Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: UI-2021-000978
[EA/06270/2020]

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 3 August 2022	**On 29 September 2022**

Before

UPPER TRIBUNAL JUDGE ALLEN
DEPUTY UPPER TRIBUNAL JUDGE CHAPMAN

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MS ONEKIA CORETTA PATTERSON NOEL
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:
For the Appellant: Mr A Eaton, counsel instructed by Southwark Law Centre
For the Respondent: Mr P. Deller, Home Office Presenting Officer

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DECISION & REASONS

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1. The Respondent, a national of Grenada, born on 26 August 1993, applied for leave to remain under the EUSS as the sole carer of a British citizen child. This application was refused in a decision dated 6 November 2020 and the Respondent appealed against this decision to the First tier Tribunal.

2. In a decision and reasons promulgated on 27 September 2021, Judge of the First-tier Tribunal Neville allowed the Respondent's appeal on the basis that the decision of the SSHD was not in accordance with the residence scheme immigration rules.

3. The SSHD sought permission to appeal to the Upper Tribunal, in time, on the basis that the Judge had made a material error of law in following the judgment of Mr Justice Mostyn in *Akinsanya* [2021] EWHC 1535 (Admin) in respect of which the SSHD had sought permission to appeal to the Court of Appeal.

4. In a decision dated 9 November 2021, permission to appeal to the Upper Tribunal was granted by Deputy Upper Tribunal Judge Woodcraft on the basis that the SSHD's proposition is arguable; it may be pragmatic to stay the instant appeal pending the outcome of the judgment of the Court of Appeal in *Akinsanya* and that, given the large number of cases that depend on the *Akinsanya* litigation, some guidance to the First tier Tribunal would be useful.

5. In a rule 24 response dated 25 February 2022, the Respondent noted that the Court of Appeal dismissed the SSHD's appeal in *Akinsanya* [2022] EWCA Civ 37 and submitted therefore, that the Respondent's appeal should be upheld. On 2 August 2022, Mr Deller for the SSHD, sent an email to the Upper Tribunal setting out the SSHD's position upon review in light of the judgment of the Court of Appeal: https://www.gov.uk/government/publications/eu-settlement-scheme-zambrano-primary-carers/eu-settlement-scheme-zambrano-primary-carers and maintaining that, following the judgment in *Velaj v SSHD* [2022] EWCA Civ 767 on 31 May 2022 a fact specific assessment as to what would happen in practice if the appeal failed was not conducted by the First tier Tribunal Judge. Therefore, the question was not properly decided as to whether the Respondent has had a *Zambrano* right to reside such as to the meet the requirements of Appendix EU.

Hearing

6. At the hearing before the Upper Tribunal, in addition to relying upon the grounds of appeal and his submission sent by email the previous day, Mr Deller further sought to rely on the judgment in *Velaj* per Andrews LJ, who held at [49] that:

> *"the question whether the dependant EU citizen would be "unable to reside in the UK" depends on a fact-specific inquiry. I agree with the Upper Tribunal that it requires 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. As they put it at [48] of the determination, "the key issue of inability*

to reside in the United Kingdom requires detailed consideration and a causal link with the departure of both carers."

7. Whilst Mr Deller did not formally seek permission to amend the grounds of challenge, it is the case, as was submitted by Mr Eaton, that the need for a fact specific enquiry was not raised in the SSHD's grounds of appeal and that the SSHD had, at the hearing before the First tier Tribunal, conceded the factual basis of the appeal and that the Respondent is the primary carer of her daughter. Mr Eaton further submitted that even if there were to be a further fact finding enquiry, it is difficult to see what other position could be reached given that the child's father is abusive and taking drugs and simply not in any position to look after his daughter. He submitted that the SSHD wished to re-argue a point which was bound to fail and permission to amend the grounds should not be granted. Even if permission to amend was granted, it has been accepted that the Respondent is the primary carer of her daughter and the SSHD cannot properly submit that her daughter should go into care and so there can be only one outcome.

8. Mr Deller responded that the Presenting Officer's concession that the Respondent is the primary carer is not a complete basis upon which to allow the appeal and the First tier Tribunal Judge and others have erred in finding that this is the only deciding factor in the case. He submitted that it was clear from the judgment in *Chavez-Vilchez* C-133/15 that the onus was upon the Respondent to demonstrate that, because of objective impediments that prevent the Union citizen parent from actually caring for the child, the child is dependent on the third-country national parent to such an extent that the consequence of refusing to grant that third-country national a right of residence would be that the child would be obliged, in practice, to leave the territory of the European Union. He submitted that following the judgments in *Akinsanya* and *Velaj* the SSHD was minded to have a Rules based scheme that reflects the purpose of the right rather than the EEA Regulations.

9. We concluded that whilst Mr Deller was seeking to argue a point that was not contained in his grounds of appeal, it was important to include it for completeness when considering the appeal as a whole. Mr Eaton indicated that he was not disadvantaged by our decision in this respect.

10. Mr Deller did not seek to make further submissions on the subject, with characteristic fairness indicating that he was very conscious that this was an individual case and not just a legal concept. Mr Eaton relied upon [3] of his skeleton argument which sets out the factual history of the case and is not disputed.

11. In response to our request for clarity as to the difference in terms of the leave which would be granted as a *Zambrano* carer as opposed to under Appendix FM of the Immigration Rules, the parties agreed that she would be entitled to either settled status or pre-settled status depending on the length of time that she has been eligible for the grant of leave to remain, whereas under Appendix FM she would be likely to be granted 30 months leave on a 10 year route to settlement.

Decision and reasons

12. We have concluded that there is no material error of law in the decision and reasons of the First tier Tribunal Judge. This is for the following reasons:

12.1. There is no factual dispute in this case. The Respondent is the primary carer of her British citizen daughter. Her father is not a suitable carer, due to having subjected the Respondent to domestic violence and having issues with drugs and it has been accepted by all parties that there are no suitable alternative carers. There was no dispute that it would be entirely inappropriate for the child to be taken into the care of the local authorities.

12.2. The Respondent applied for settled status on 28 June 2020, which application was refused by the SSHD on 6 November 2020 on the basis that she had not established that her children would have to leave the UK if she were unable to remain and that she had a realistic prospect of success if she applied for leave to remain under Appendix FM/Article 8 and would not, therefore, be required to leave the United Kingdom;

12.3. On appeal to the First tier Tribunal, the jurisprudential position was that set out in *Akinsanya* [2021] EWHC 1535 (Admin) per Mostyn J, who found that the Secretary of State erred in law when framing her definition of a 'person with a Zambrano right to reside' under the EU Settlement Scheme ('EUSS'). Mostyn J held that (contrary to Home Office policy) a primary carer of a UK citizen child may have a derivative right to reside on *Ruiz Zambrano* grounds even where they are entitled to limited leave to remain on another basis, such as under Article 8 of the European Convention on Human Rights.

12.4. Whilst it was the position of the Presenting Officer that the First tier Tribunal Judge should disagree with the conclusions of Mr Justice Mostyn, we find he did not err in so doing because although the First-tier judge was not bound by Mostyn J's conclusions, as a decision of the Administrative Court it was clearly strongly persuasive and he did not err in law in following them.

12.5. Permission to appeal to the Upper Tribunal was granted solely in relation to the fact that the SSHD had obtained permission to appeal to the Court of Appeal. However, in a judgment dated 25 January 2022, whilst Underhill LJ preferred the submissions on behalf of the SSHD with regard to ground 1, the effect of the *Zambrano* jurisprudence, he upheld the judgment of Mostyn J as to the SSHD's erroneous approach to regulation 16 of the EEA Regulations, holding that persons with limited leave to remain are entitled to a derivative right to remain, alongside their limited leave, if they otherwise satisfy certain specified criteria.

12.6. We note that the Respondent in this case has no leave under Appendix FM of the Immigration Rules and so would, in any event, not be excluded from the grant of leave as a *Zambrano* carer.

12.7. At the hearing before us Mr Deller sought to rely on the subsequent judgment of the Court of Appeal in *Velaj* which was heard on 17 May 2022 and handed down on 31 May 2022 and where Andrews LJ held that: *the question whether the dependant EU citizen would be "unable to reside in the UK" depends on a fact-specific inquiry."*

12.8. Whilst we decided that it would be pertinent to include consideration of the effect of *Velaj,* in this particular case ultimately we have concluded that it makes no material difference, given the absence of any dispute of fact particularly as to the lack of availability of any alternative carer for the Respondent's British daughter.

Decision

13. We find no error of law in the decision and reasons of First tier Tribunal Judge Neville and his decision is upheld.

Rebecca Chapman

Deputy Upper Tribunal Judge Chapman