AND REASONS

BACKGROUND

1. The Appellant appeals against the decision of First-tier Tribunal Judge Cansick promulgated on 19 July 2023 ("the Decision") dismissing the Appellant's appeal against the Respondent's decision dated 7 September 2022 refusing her a family permit under the EU Settlement Scheme ("EUSS") pursuant to Appendix EU (Family Permit) to the Immigration Rules ("Appendix EU (FP)").

2. The facts of this case are not in dispute and can be shortly stated. The Appellant is a national of Afghanistan. She is the partner of Mr Sadat Zahir who is a British Citizen living in the UK ("the Sponsor"). The couple have

two sons now aged five and two. The Appellant and the two children remain living outside the UK. They were at the time of the First-tier Tribunal hearing and remain living in Iran.

3. On 11 January 2022, the Appellant applied to come to the UK as the "Zambrano carer" of her children. Their British citizenship is now established by copies of passports in the Appellant's bundle. The Respondent refused the application on the basis that the Appellant had not demonstrated that she was a family member as defined in Appendix EU (FP) and nor had she shown that the Sponsor was an EU national.

4. At the hearing before Judge Cansick, it was argued that the appeal should be allowed as the Appellant was a "Zambrano carer" for her two British children citizen. It was argued that the application should have been considered under the Immigration (European Economic Area) Regulations 2016 ("the EEA Regulations"). Notwithstanding the revocation of the EEA Regulations on 31 December 2020, it was argued that the Appellant could continue to rely on those regulations by reason of a consent order agreed by the Respondent in the High Court in the case of R (oao Akinsanya) v Secretary of State for the Home Department [2021] EWHC 1535 (Admin) ("Akinsanya"). It was also argued on the Appellant's behalf that a statement published by the Respondent on 13 June 2022 following Akinsanya permitted "Zambrano carer" applications under the EEA Regulations until 25 July 2022.

5. Judge Cansick rejected those arguments for reasons I come to below. He therefore dismissed the appeal.

6. The Appellant appealed the Decision on the basis that the Judge had erred in finding that the EEA Regulations could not be applied and had erred in finding that there was no provision for an application as a "Zambrano carer" under Appendix EU (FP).

7. Permission to appeal was granted by First-tier Tribunal Judge Dempster on 25 September 2023 as follows:

> "1. The in time grounds assert that the judge erred in law in finding that the appellant's case did not fall within the scope of the decision in Akinsanya in concluding that the relevant consent order was limited to applications for leave to remain in cases where the application was based on a person's status as a Zambrano carer. Further, it is asserted that the judge erred in law in finding that applications made by Zambrano carers did not fall within Appendix EU (Family Permit).
> 2. For the reasons stated in the grounds, it is arguable that there is provision within Appendix EU (Family Permit) for Zambrano carers and there is thus an arguable error of law.
> 3. For the avoidance of doubt, all grounds may be advanced at the oral hearing."

8. The Respondent filed a detailed Rule 24 Reply addressing the grounds dated 9 November 2023.

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

10. There was no record of receipt of a bundle on the Tribunal file. However, I was informed by Mr Osmani that one had been uploaded and also sent by email and that the Tribunal had acknowledged it. Mr Clarke indicated that he had not seen the bundle but that was unsurprising since he could not have access to it via the Tribunal system. Mr Osmani arranged for the bundle to be sent to both me and Mr Clarke. As it is, since the arguments all focus on the law rather than the facts of the case, I do not need to refer to the documents in the bundle save for the core documents relating to the error of law issue.

11. Mr Osmani also emailed a skeleton argument dated 13 March 2024. I received that without objection from Mr Clarke. I will deal with the arguments there made below insofar as it is necessary to do so.

12. Having heard from Mr Osmani and Mr Clarke, I indicated that I found there to be no error of law in the Decision and therefore that I would uphold the Decision with the consequence that the Appellant's appeal remains dismissed. I indicated that I would set out my reasons for this conclusion in writing which I now turn to do.

DISCUSSION

The Decision

13. Judge Cansick's reasons for dismissing the appeal are contained in three short paragraphs and it is therefore appropriate to set those out in full as follows:

> "12. I do not consider any of the arguments put forward by Mr Nicholson demonstrate that the appellant meets the requirements of the EUSS as a Zambrano carer. The consent order referred to is regarding applicants who were present in the UK as Zambrano carers at the specified time. It is regarding applications under Appendix EU and not Appendix EU (Family Permit). The appellant has not been a Zambrano carer in the UK and her application is not under Appendix EU. As such Mr Nicholson's argument that the appellant's application is to be considered under the 2016 regulations is incorrect.
> 13. There is no provision for a Zambrano carer application under Appendix EU (Family Permit). Neither would the appellant be able to succeed with a Zambrano application under Appendix EU as she has not been a Zambrano carer in the UK. It has therefore not been demonstrated that the respondent's decision is not in accordance with the rules. Neither has it been demonstrated that a right of the appellant under the Withdrawal Agreement has been breached. The arguments that the appellant's appeal should succeed as she is a Zambrano carer therefore fail.
> 14. The appellant applied under Appendix EU (Family Permit) as the family member of a British citizen. There is no evidence that the appellant's sons

met any of the required conditions of exercising treaty rights in an EEA state before the end of the transition period or that the appellant falls into a relevant family member category. The appeal therefore also fails because the appellant does not meet the criteria in Appendix EU (Family Permit) for a family member of a British citizen."

The Grounds of Appeal and Respondent's Response

14. The Appellant's grounds of appeal against the Decision can be divided into two. The first addresses the timing of the application and an argument that, notwithstanding the application having been made after the revocation of the EEA Regulations, the Appellant could still apply under those regulations due to the Respondent's position taken in Akinsanya. The second addresses the issue whether there is provision for status to be granted to a "Zambrano carer" under Appendix EU (FP). I take those in turn.

Akinsanya, the Consent Order and Subsequent Announcement

15. It is first appropriate to deal with the case of Akinsanya and what was or was not decided by that case both in the High Court (the judgment on which the Appellant relies) but also in the Court of Appeal ([2022] EWCA Civ 37).

16. Ms Akinsanya had applied for status under Appendix EU. She was resident in the UK at the time of her application. At that time, Appendix EU provided that an applicant could not meet the definition of a "person with a Zambrano right to reside" if he/she held leave to remain in the UK unless that were under Appendix EU. Previously, the EEA Regulations had provided that only the holding of indefinite leave to remain would preclude an individual from the right to remain in the UK as a "Zambrano carer" (paragraph 16(7)(c)(iv) of the EEA Regulations). The Respondent had appeared to tie the definition under the EUSS to paragraph 16 of the EEA Regulations, but it was argued that the two were inconsistent.

17. Mr Justice Mostyn concluded that the position as set out in the EEA Regulations was consistent with the position in EU case law concerning the scope of Zambrano rights and therefore the Respondent had not been entitled to change the position under Appendix EU.

18. The Respondent appealed the judgment. The Court of Appeal accepted the Respondent's argument that EU case law did not require that a Zambrano right be recognised for those with limited leave to remain. However, the Court of Appeal was concerned that the Respondent may have intentionally framed the EEA Regulations in such a way as to confer a wider right under those regulations and therefore was concerned that the apparent alteration to the position in Appendix EU did not reflect what was intended by regulation 16(7) of the EEA Regulations. The Court declared that the Respondent had misunderstood the position under the EEA Regulations and that this rendered unlawful his transposition of the rights

in the definition under Appendix EU (at least until the Respondent had reconsidered his position).

19. The consent order on which the Appellant relies arose from the judgment of Mostyn J. The Respondent agreed that he would reconsider the position in light of that judgment. As the Court of Appeal said, having made the declaration it did, that reconsideration should now take place.

20. The relevant provisions of the consent order are set out at [7] of the Respondent's Rule 24 Reply as follows:

> "e. The Secretary of State intends to implement and publicise a policy under which, for a reasonable period which she will specify, but which will be for a period of not less than six weeks after publication of the outcome of her reconsideration referred to at a. above, Zambrano applications made on or after 1 July 2021 will be deemed, under the definition of 'required date' in Annex 1 to Appendix EU, to have reasonable grounds for the person's failure to make that application at the earlier date relevant to that definition.
> f. In accordance with paragraph (c) of the definition of 'EEA Regulations' in Annex 1 of Appendix EU, the question of whether an applicant is a person with a Zambrano right to reside as defined in Appendix EU in respect of a period on or after 1 July 2021 is to be determined on the basis of the Immigration (European Economic Area) Regulations 2016 as they had effect immediately before they were revoked, and where the context requires it, on the basis that they had not been revoked."

21. As the Respondent points out, the order therefore referred only to applications under Appendix EU (that is to say cases like that of Ms Akinsanya where applicants were resident in the UK at the time of application). It made no mention of applications being permitted under Appendix EU (FP).

22. As the Respondent also points out, the definition of a "person with a Zambrano right to reside" under Appendix EU has always been limited to those who were resident in the UK at the end of the transition period (ie on 31 December 2020) or those who applied for a family permit prior to that date (see below in relation to the relevant provisions of Appendix EU(FP)). Those provisions cannot apply to this Appellant.

23. Turning then to the announcement on 13 June 2022, to assist the Appellant's understanding of the position, I set that out in full as follows (taken from the Respondent's website):

> "Following the Court of Appeal's judgment in the case of Akinsanya, the Home Secretary has reconsidered the EU Settlement Scheme (EUSS) requirements for applicants relying on being a Zambrano primary carer.
> Such a person is a direct relative or legal guardian who, at the end of the transition period on 31 December 2020, had a right to reside in the UK as the primary carer of a British citizen because, without that right, the British citizen would have been compelled to leave the UK and the EU. Such persons did not have a right under EU law to acquire permanent resident status in the UK and are not covered by the Citizens' Rights Agreements.

> They were included in the EUSS from 1 May 2019 as more generous national provision. As set out in the Explanatory Memorandum to the relevant Immigration Rules changes (HC 1919), the intention was to protect those lawfully resident in the UK by the end of the transition period by virtue of a Zambrano right to reside, based on EU law.
> The Court of Appeal judgment in Akinsanya held that the Home Office had erred in its understanding of regulation 16(7) of the Immigration (European Economic Area) Regulations 2016 in defining 'a person with a Zambrano right to reside' in the Immigration Rules for the EUSS in Appendix EU. However, the Court of Appeal found that, as a matter of EU law, a Zambrano right to reside does not arise where a person holds leave to remain.
> The Home Secretary has carefully considered the Court of Appeal judgment and has decided that she no longer wishes that definition in Appendix EU to reflect the scope of the 2016 Regulations (which have now been revoked) but wishes it to reflect the scope of those who, by the end of the transition period, had an EU law right to reside in the UK as a Zambrano primary carer, in line with the originally stated policy intention. She therefore intends to maintain the requirement in sub-paragraph (b) of the definition that the applicant did not, by the end of the transition period and during the relevant period relied upon, have leave to enter or remain in the UK (unless this was under the EUSS).
> This means applications will be considered under the existing Immigration Rules for the EUSS in Appendix EU. Applicants will be eligible for EUSS status in this category where, by the end of the transition period and during the relevant period relied upon, they met the relevant requirements of regulation 16 of the 2016 Regulations and did not have leave to enter or remain in the UK (unless this was under the EUSS).
> From today, for a period of six weeks until 25 July 2022, people will be able to apply or re-apply to the EUSS as a 'person with a Zambrano right to reside' and be deemed to have reasonable grounds for having missed the deadline to apply, which was 30 June 2021.
> Where a person applies after 25 July 2022, they will need to show there are reasonable grounds why they missed the 30 June 2021 deadline. You can find non-exhaustive examples of such grounds at www.gov.uk/settled-status-eu-citizens-families/eligibility."

24. As the Respondent points out, what this did not say was that applications would be considered under the EEA Regulations (which they could not be as those had been revoked). It provided only for those who had not made "Zambrano carer" applications up to that point and did not have leave to enter or remain on any other basis to make an application under the EUSS which would be treated as in time. As the Respondent pointed out, even if the Appellant had made an application based on a misunderstanding of that announcement (which could not be the case since she made her application in January 2022), it could not otherwise avail her. First, she was not making an application under Appendix EU but under Appendix EU (FP). Second, her case had nothing to do with having an alternative form of leave in the UK since she was not in fact in the UK.

25. For those reasons, the case of Akinsanya, the consent order made in those proceedings and the announcement which followed the review have no relevance whatsoever to the Appellant's case.

26. I observe that in any event the Appellant's application was not refused on the basis that it was out of time but that she could not meet the relevant provisions of Appendix EU (FP) or the withdrawal agreement between the EU and UK on the UK's departure from the EU ("the Withdrawal Agreement").

27. I move on then to the Appellant's second ground.

Appendix EU (FP)

28. The Appellant relies on paragraph FP8A of Appendix EU (FP) as follows:

> "FP8A. The applicant will be granted an entry clearance under this Appendix, in the form of an EU Settlement Scheme Family Permit, where:
> (a) the entry clearance officer is satisfied that the applicant is a **specified EEA family permit case**; and
> (b) had the applicant made a valid application under this Appendix, it would not have been refused on grounds of suitability under paragraph FP7."

29. Whether the Applicant can meet that paragraph depends on the definition of a "specified EEA family permit case" in Annex 1 as follows:

"specified EEA family permit case	a person who: (a) on the basis of a valid application made under the EEA Regulations before the specified date, would, had the route not closed after 30 June 2021, have been issued an EEA family permit under regulation 12 of the EEA Regulations: (i)(aa) as an extended family member under regulation 8; and (bb) where the 'relevant EEA national' referred to in regulation 12(4) was resident in the UK in accordance with regulation 12(1)(a)(i) before the specified date; or (ii)(aa) as a person with a derivative right to reside in the UK by virtue of regulation 16(1); and (bb) where, pursuant to regulation 12(2), any person from whom the right to be admitted to the UK under the criteria in regulation 11(5) was derived was resident in the UK before the specified date; or (b) after the specified date and before 1 June 2021 was issued an EEA family permit under regulation 12 of the EEA Regulations, has contacted the Home Office to advise that they were not able to travel to the UK by 30 June 2021, and the entry clearance officer is satisfied by information or evidence provided by the person that there were compelling practical or compassionate reasons or COVID-19 related reasons why they were not able

to travel to the UK by 30 June 2021; or
(c) on or after 1 June 2021 was issued an EEA family permit under regulation 12 of the EEA Regulations with an expiry date of 30 June 2021, and has contacted the Home Office to advise that they were not able to travel to the UK by 30 June 2021
…"

[emphasis added]

30. The Appellant faces the following difficulties in meeting the definition set out in the underlined section.

31. First, the application had to be made prior to the "specified date" (31 December 2020). The Appellant's application was not made until 11 January 2022.

32. Second, paragraph 16(1)(b) of the EEA Regulations required the applicant to meet one or more of the conditions in the other subsections of paragraph 16. The only one which could have applied to the Appellant is paragraph 16(5) which read as follows:

> "(5) The criteria in this paragraph are that—
> (a) the person is the primary carer of a British citizen ("BC");
> (b) BC is residing in the United Kingdom; and
> (c) BC would be unable to reside in the United Kingdom or in another EEA State if the person left the United Kingdom for an indefinite period."

The Appellant relies on being the primary carer of her two British citizen sons, but neither is resident in the UK. The Appellant therefore falls at the first hurdle of this definition. She could not be a person with a derivative right to reside under paragraph 16(1) of the EEA Regulations. It follows that she could not meet paragraph (a)(ii)(aa) of the definition of a "specified EEA family permit case".

33. Finally, that point is underscored by (a)(ii)(bb) of the definition on which the Appellant relies. The person from whom the Appellant derives her right (her sons) might have previously met the provisions of paragraph 11(5)(e) of the EEA Regulations if, under those regulations the Appellant had been accompanying them to the UK (although that is disputed by the Respondent). However, she can only meet the definition of a "specified EEA family permit case" if that person was resident prior to the specified date (31 December 2020). The Appellant's sons do not and never have lived in the UK. Accordingly, the Appellant cannot satisfy that part of the definition.

34. The Appellant ends this ground with the following paragraph:

> "7. Since the rights protected by this provision extend to the primary carers of British citizens the deeming provisions referred to in §5 above must be read into the definition in paragraph (ii)(bb)"

Paragraph 5 of the pleaded grounds relates to the Akinsanya ground. It is not at all clear what is meant by "the deeming provisions". However, since Akinsanya was not concerned at all with Appendix EU (FP) and the provisions on which the Appellant relies under Appendix EU (FP) have nothing to do with the arguments put forward in Akinsanya concerning alternative leave, the Appellant cannot benefit from that case or anything which flowed from it.

Conclusion in Relation to the Error of Law as Pleaded

35. For the foregoing reasons, neither ground put forward by the Appellant discloses any error of law in the Decision. For that reason, I uphold the Decision with the consequence that the Appellant's appeal remains dismissed.

The Appellant's Skeleton Argument

36. As I noted above, Mr Osmani provided a late skeleton argument. That did not address the error of law issues in any further detail but rather set out what he perceived to be the Appellant's case in substance.

37. I do not intend to dwell on the detail of that skeleton argument. Much of it is misconceived, addressing as it does the previous position under EU law in relation to "Zambrano carers". The position now has to be considered under either the domestic Immigration Rules relating to the EUSS (here Appendix EU (FP)) under which the Appellant fails for the reasons set out above or under the Withdrawal Agreement.

38. For the sake of completeness and although no error of law was pleaded in relation to the Decision by reference to the Withdrawal Agreement (nor it seems was that issue argued before Judge Cansick), I address one point made in the skeleton argument in that regard to assist the Appellant's understanding.

39. The Appellant relies on Article 13(2) of the Withdrawal Agreement as giving her a right of residence. That provision reads as follows:

> "Family members who are either Union citizens or United Kingdom nationals shall have the right to reside in the host State as set out in Article 21 TFEU and in Article 6(1), point (d) of Article 7(1), Article 12(1) or (3), Article 13(1), Article 14, Article 16(1) or Article 17(3) and (4) of Directive 2004/38/EC, subject to the limitations and conditions set out in those provisions."

40. As Mr Clarke pointed out, family members are defined in Article 9 of the Withdrawal Agreement as follows:

> "'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;"

41. The Sponsor is not an EU national. As such, the Appellant could not be a family member within Article 2(2) of Directive 2004/38/EC as the Sponsor is not exercising a right of free movement (he is a British citizen).

42. Paragraph (ii) of the definition cannot avail the Appellant either. The UK nationals from whose rights the persons referred to at (ii) derive their rights must have a right of residence "granted by this Part". This part of the Withdrawal Agreement is entitled "Citizens Rights". Although the residence rights are set out in Article 13, the personal scope of this part of the Withdrawal Agreement is set out in Article 10. That makes clear that UK nationals are only in personal scope if they have exercised their rights of free movement in another Member State prior to the end of the transition period and continue to reside there thereafter. That is why, in Article 13, the references are to "host State". The right of residence of the Sponsor and the Appellant's two sons are as British citizens and arise entirely from the UK's domestic law. For that reason, there is no right of residence as the "Zambrano carer" of a British national under the Withdrawal Agreement.

43. Insofar as the Appellant relies in her skeleton argument on human rights, Mr Osmani informed me that she has in fact made an application for entry relying on her human rights. Although that has been refused by the Respondent, the Appellant has a right of appeal which she has exercised. Mr Osmani invited me pragmatically to remit this appeal so that it could be heard alongside that appeal. There is no basis on which I could do so. For the reasons I have already explained, the Appellant's grounds do not disclose any error of law in the Decision and there is no reason for me to set it aside. For the reasons I have explained, the Appellant cannot succeed under EU law in any event. She has her appeal based on her human rights and can pursue that independently of the outcome of this appeal.

CONCLUSION

44. For the foregoing reasons, I conclude that there is no error of law in the Decision. Accordingly, I uphold the Decision with the consequence that the Appellant's appeal remains dismissed.

NOTICE OF DECISION

The Decision of Judge Cansick promulgated on 19 July 2023 did not involve the making of an error of law. I 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
14 March 2024