Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: EA/02205/2021
UI-2021-001513

THE IMMIGRATION ACTS

Heard at Field House, London	**Decision & Reasons Promulgated**
On Monday 6 June 2022	**On Monday 25 July 2022**

Before

UPPER TRIBUNAL JUDGE SMITH

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

-and-

MRS SHOKORIA ZARMIR

Respondent

Representation:
For the Appellant: Mr E Tufan, Senior Home Office Presenting Officer
For the Respondent: Mr M Thompson, Counsel instructed by the Appellant on a direct access basis

DECISION AND REASONS

BACKGROUND

1. This is an appeal by the Secretary of State. For ease of reference, I refer to the parties as they were before the First-tier Tribunal. The Respondent appeals against the decision of First-tier Tribunal Judge K M Verghis promulgated on 26 July 2021 ("the Decision"). By the Decision, the Judge allowed the Appellant's appeal against the Respondent's decision dated 5 February 2021, refusing the Appellant's application under the EU

Settlement Scheme to remain as a person with a "Zambrano" right of residence. The Judge also allowed the appeal on Article 8 ECHR grounds.

2. The Appellant, a national of Afghanistan, is the mother of MZ, a child born on 26 July 2019 and a British national. The Appellant is the spouse of a British national, Mr Zarmir Ismael, who is the father of MZ. They also have two older children, both British nationals. Mr Ismael is (or was at the time of the appeal before Judge Verghis) studying in Ukraine. The Appellant therefore asserted that she was the primary carer for her three children. The Respondent accepted the identity and nationality of the Appellant, Mr Ismael and the children. She asserted that the Appellant had not shown that MZ would be unable to remain in the UK if the Appellant were to leave. The Respondent also pointed to the Appellant's failure to make an application based on her Article 8 rights and therefore the Respondent said that the Appellant could not show that she could not remain in the UK absent the Zambrano right of residence.

3. The Appellant's appeal was determined on the papers. The Judge found there to be no dispute that the Appellant is the primary carer of the children nor that, had she made an application to remain under Appendix FM of the Immigration Rules, she might have succeeded. The Judge accepted that there was no requirement to make an Article 8 claim before making a Zambrano claim (relying on Patel and Shah v Secretary of State for the Home Department [2019] UKSC 59). She concluded that the Appellant met regulation 16(5) of the Immigration (European Economic Area) Regulations 2016 ("the EEA Regulations") and was entitled to a Zambrano right to reside.

4. The Judge then went on to consider Article 8 ECHR. She made reference to the Court of Appeal's judgment in TZ and PG v Secretary of State for the Home Department [2018] EWCA Civ 1109 which she considered assisted the Appellant. She concluded that the refusal of leave to remain would be disproportionate. She went on to allow the appeal without stating the basis for that conclusion.

5. The Respondent took issue primarily in relation to the Judge's consideration of the appeal through the lens of Article 8 ECHR. It is pointed out that the refusal decision under appeal was under the EU Settlement Scheme and not a refusal of a human rights claim nor a decision under the EEA Regulations. The Judge had, the Respondent said, failed to consider whether the children would be compelled to leave the UK if the Appellant were removed to Afghanistan which was the relevant issue in dispute. It is accepted as the Judge found that the Appellant is the primary carer of the children. The Respondent referred to the case of R (oao Akinsanya) v Secretary of State for the Home Department [2021] EWHC 1535 (Admin). The Respondent was the losing party in that case but the decision of Mostyn J in that case was, at the time of the Respondent's grounds, under appeal to the Court of Appeal. The appeal has since been heard and determined ([2022] EWCA Civ 37)

("Akinsanya"). Although the Court of Appeal accepted that Mostyn J had erred in law in one regard, the Respondent's appeal failed overall.

6. Turning back to this appeal, permission to appeal was granted by Designated First-tier Tribunal Judge Shaerf on 22 February 2022 in the following terms so far as relevant:

> "... The grounds for appeal rely on the Respondent's view that *The Queen (Akinsanya) v SSHD [2021] EWH 1535 (Admin)* was wrongly decided and the SSHD's appeal is due to be heard by the Court of Appeal at the end of his year. The Court of Appeal has now handed down its judgment in *Akinsanya v SSHD [2022] EWCA Civ 37* in which the judgment of the Administrative Court is affirmed for different reasons. This ground is not as persuasive as the first ground addressed in the next paragraph.
>
> The grounds assert the Judge did not consider this appeal against the refusal under the EUSS by reference to the provisions of Appendix EU of the Immigration Rules and arguably erred in law by considering it with reference to the Immigration (EEA) Regulations 2016 as amended. Permission on this ground is granted and the other grounds may also be argued.
>
> The unrepresented Appellant has objected to an earlier Notice of the Tribunal seeking to set aside the Judge's decision. Accordingly, for the reasons given to appeal, permission is granted."

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

8. I had before me a core bundle of documents relevant to this appeal, the Respondent's bundle before the First-tier Tribunal and the Appellant's bundle before the First-tier Tribunal. I also had a Rule 24 response from the Appellant.

DISCUSSION

9. Mr Tufan began his submissions by informing me that the Respondent has now granted the Appellant leave to remain on a ten year route based on her family life. He produced a letter confirming the grant of leave dated 22 December 2021. He also confirmed that a biometric residence permit has been issued since.

10. As Mr Tufan also accepted, however, the effect of the grant of leave to remain is not determinative of this appeal. The appeal is in relation to a refusal under the EU Settlement Scheme. As the regulations relating to appeals in that regard confirm, a grant of leave to remain does not bring an appeal to an end. I was told that Mr Thompson had confirmed that the Appellant did not wish to withdraw her appeal.

11. Since the Respondent has granted leave to remain on Article 8 grounds, it follows that she cannot object as such to the Judge having found that removal would be disproportionate. However, the Respondent's short point is that the Appellant should have made an application under the Immigration Rules based on her Article 8 rights and that, had she done so, since she would not be at risk of removal, she could not succeed in her Zambrano claim.

12. Mr Tufan indicated that since the Appellant did not wish to withdraw her appeal, he would like an adjournment of the hearing before me. He drew my attention to the judgment in Akinsanya. He informed me that the Respondent had given an undertaking in that case to publish a policy regarding, as I understood it, the interaction between domestic law rights (based on family and private life) and EU law rights based on Zambrano.

13. Mr Thompson submitted that the Respondent's argument was wrong and that Akinsanya had no relevance to this case. As such, there was no basis for any adjournment.

14. I have carefully considered the Court of Appeal's judgment in Akinsanya. In that case, the appellant was a person who had already been granted limited leave to remain in the UK. The Respondent's argument was that, as a person with a domestic law right to remain in the UK, a Zambrano right to reside could not arise as there would be no need for that person to leave and therefore no compulsion on the EEA national to leave with that person. The appellant's argument was that the Zambrano right existed independently of whether a person had a domestic law right to remain.

15. The Court resolved that issue in the Respondent's favour (see [54] and [55] of the judgment). However, crucially, the Court went on when dealing with the second ground in that appeal, to find that regulation 16 of the EEA Regulations could still be met if a person had only limited leave to remain. As Mr Thompson pointed out, the appellant in Akinsanya won her appeal notwithstanding that she already had limited leave to remain.

16. I also agree with Mr Thompson, however, that Akinsanya is not directly on point in this appeal since at the time of the Decision, the Appellant did not have any leave to remain. It is only as a result of the allowing of the appeal also on Article 8 grounds (and subsequent grant of leave whether consequent on the outcome of the appeal or further application) that the Appellant has been granted leave to remain. That cannot therefore disclose any error of law on the part of this Judge. It is for that reason that I rejected the Respondent's request for an adjournment.

17. As Mr Thompson pointed out, the Judge applied the correct test to whether the Appellant met the EEA Regulations (see [13] and [14] of the Decision). Contrary to what is said in the grant of permission, the Judge was right to focus on regulation 16 of the EEA Regulations. The Judge clearly understood that the Respondent's decision under appeal was in response to an application under the EU settlement scheme (see [2] of the

Decision). However, crucially the question to be answered in that regard, as the Respondent's decision under appeal made clear, was whether the Appellant had a right to reside under regulation 16 of the EEA Regulations. The Judge was therefore right to decide that issue as she did at [13] and [14] of the Decision.

18. For those reasons, I conclude that the Judge did not err in law. She determined the issues under both EU law and domestic law, applying the correct tests. Although the Appellant, following the Decision (if it were not appealed and now due to the grant of leave) was entitled to limited leave to remain, she did not have leave to remain at that time. Crucially, even if she did, that leave would not have been sufficient to preclude her relying on her Zambrano rights as such leave would have been limited. Based on the Court of Appeal's judgment in Akinsanya, she could therefore still enjoy a Zambrano right to reside, independently of her grant of limited leave. The Judge did not therefore err in her conclusion that the Appellant had a right to reside under regulation 16 of the EEA Regulations and by allowing the appeal also on this basis.

CONCLUSION

19. For the foregoing reasons, I am satisfied that there is no error of law in the Decision. I therefore uphold the Decision with the result that the Appellant's appeal remains allowed on all grounds.

DECISION

The Decision of First-tier Tribunal Judge K M Verghis promulgated on 26 July 2021 does not involve the making of an error on a point of law. I therefore uphold the Decision with the consequence that the Appellant's appeal remains allowed on all grounds.

Signed: L K Smith

Upper Tribunal Judge Smith Dated: 6 June 2022