Upper Tribunal
(Immigration and Asylum Chamber) Appeal Numbers: UI-2021-000698
EA/01503/2021

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 21st July 2022	**On 11th November 2022**

Before

UPPER TRIBUNAL JUDGE RIMINGTON

Between

MISS CHRISTELLE SIAKENGE LATALE
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Miss Latale in person
For the Respondent: Mr P Deller, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a citizen of Cameroon born on 25th March 1988 and she appealed against the decision of the Secretary of State dated 14th January 2021 refusing her a derivative residence card as the primary carer of a British citizen child under the Immigration (European Economic Area) Regulations 2016.

2. The appellant entered the United Kingdom on a Tier 4 visa valid from 7th September 2009 until 31st December 2010 and subsequently sought leave to remain as a student which was granted and subsequently extended

until 31st May 2013. On 1st July 2013 she sought leave to remain on the basis of her family and private life but that was refused on 22nd July 2013. Subsequent applications on 3rd February 2014 on Article 8 grounds and on 12th May 2016 and on 19th May 2016 were refused. On 7th September 2017 the appellant claimed asylum and that too was refused but she was granted leave apparently on a discretionary basis to remain until 14th July 2022. Work was permitted according to her residence permit.

3. On 5th February 2020 she sought settled status but that was refused on 7th September 2020. The present application for a derivative residence card was made on 11th December 2020 under the Immigration (European Economic Area) Regulations 2016 ("the EEA Regulations 2016") and generated this appeal.

The Secretary of State's Refusal

4. The Secretary of State refused the appellant's application under Regulations 16(5), 16(8) and 20 of the Immigration (European Economic Area) Regulations 2016. It was noted that the appellant applied as the primary carer of her son, ELMKD, born on 20th December 2012. The refusal stated that because she currently held leave to remain until 14th July 2022 her British Citizen son would not be forced to leave the UK.

5. Under **Ruiz Zambrano v Office National de L'Emploi (C-34/09) [2012] QB 265** the Court of Justice of the European Union held on 8th March 2011 that Article 20 of the Treaty on the Functioning of the European Union ("TFEU") precluded national measures which had the effect of depriving citizens of the European Union of the genuine enjoyment of the substance of those rights conferred by virtue of their status as citizens of the European Union. A refusal to grant a right of residence to a third country national with dependent minor children in the member state where those children were nationals and reside together, also with a refusal to grant such a person a work permit, had such an effect. It was held that such a refusal would lead to a situation where those children would have to leave the territory of the European Union in order to accompany their parents.

6. In **Patel v Secretary of State for the Home Department [2019] UKSC** 59 the Supreme Court held at [22]:

> *"22. What lies at the heart of the Zambrano jurisprudence is the requirement that the Union citizen would be compelled to leave Union territory if the TCN, with whom the Union citizen has a relationship of dependency, is removed. As the CJEU held in O v Maahanmuuttovirasto (Joined Cases C-356/11 and C-357/11) [2013] Fam 203, it is the role of the national court to determine whether the removal of the TCN carer would actually cause the Union citizen to leave the Union. In this case, the FTT found against Mr Patel and concluded that his father would not accompany him to India. That means that, unless Chavez-Vilchez adopts a different*

> *approach to compulsion, Mr Patel's appeal must fail. There is no question of his being able to establish any interference with his Convention right to respect for his private and family life as he has failed already in that regard'.*

7. This appeal came before the First-tier Tribunal on 30th July 2021 and First-tier Tribunal Judge Beg decided that where the applicant had a right to remain under the Immigration Rules it followed that the British citizen child would not be compelled to leave the United Kingdom with her because as the court in **Patel** indicated at the heart of the **Zambrano** jurisprudence was a requirement that the Union citizen should not be compelled to leave the Union territory because of his dependency on a third country carer parent. The judge accepted and found that there was no dispute that the appellant was the sole carer of her British citizen son then aged 8 and who was attending primary school, but also that the mother had leave to remain until 14th July 2022 and consequently the child would not be compelled to leave the UK with her. However the judge dismissed the appeal on the basis that the appellant did not meet the requirements of Regulation 16(6) of the Immigration (European Economic Area) Regulations 2016 ("EEA Regulations").

8. That decision was set aside on 4th May 2022 on the basis that Regulation 16(6) related to a person under the age of 18 without leave to enter or remain in the UK and Regulation 16(6) had no relevance in this instance. The appellant maintained that Regulation 16(5) should have been applied. The Secretary of State's initial decision the Home Office refused her application for a derivative residence card under Regulation 16(5), 16(8) and 20 only.

9. It was noted that Regulation 16(7) only precluded the primary carer if they were an exempt person and the appellant maintained she was not an exempt person, and the judge misapplied the case of **Patel**. The appellant emphasised and continued to emphasise in the resumed hearing for remaking that Regulation 16 confirmed that the Regulation did not require her to satisfy all the criteria of Regulation 16 but "each of the criteria in one or more of paragraphs (2) to (6)". The appellant maintained that she had satisfied Regulation 16(5) and which in fact the Home Office had applied to her application. Regulation 16(5) did not mention that if the appellant had leave to remain that disqualified her.

10. At the hearing before me there was no challenge to the fact that the child was a British citizen. Mr Deller accepted that under Regulation 16(8), the mother was the "primary carer", and that did not appear to be in issue here; Regulation 20 was simply how the document was issued. He submitted that the only issue was whether the appellant had leave on another basis and its effect.

11. Mr Deller submitted that under the policy review announced on 13th June 2022 (EU Settlement Scheme: Zambrano primary carers – GOV.UK (www.gov.uk)) applications under the EU Settlement Scheme as a person

with a **Zambrano** right to reside would still fall for refusal where leave to remain was held on another basis, and submitted that her EUSS application was still bound to be refused. He accepted that the appeal in this instance was against a refusal to issue a document under the EEA Regulations but it was still submitted that the appeal could not succeed under the Regulations either because of the Court of Appeal ruling in **Akinsanya v Secretary of State** [2022] EWCA Civ 37 in line with [54] to [57] and later in **Velaj** at [57]. **Akinsanya** held that the **Zambrano** right, properly understood, was one which could not arise where there is no real prospect of the primary carer being required to leave the United Kingdom due to having another actual basis of stay and that requirement was not met at the end of the transition period on 31st December 2020 by someone with other limited leave to remain. Mr Deller submitted that the true understanding of the **Zambrano** right should be read into Regulation 16(5) and that in effect a person with limited leave to remain would not be required to leave the UK. He argued that [54] to [57] of **Akinsanya** and [57] of **Secretary of State v Velaj [2022] EWCA Civ 76** held that a **Zambrano** right properly understood could not arise where there was no real prospect of the primary carer being required to leave the UK due to having another actual basis of stay.

Analysis

12. This appeal was subject to an adjournment in the Upper Tribunal because the Secretary of State wished to clarify the position in relation to the appellant's EUSS application. At both the error of law decision and at the adjourned hearing the question of legal representation was raised with the appellant. Mr Deller praised the appellant for her submissions which he observed, bearing in mind she had no representation, were impressive. However, on at least two occasions I stressed to the appellant the complexity of this legal field and invited her to consider seeking legal representation. The law in relation to EU rights following exit from the European Union particularly in relation to the EEA Regulations is complex.

13. The material part of Paragraph 16(5) of the EEA Regulations 2016 in contention reads as follows:

> *"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."*

14. The appellant submitted that she was entitled to a derivative right of residence as she fulfilled the criteria set out above.

15. I turn, however, to the question of the underlying appeal right and grounds for appeal. The appellant made her application for a derivative right of

residence on 11th December 2020 (prior to the revocation of the EEA regulations 2016) . The decision issued by the Secretary of State was dated 14 January 2021 (post the revocation of the EEA regulations 2016) and a right of appeal was granted to the appellant as follows: 'You have a right of appeal against this decision under regulation 36 of the 2016 Regulations'.

16. The commencement day for the revocation of the EEA Regulations is 31st December 2020. The EEA Regulations were revoked by the Immigration and Social Security Co-ordination (EU Withdrawal) Act 2020 Schedule 1(1) paragraph 2(2) and enforced on Implementation period ("IP") completion day (31st December 2020) by Regulation 4 of the Immigration and Social Security Co-ordination (EU Withdrawal) Act 2020 (Commencement) Regulations (SI 2020/1279).

17. The revocation, however, has effect subject to savings specified in Schedule 3 of The Immigration and Social Security Co-ordination (EU withdrawal Act 2020) (Consequential, Saving Transitional and Transitory Provisions) (EU Exit) Regulations 2020 (SI 2020 1309) which is set out, in so far as material, as follows:

> ***Schedule 3***
>
> ***Pending applications for documentation under the EEA Regulations 2016***
>
> ***3.*** *—* *…*
>
> *(6) Regulation 20 of the EEA Regulations 2016 (issue of a derivative residence card), continues to apply for the purposes of considering and, where appropriate, granting an application for a derivative residence card which was validly made in accordance with the EEA Regulations 2016 before commencement day.*
>
> ***Application of EEA Regulations 2016 to pending applications***
>
> ***4.***— *(1) Subject to sub-paragraph (2) the provisions of the EEA Regulations 2016 specified in paragraph 6 continue to apply (despite the revocation of those Regulations) with the modifications specified for the purposes of determining whether an application referred to in paragraph 3 should be granted.*
>
> *…*
>
> ***Existing appeal rights and appeals***
>
> ***5.****—(1) Subject to sub-paragraph (4), the provisions of the EEA Regulations 2016 specified in paragraph 6 continue to apply —*
>
> *(a) to any appeal which has been brought under the Immigration (European Economic Area) Regulations*

2006 *and has not been finally determined before commencement day,*

(b) to any appeal which has been brought under the EEA Regulations 2016 and has not been finally determined before commencement day,

(c) in respect of an EEA decision, within the meaning of the EEA Regulations 2016, taken before commencement day, or

(d) in respect of an EEA decision, within the meaning of the EEA Regulations 2016 as they continue in effect by virtue of these Regulations or the Citizens' Rights (Application Deadline and Temporary Protection) (EU Exit) Regulations 2020, which is taken on or after commencement day.

(2) For the purposes of paragraph (1)—

(a) an appeal is not to be treated as finally determined while a further appeal may be brought and, if such a further appeal is brought, the original appeal is not to be treated as finally determined until the further appeal is determined, withdrawn or abandoned; and

(b) an appeal is not to be treated as abandoned solely because the appellant leaves the United Kingdom.

(3) The revocation of the EEA Regulations 2016 does not affect the application of the Immigration (European Economic Area) Regulations 2006 to an appeal that falls within paragraph 3(1) of Schedule 4 to the EEA Regulations 2016.

(4) The provisions specified in paragraph 6 do not apply to the extent that the provisions of the EEA Regulations 2016 specified in paragraph 6 continue to apply to an appeal or EEA decision by virtue of the Citizens' Rights (Application Deadline and Temporary Protection) (EU Exit) Regulations 2020.

18. The citizen Rights (Application Deadline and Temporary Protection) (EU Exit) Regulations 2020 do not apply to this appellant for reasons given below.

19. The EEA Transitional Regulations continue at paragraph 6: (and which I have set out in full for clarity):

Specified provisions of the EEA Regulations 2016

6.— *(1) The specified provisions of the EEA Regulations 2016 are—*

(a) *regulation 2 (general interpretation)* ***with the following modifications****—*

(i) as if all instances of the words "or any other right conferred by the EU Treaties"—

(aa) *in so far as they relate to things done on or after exit day but before commencement day, were a reference to a right conferred by the EU Treaties so far as they were applicable to and in the United Kingdom by virtue of Part 4 of the EU withdrawal agreement;*

(bb) *in so far as they relate to things done on or after commencement day, were omitted;*

(ii) as if all instances of the words "or the EU Treaties"—

(aa) in so far as they relate to things done on or after exit day but before commencement day, were a reference to the EU Treaties so far as they were applicable to and in the United Kingdom by virtue of Part 4 of the EU withdrawal agreement;

(bb) in so far as they relate to things done on or after commencement day, were omitted;

(iii) as if, at the end of the definition of "deportation order", there were inserted "or under section 5(1) of the Immigration Act 1971";

(iv) as if, in the definition of "EEA State", the words ", other than the United Kingdom" were omitted; and

(v) as if, at the end of the definition of "exclusion order", there were inserted "or directions issued by the Secretary of State for a person not to be given entry to the United Kingdom on the grounds that the person's exclusion is conducive to the public good";

(b) *regulation 3 (continuity of residence) with the modification that, at the end of paragraph (3)(c), there were inserted "or the Immigration Acts";*

(c) *regulation 4 ("worker", "self-employed person", "self-sufficient person" and "student") with the modification that, in paragraph (1)(b), for "in accordance with" there were substituted "within the meaning of";*

(d) *regulation 5 ("worker or self-employed person who has ceased activity");*

(e) *regulation 6 ("qualified person") with the following modifications—*

(i) in paragraph (4C), "and having a genuine chance of being engaged" were omitted;

(ii) in paragraph (6), after "employment and" there were inserted ", when determining whether the person is a jobseeker,";

(iii) in paragraph (7), after "continuing to seek employment and" there were inserted ", where that person is a jobseeker";

(f) *regulation 7 ("family member");*

(g) *regulation 8 ("extended family member");*

(h) *regulation 9 (family members and extended family members of British citizens) with the following modifications—*

(i) in paragraph (1), at the end there were inserted "and BC is to be treated as satisfying any requirement to be a qualified person";

(ii) sub-paragraph (a) of paragraph (3) were omitted;

(iii) paragraph (7) were omitted;

(i) *regulation 9A (dual national: national of an EEA State who acquires British citizenship);*

(j) *regulation 10 ("family member who has retained the right of residence") with the following modifications—*

(i) in paragraph (2)(b), in so far as it applies to residence in the United Kingdom after commencement day, for "in accordance with these Regulations" there were substituted "lawfully";

(ii) in paragraph (5)(a), "the initiation of proceedings for" were omitted;

(k) *regulation 11 (right of admission to the United Kingdom);*

(l) *regulation 21 (procedure for applications for documentation under this Part and regulation 12);*

(m) *regulation 22 (verification of a right of residence);*

(n) *regulation 23 (exclusion and removal from the United Kingdom) with the modification that in each of paragraphs (1), (5), (6)(b) and (7)(b), after "regulation 27", there were inserted "or on conducive grounds in accordance with regulation 27A or if the person is subject to a deportation order by virtue of section 32 of the UK Borders Act 2007(**7**)";*

(o) *regulation 24(1), (3),(4), (6) and (7) (refusal to issue or renew and revocation of residence documentation), with the modification that references to revocation are omitted;*

(p) *regulation 27 (decisions taken on grounds of public policy, public security and public health) with the modification that after regulation 27 there were inserted—*

"Decisions taken on conducive grounds

27A. - *(1) An EEA decision may be taken on the ground that the decision is conducive to the public good.*

(2) But a decision may only be taken under this regulation in relation to a person as a result of conduct of that person that took place after IP completion day.";

(q) *regulation 28 (application of Part 4 to a person with a derivative right to reside) in so far as it applies to a person within regulation 28(1)(c),*

(r) *regulation 32 (person subject to removal) with the modification that in paragraph (5), after "public health", there were inserted "in accordance with regulation 27 or on conducive grounds in accordance with regulation 27A";*

(s) *regulation 33 (human rights considerations and interim orders to suspend removal);*

(t) *regulation 35 (interpretation of Part 6) in respect of the interpretation of the provisions which continue to apply by virtue of paragraph 4 or 5;*

(u) *regulation 36 (appeal rights);*

(v) *regulation 37 (out of country appeals);*

(w) *regulation 38 (appeals to the Commission);*

(x) *regulation 39 (national security: EEA decisions);*

(y) *regulation 40 (effect of appeals to the First-tier Tribunal or Upper Tribunal);*

(z) *regulation 41 (temporary admission to submit case in person);*

(aa) regulation 42 (alternative evidence of identity and nationality);

(bb) Schedule 1 (considerations of public policy, public security and the fundamental interests of society etc.) with the modification that for paragraph 1 there were substituted—

*"**1.** The United Kingdom enjoys considerable discretion, acting within the parameters set by the law, to define its own standards of public*

policy and public security, for purposes tailored to its individual context from time to time.".

(cc) Schedule 2 (appeals to the First-tier Tribunal) with the modification that—

(aa) in relation to an appeal within paragraph 5(1)(a) to (c), in each of paragraphs 1 and 2(4), the words "under the EU Treaties", in so far as they relate to things done on or after exit day but before commencement day, were a reference to the EU Treaties so far as they were applicable to and in the United Kingdom by virtue of Part 4 of the EU withdrawal agreement;

(bb) in relation to an appeal within paragraph 5(1)(d), in each of paragraphs 1 and 2(4), the words "under the EU Treaties", were a reference to "under the Immigration (European Economic Area) Regulations 2016 ***as they are continued in effect*** *by these Regulations* ***or*** *the* ***Citizens' Rights (Restrictions of Rights of Entry and Residence) (EU Exit) Regulations 2020****, or by virtue of the EU withdrawal agreement, the EEA EFTA separation agreement (which has the same meaning as in the European Union (Withdrawal Agreement) Act 2020) or the Swiss citizens' rights agreement (which has the same meaning as in that Act)".*

20. Although the appellant was ostensibly given a right of appeal in the refusal letter and paragraph 3 of Schedule 3 refers in paragraph 6 to the continuation of regulation 20 for the purpose of considering and where appropriate granting an application which was validly made in accordance with the EEA regulations, the question in relation to the ground of appeal remains at large.

21. For the purposes of the continuation of her appeal rights under the Immigration (European Economic Area) Regulations 2016 the appellant does not fall within 5(1)(a) as the appeal was not brought under the 2006 regulations. She does not fall under 5(1)(b) because the appeal was not determined before commencement day ("31st December 2020). She does not fall under 5(1)(c) because the EEA decision was not taken before commencement day. She appears to fall under 5(1)(d). However this makes reference to '*an EEA decision, within the meaning of the EEA Regulations as they continue in effect by virtue of these Regulations or the Citizens' Rights (Application Deadline and Temporary Protection) (EU Exit) Regulations 2020, which is taken on or after commencement day'*.

22. These latter regulations do not apply to the appellant because further to paragraph 4(2)(b), she was in the UK with limited leave under national law and paragraph 4 stipulates as follows:

> *4(b) 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).*

23. Turning back to the Transitional Regulations, the appellant cannot derive benefit from the EEA Regulations 2016 because Regulation 16 was not '*continued in effect*' under Schedule 3 paragraph 4 with reference to paragraph 6. Regulation 16 does not feature in paragraph 6.

24. I have considered whether the appellant can derive benefit from the provisions under the Withdrawal Agreement which set out as follows:

> ***Withdrawal Agreement***
>
> *Article 10*
>
> *Personal scope*
>
> *1 Without prejudice to Title III, this Part shall apply to the following persons:*
>
> ***a)*** *Union citizens who exercised their right to reside in the United Kingdom in accordance with Union law before the end of the transition period and continue to reside there thereafter;*
>
> ***b)*** *United Kingdom nationals who exercised their right to reside in a Member State in accordance with Union law before the end of the transition period and continue to reside there thereafter;*
>
> ***c)*** *Union citizens who exercised their right as frontier workers in the United Kingdom in accordance with Union law before the end of the transition period and continue to do so thereafter;*
>
> ***d)*** *United Kingdom nationals who exercised their right as frontier workers in one or more Member States in accordance with Union law before the end of the transition period and continue to do so thereafter;*
>
> ***e)*** *family members of the persons referred to in points (a) to (d), provided that they fulfil one of the following conditions:*
>
> *(i) they resided in the host State in accordance with Union law before the end of the transition period and continue to reside there thereafter;*
>
> *(ii) they were directly related to a person referred to in points (a) to (d) and resided outside the host State*

before the end of the transition period, provided that they fulfil the conditions set out in point (2) of Article 2 of Directive 2004/38/EC at the time they seek residence under this Part in order to join the person referred to in points (a) to (d) of this paragraph;

(iii) they were born to, or legally adopted by, persons referred to in points (a) to (d) after the end of the transition period, whether inside or outside the host State, and fulfil the conditions set out in point (2)(c) of Article 2 of Directive 2004/38/EC at the time they seek residence under this Part in order to join the person referred to in points (a) to (d) of this paragraph and fulfil one of the following conditions:

— both parents are persons referred to in points (a) to (d);

— one parent is a person referred to in points (a) to (d) and the other is a national of the host State; or

— one parent is a person referred to in points (a) to (d) and has sole or joint rights of custody of the child, in accordance with the applicable rules of family law of a Member State or of the United Kingdom, including applicable rules of private international law under which rights of custody established under the law of a third State are recognised in the Member State or in the United Kingdom, in particular as regards the best interests of the child, and without prejudice to the normal operation of such applicable rules of private international law(7);

***f**) family members who resided in the host State in accordance with Articles 12 and 13, Article 16(2) and Articles 17 and 18 of Directive 2004/38/EC before the end of the transition period and continue to reside there thereafter.*

25. The appellant cannot derive assistance from the Withdrawal Agreement. She does not fall within the personal scope of Article 10 (a) to (d) because she is not an EEA or UK citizen. In relation to the family member provisions under 10(e) she did not reside in accordance with Union law prior to the transition because she had leave under national law; she did not in accordance with 10(e)(ii) reside outside the host state and the appellant did not reside in the host states in accordance with Articles 12 and 13, Article 16(2) and Articles 17 and 18 of Directive 2004/38/EC.

26. I conclude that the appellant no longer has a ground of appeal because for the purposes of her appeal regulation 16 of the EEA Regulations was not preserved as identified above by the Transitional regulations.

27. Even if I am wrong about that under the Immigration (European Economic Area) Regulations 2016 the sole right of appeal in an appeal against an EEA decision under the Immigration (EEA) Regulations 2016, is that the decision breaches the appellant's rights under the EU Treaties in respect of entry to and residence in the UK (Schedule 2, paragraph 1), **Munday (EEA decision: grounds of appeal)** [2019] UKUT 91(IAC).

28. As set out in the reported decision of **Geci (EEA Regs: transitional provisions; appeal rights)** [2021] UKUT 285 (IAC) at (3) of the headnote, the Tribunal's task was to decide whether the decision breached the appellant's rights under the EU treaties as they applied in the United Kingdom prior to 31st December 2020. At that point Ms Latale had leave limited leave to remain until July 2022.

29. It was clear that the appellant could fulfil Regulation 16(a) and (b) of the EEA Regulations 2016 and that Mr Deller accepted that. The question remained in relation to 16(5)(c). **Akinsanya** related to a consideration of an application under the EU Settlement Scheme, but nevertheless considered the construction of Regulation 16 of the 2016 Regulations, albeit with a focus on Regulation 16(7) but considered of the Zambrano right itself. At [54]-[55] Underhill LJ held

> *"54. … It is clear from Iida and NA that the Court does not regard Zambrano rights as arising as long as domestic law accords to Zambrano carers the necessary right to reside (or to work or to receive social assistance). To put it another way, where those rights are accorded what I have called "the Zambrano circumstances" do not obtain.*
>
> *55. That analysis is perfectly sustainable at the theoretical level. As the Court recognises (see para. 72 of the judgment in Iida) the right of third country nationals to reside in a member state is normally a matter for that state. Zambrano rights are for that reason exceptional. They are not typical Treaty rights, since they arise only indirectly and contingently in order to prevent a situation where EU citizen dependants are compelled to leave the EU. That being so, it makes sense to treat them as arising **only** in circumstances where the carer has no domestic (or other EU) right to reside (or to work, or to receive necessary social assistance)". [my emphasis]*

30. Underhill LJ agreed that Zambrano circumstances arose as soon as a claimant had no leave to remain and was thus as a matter of domestic law liable to removal but accepted that the natural reading of the right under Regulation 16 as framed by the Secretary of State may have gone beyond an entitlement in EU law. It was submitted before Lord Justice Underhill in **Akinsanya** that there was a presumption against "gold-plating" in the framing of Regulation 16(7) but that was rejected. The framing of the Regulation itself only excluded those with Indefinite Leave to Remain. Therefore, whatever the intention or understanding of the Secretary of State in relation to Regulation 16(7) it was clear that a person with limited

leave to remain was not exempted from the consideration of the Zambrano right under Regulation 16 of the Regulations. That however was different proposition from finding that holding leave still entitled an appellant to claim the *substance* of the EU right.

31. The Court of Appeal in **Velaj** at [57] was clear when analysing **Akinsanya and** said this

> *'… After analysing the Zambrano jurisprudence, including Iida v Stadt Ulm (Case C-40/11) [2011] Fam 121 and Secretary of State for the Home Department v A (Case C-115/15) [2017] QB 109, Underhill LJ concluded that as a matter of EU law, a Zambrano right is a right of last resort which does not arise if the third-country national carer otherwise enjoys a right under domestic law to reside in the member state in question'.*

32. **Velaj** at [19] confirmed the Upper Tribunal decision of the same case holding that "the question whether a child would be compelled to leave is a practical test to be applied to the actual facts" and "*Regulation 16(5) therefore cannot be construed as requiring an entirely theoretical assumption*", and added at [49] "*it is clear from Chavez-Vilchez and Patel that the question whether the dependant EU citizen would be 'unable to reside in the UK' depends on a fact-specific inquiry".* The decision required a nuanced analysis of inability and not a simple analysis of a hypothetical question and that "*must mean that the decision-maker is looking at what is likely to happen in reality"* and "*the key issue of inability to reside in the United Kingdom requires detailed consideration and a causal link with the departure of both carers*".

33. In the case of **Velaj**, however, it was accepted that there would be a new species of purely domestic derivative rights for someone who would never meet the **Zambrano** test *"in circumstances where the departure of that person from the UK would in practice have no effect at all upon the ability of the British citizen dependant to remain in the UK*". In that case of **Velaj** the mother was a British citizen and it was clear that requiring the decision-maker to assume that both primary carers would leave the UK when one of them would undoubtedly stay behind precludes the type of nuanced enquiry that was envisaged in **Chavez-Vilchez** [2017] EUECJ C-133/15), and that in effect the 2018 amendment, far from implementing **Chavez-Vilchez**, would have the opposite effect. Lady Justice Andrews stated at [51] "the decision-maker is looking at the likely impact upon the child of the primary carer being forced by law or by economic pressure to leave the UK. It presupposes that on the facts of the specific case, this is a realistic hypothesis".

34. Although the court rejected the submission of the appellant Mr Velaj on the basis of a purely hypothetical premise, it appeared to agree at [68] and [69] that the immigration status of a person with limited leave to remain could be part of the fact finding exercise and noting that such leave is precarious, likely to be subject to conditions and liable to be withdrawn or

truncated, and stated "*it is possible to conceive of situations in which the conditions attached to a limited leave to remain are such as to make it impossible in practice for the primary carer to remain in the UK and look after the child*".

35. Andrews LJ at [69] in **Velaj** said this:

> *"69. I can also envisage a Zambrano carer whose limited leave to remain is due to expire making an application under Regulation 16(5)(c) and succeeding on the basis that they would have to leave the UK as soon as their limited leave expired and the child would have to go with them. In such a case if the decision-maker asks 'what will happen to the child in the event that the primary carer leaves the UK for an indefinite period?' they will not be positing a completely unrealistic scenario. In any event, the practical difficulties of someone with limited leave to remain being able to satisfy the requirements of Regulation 16(5)(c) would not be a justification for construing those requirements in a manner which was clearly unintended".*

36. When considering the nature of the leave held and the nature of renewal and conditions, the European Court of Justice in **Ilda** paragraph 75 – 77 recorded

> *75 Finally, as may be seen from paragraphs 28 and 40 to 45 above, the claimant in the main proceedings has a right of residence under national law until 2 November 2012, which is prima facie renewable, according to the German Government, and can in principle be granted the status of long-term resident within the meaning of Directive 2003/109.*
>
> *76 In those circumstances, it cannot validly be argued that the decision at issue in the main proceedings is liable to deny Mr Iida's spouse or daughter the genuine enjoyment of the substance of the rights associated with their status of Union citizen or to impede the exercise of their right to move and reside freely within the territory of the Member States (see McCarthy, paragraph 49).*
>
> *77 It must be recalled that the purely hypothetical prospect of exercising the right of freedom of movement does not establish a sufficient connection with European Union law to justify the application of that law's provisions (see Case C-299/95 Kremzow [1997] ECR I-2629, paragraph 16). The same applies to purely hypothetical prospects of that right being obstructed*

37. Underhill LJ in **Akinsanya**, interpreted **Iida v Stadt Ulm** (Case C-40/11) [2011] Fam 121 at [44] in this way

> *'Para. 72 in that passage recapitulates the rationale for the grant of Zambrano rights. Paras. 73-75 give three reasons why that*

rationale did not apply in the applicant's case. The first and second are not relevant in the circumstances of this case, but Mr Blundell submitted that the third is directly in point. The reason given in para. 75 is that the applicant currently enjoyed the right to reside under German law and ***was likely to continue to do so*** *(whether under German law or by virtue of an entitlement to long-term resident status under Directive 2003/109). The significance of that can only, he submitted, be that the Court did not regard the Zambrano jurisprudence as being engaged in circumstances where the carer already enjoyed residence rights and where accordingly there was no current risk of them, or therefore their EU citizen dependants, having to leave the EU. Even if the domestic right in question might in principle lapse or be removed, leading to the potential "obstruction" of the dependants' article 21 rights, that did not engage Zambrano so long as that possibility was "purely hypothetical": see the second sentence of para. 77.*

38. The applicant in **Iida** was construed to have leave under national law and this critically '*was likely to continue to do so either under German law or by virtue of an entitlement to long term resident status under the EU Directive itself*'. Although that is not the case here Underhill LJ addressed the point on renewal by stating at [45]

> *'In my view Iida does indeed support Mr Blundell's [Secretary of State] case, for the reasons that he gives. Mr Cox noted that at the end of para. 75 the Court refers to the fact that the applicant was now entitled to long-term residence status under Directive 2003/109, i.e. as a matter of EU law. That is true but it is not the essence of the point being made. The paragraph starts with the fact that the applicant enjoyed a right of* ***residence as a matter of German law****: it is that which was material to his position in the underlying proceedings and it was plainly part of the Court's reasoning' [my emphasis].*

39. To bolster that position at [47] **Akinsanya** took an extract from the judgment in **NA v Secretary of State** C115/15 [2017] QB said this

> *"74. The first condition on which the possibility of claiming a right of residence in the host Member State under Article 20 TFEU, as interpreted by the Court in … Zambrano …, depends, namely that the person concerned does not qualify for a right of residence in that Member State under European Union secondary law, is in this case not met."*

40. Further at [49] the court found this in relation to **NA**

> *"The Court at para. 69 framed the issue in terms of whether the Zambrano right arose where the person in question already enjoyed a right of residence "under national or international law". On the facts of the particular case the right arose under*

> *international law, but I see nothing to suggest that the Court believed that the answer might be different if it arose under national law; nor can I myself see a reason why it should. And even if I were wrong about that, NA is at worst neutral: it says nothing to undermine Mr Blundell's reliance on Iida."*

41. Although **Velaj** appears to draw away from that conclusion not least that **Akinsanya** was based on regulation 16(7) not 16(5)**, Akinsanya** is clear on the *nature and ambit* of the Zambrano right itself under EU law and when it can be claimed, when stating that the essence of the right is precluded by an alternative right under national law. That is the case here. **Velaj** proceeds to confirm the position at [69] by stating

> *'practical difficulties of someone with limited leave to remain being able to satisfy the requirements of Regulation 16(5)(c) would not be a justification for construing those requirements in a manner which was clearly unintended'.*

42. Moreover, the approach in **Velaj** at [69] (cited above) as to envisaging success under Regulation 16(5)(c) owing to the possible expiry of limited leave, to my mind, is in relation to the approach to the *Regulations* not the underlying Zambrano right which is relevant now and the true nature of the of which is explored above.

43. I conclude, first, as held in **Geci** the appeal is confined to whether the decision of the respondent breaches the appellant's right under the EU treaties and as explained in **Akinsanya** the Zambrano right arises only in circumstances where the carer has no domestic (or other EU) right to reside (or to work, or to receive necessary social assistance)".

44. It is correct as per [54] of **Akinsanya** that the court did not regard **Zambrano** rights as arising as long as domestic law accords to **Zambrano** carers the *necessary* right to reside [my italics] but at [55] it was stated that **Zambrano** rights were exceptional and not typical treaty rights since they only arose indirectly in order to prevent a situation where the EU citizen dependants were compelled to leave the EU and "*that being so, it makes sense to treat them as arising only in circumstances where the carer has no domestic (or other EU) right to reside (or to work, or to receive necessary social assistance*)". No time on the length of leave was identified.

45. Secondly, the requirement under regulation 16(7) under the EEA Regulations 2016 is a threshold only in order to approach the 16(5) criteria. It does not reflect on the substance of the EU law right which is in issue here.

46. Thirdly, Zambrano rights (save in relation to appeals under the transitional regulations) no longer have purchase. Those Regulations have ceased to have effect, save for certain transitional purposes, since 31 December 2020 (i.e. the revocation of the EEA regulations 2016). As at the date of

revocation the appellant had a right of residence under national law within the UK albeit limited.

47. Fourth, in view of the consideration of the matter by Underhill LJ following specific argument on the point in the Court of Appeal and the conclusion of Lady Justice Andrews at [69] of **Velaj,** the extent of the right under EU law and when it can and cannot occur is conclusive.

48. The appellant had limited leave which was due to expire in July 2022 and indeed by the time of the renewed hearing had expired. At the relevant time, however, the appellant had leave and it was open to her to make an application for that leave to be renewed either under Article 8 or through another route. The main point is that she had leave whether precarious or not. The appellant brought no conditions to my notice that she was unable to claim public funds and under her leave she was able to work.

49. The relevant date for the focus of my analysis must be 31 December 2020. Following the 'exit' from the EU date no such ' Zambrano right' is recognised in the UK save as required under the pending appeals. The appeal by the appellant, as per **Geci**, is against the EU Treaties by virtue of the transitional arrangements, and does not afford the appellant the latitude of appealing against the EEA Regulations 2016 themselves and thus despite what is said in the Regulations in relation to '*if the person left the United Kingdom for an indefinite period',* the holding of limited leave at that point means that the appellant had a domestic leave and cannot be practically required to remove and thus cause the child to be compelled to remove from the EU. It was always open to the appellant to seek renewal of her leave under Article 8 and seek a fee waiver if required.

50. In so far as the best interests of the child need to be considered they are met in the factual situation that exists. Clearly the child will stay with the appellant.

51. As at the relevant date Miss Latale had no derivative right to reside under Regulation 16(5) as the possibility did not exist of her having to leave the UK such that her child would be unable to remain. On an analysis of the practical implications rather than a hypothetical proleptic analysis I find therefore that the appellant cannot succeed in this appeal and it is dismissed.

Notice of decision

The appellant's appeal is dismissed.

No anonymity direction is made.

Signed Helen Rimington Date 27th September 2022

Upper Tribunal Judge Rimington

TO THE RESPONDENT
FEE AWARD

I have considered making a fee award and have decided to make no fee award in view of the complexity of the matter.

Signed Helen Rimington Date 27th September 2022

Upper Tribunal Judge Rimington