



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

Case No: UI-2024-004152

First-tier Tribunal No:
EA/09960/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:

On 28th of November 2024

Before

UPPER TRIBUNAL JUDGE GREY

Between

OPEYEMI MOTUNRAYO KOLAWOLE

Appellant

And

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: In person and not legally represented

For the Respondent: Mr M. Parvar, Senior Home Office Presenting Officer

Heard at Field House on 25 November 2024

DECISION AND REASONS

1. This is an appeal brought by appellant against the decision of First-tier Tribunal Judge Allen ('the Judge') promulgated on 25 June 2024, in which she dismissed the appellant's appeal against the Secretary of State for the Home Department's decision to refuse her application under the EU Settlement Scheme (EUSS).

Factual Background

2. The appellant is a citizen of Nigeria aged 24 years old. She last arrived in the United Kingdom on 16 September 2013. On 8 October 2013 the appellant claimed asylum. The claim for asylum was refused but the appellant was granted discretionary leave to remain as an unaccompanied minor asylum seeker until 17 July 2016 whereupon the appellant was granted further discretionary leave to remain until 12 November 2018. A further application for leave was refused on 16 May 2019. The appellant appealed in respect of the respondent's refusal and the appeal was dismissed on 20 December 2019. Permission to appeal was refused by both the First-tier Tribunal and Upper Tribunal and the appellant became appeal rights exhausted in 2020.
3. On 27 June 2021 the appellant applied for leave to remain as a person with a Zamorano right to reside under the EUSS. The appellant claims to be the primary carer of her twin cousins aged 4 years old. On 27 September 2022 the respondent refused the application. The appellant appealed and the appeal was heard at Taylor House on 25 June 2024 and was dismissed by the Judge on 23 July 2024.

The Judge's decision

4. The Judge considered the requirements under Appendix EU in relation to a person with a Zambrano right to reside. The Judge determined that as a cousin the appellant was not a direct relative of the twins.
5. The Judge then considered whether the appellant has primary responsibility for the twins' care or whether she shares equally the responsibility with one other person. Although the Judge noted that the appellant shared the same accommodation as the two children she determined on the evidence that responsibility for the twins remained shared between their biological mother and father.
6. For completeness, the Judge addressed the further matter of whether the twins would be unable to remain in the UK if the appellant were required to leave. The Judge accepted that the twins would miss the appellant were she required to leave the UK but found that there was no suggestion that the twins' parents would allow their children to leave the UK with the appellant or that they would leave the UK with their children and the appellant. The Judge found that the best interests of the children would be to remain in the UK with their parents.

The grounds of appeal

7. The grounds set out a number of challenges to the Judge's decision which dispute the Judge's finding that the appellant is not the primary carer of her twin cousins. The appellant reasserts that the twins are emotionally attached to her and they would be compelled to leave the UK if she were unable to remain. Further, the appellant claims that she is a direct relative of her twin cousins and has "*de facto guardianship*".

8. Permission to appeal was granted on all grounds by Upper Tribunal Judge Hirst in the following terms:

“It is arguable that the judge misdirected herself as to the relevant definition under Annex 1 to Appendix EU, because at the time of the appellant’s application (27 June 2021) and the date of the decision on her application (27 September 2022) Appendix EU did not require a ‘primary carer’ to be either a direct relative or a legal guardian.”

Analysis and decision

9. I acknowledge that the appellant is not legally represented in her appeal. The only matter pursued by the appellant at the error of law hearing was in relation to whether she was a ‘direct relative’ of her cousins for the purposes of Appendix EU. Although I find that the conclusion in respect of this issue is not determinative of the appeal in view of the other findings of the Judge, and the appellant did not address me on the other matters she had raised in her written grounds, I have nonetheless considered all issues that fell to be determined by the Judge in the appeal. I find that the Judge made no material error of law in dismissing the appellant’s appeal and that the grounds amount to nothing more than the appellant attempting to re-argue her case.
10. The Judge correctly states that the material date for her assessment was the date of the appellant’s EUSS application which is 27 June 2021. I have considered the relevant requirements under Appendix EU in force at that time together with the prevailing Home Office guidance: ‘EU Settlement Scheme: person with a Zambrano right to reside’ Version 4.0, 27 April 2021.
11. In relation to the Rules in force at the time of application, the definition of a ‘person with a Zambrano right to reside’ in Annex 1 of Appendix EU provided:

“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:
 - (i) the criterion in paragraph (1)(a) of that regulation; and
 - (ii) the criteria in:
 - (aa) paragraph (5) of regulation 16 of the EEA Regulations; or
 - (bb) 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 paragraph EU3 of 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, unless this was granted under this Appendix”

12. On the facts of the appellant’s circumstances she claims to be a primary carer of a British citizen. Regulation 16 of The Immigration (European Economic Area) Regulations 2016 provides in this regard:

“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.”

13. Regulation 16(8) provides:

“(8) A person is the “primary carer” of another person (“AP”) if—

- (a) the person is a direct relative or a legal guardian of AP; and
- (b) either—
 - (i) the person has primary responsibility for AP’s care; or
 - (ii) shares equally the responsibility for AP’s care with one other person”

14. In relation to “direct relative” the Home Office guidance relevant at the time of application states at page 37:

“For the purposes of assessing whether, by the specified date, the applicant is (or, as the case may be, for the relevant period was) a ‘person with a Zambrano right to reside’ for the purposes of Appendix EU, a direct relative of the relevant British citizen is:

- a parent
- a grandparent
- a brother or sister
- a spouse or civil partner (for example, in the case of an adult British citizen)
- a child
- a grandchild

This is **an exhaustive list** and no other types of relationship may be accepted.”

15. The appellant’s relationship with the twins is that of maternal cousin. Having regard to the relevant Rules, Regulations and guidance at the time I find that the appellant does not meet the requirement of being a ‘direct relative’ of the twins. I find that the Judge made no error of law in this regard.

16. In relation to whether the appellant has primary responsibility for the care her twin cousins, either alone or equally with one other person as required by regulation 16(8)(b), I find that the Judge assessed all material evidence before her and reached conclusions on the evidence that were unarguably open to her.
17. The Judge referred to a letter from the twins' mother who stated that the appellant has become a "lovely big sister and cousin to the twins" and is a great source of support to her. The Judge also referred to a statutory declaration from the parents describing the appellant as the children's "guardian and kinship carer". However, the Judge noted that neither parent attended the hearing to give evidence and recorded that the appellant nonetheless wished to proceed with the hearing in the absence of the parents. The Judge found that she was unable to place any weight on the statutory declaration given that neither parent had attended the hearing to give evidence and have their evidence tested in cross-examination.
18. The Judge noted that although the appellant lived at the same accommodation as her twin cousins, from November 2021 until January 2024 the appellant was absent from the home from Sunday until Wednesday every week due to her apprenticeship in Aberdeen. During this time the twins lived with and were cared for by their biological parents. Although the parents are currently separated from one another, the Judge found that the father still remains active in the twins' lives and continues to share responsibility for the twins' care with their mother.
19. The grounds have failed to identify any error of law in the Judge's assessment of the evidence and her finding that the appellant did not have primary responsibility for the care her twin cousins. The Judge has provided cogent reasons for the findings that were very clearly open to her on the evidence.
20. Similarly the Judge provides cogent reasons for finding that the twins would not be compelled to leave the UK if the appellant were required to leave. She acknowledged the emotional ties between the appellant and her cousins but found that they would be able to maintain contact though video calls and visits to Nigeria and that the twins' parents would provide any emotional support they may need in adjusting to the appellant's absence. The Judge assessed the best interest of the children and found this was to remain in the UK with their parents. I find that the Judge made no error of law in finding that there was no basis for finding that the twins would be required to leave the UK if the appellant did, nor any suggestion that their parents would allow them to leave.

Notice of Decision

The appellant's appeal is dismissed.

The decision of the First-tier Tribunal did not involve the making of a material error of law and therefore stands.

Sarah Grey
Judge of the Upper Tribunal
Immigration and Asylum Chamber

26 November 2024