



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

Case No: UI-2023-002833

First-tier Tribunal No:  
EA/04164/2022

**THE IMMIGRATION ACTS**

**Decision & Reasons Issued:  
On 18 December 2023**

**Before**

**UPPER TRIBUNAL JUDGE MANDALIA  
and  
DEPUTY UPPER TRIBUNAL JUDGE GRIMES**

**Between**

**Liliana Paz  
(NO ANONYMITY DIRECTION MADE)**

Appellant

**and**

**Secretary of State for the Home Department**

Respondent

**Representation:**

For the Appellant: Mr P Thoree, Solicitor

For the Respondent: Ms S Cunha, Senior Home Office Presenting Officer

**Heard at Field House on 5 December 2023**

**DECISION AND REASONS**

1. The appellant in the appeal before us is the Secretary of State for the Home Department ("SSHd") and the respondent to this appeal is Miss Liliana Paz. However, for ease of reference, in the course of this decision we adopt the parties' status as it was before the FtT. We refer to Miss Paz as the appellant, and the Secretary of State as the respondent.

2. The appellant is a national of Columbia. On 2 March 2021 she applied under the EU Settlement Scheme (“EUSS”) as a person with a Zambrano right to reside in the UK as the primary carer of her daughter, who we refer to as LP, born on 24 May 2005, a British citizen. LP’s father, a Columbian national is said to have returned to Columbia in or about 2013.
3. The application was refused by the respondent for reasons set out in a decision dated 16 May 2021. The respondent considered whether the appellant meets the requirements for settled status (also known as indefinite leave to enter or remain) or pre-settled status (also known as limited leave to enter or remain) under the EU Settlement Scheme. To qualify under the scheme the appellant had to meet the requirements set out in Part 1 of Appendix EU to the Immigration Rules. The respondent said that according to the respondent’s records, the appellant already had leave to remain in the UK valid until 9 August 2021. That leave was granted to the appellant on Family/Private Life grounds under the Immigration Rules, and not under the EU Settlement Scheme. Therefore, she cannot qualify as a person with a Zambrano right to reside.
4. The appellant’s appeal against that decision was allowed by First-tier Tribunal Judge Davey for reasons set out in a decision promulgated on 24 May 2023. The judge referred to Regulation 16 of the Immigration (European Economic Area) Regulations 2016 (“the 2016 EEA Regulations”) and found that the appellant has shown on a balance of probabilities that she did qualify and under Regulation. He said it was clear that she had a derivative right as the primary carer of the British national child. Judge Davey said the appellant also qualified for the grant of ILR under the EUSS as she had been the primary carer for over five years, and there was nothing to gainsay the evidence relating to that length of time or to the fact that the appellant was the sole carer of the child.
5. The respondent claims that under the Immigration (Citizens’ Rights Appeals) (EU Exit) Regulations 2020, the refusal of an application under the EU Settlement Scheme gives rise to a right of appeal on the grounds that the decision is not in accordance with the “residence scheme Immigration Rules”. The respondent claims Judge Davery erroneously focused upon Regulation 16 of the 2016 EEA Regulations and the decision of the Court of Appeal in *Akinsanya v SSHD* [2022] EWCA Civ 37.
6. Permission to appeal was granted by Upper Tribunal Judge Gleeson on 25 October 2023.
7. No rule 24 response has been filed by Mr Thoree. That is unfortunate because neither we nor the respondent have any indication as to the appellant’s response to the matters set out in the grounds of appeal. That is particularly so when there is a reported decision of the Upper Tribunal; *Sonkor (Zambrano and non-EUSS leave)* [2023] UKUT 00276 (IAC), that for all intents and purposes appears to dispose of the issues that arise in this appeal. It is unfortunate that Mr Thoree was not aware of that decision prior to the hearing of the appeal before us. A copy of the decision was provided to him and he was given an opportunity to consider it.

8. Mr Thoree submits the decision in *Sonkor* was wrongly decided, but he was unable to articulate why, and made no attempt to distinguish that decision from the facts in the appeal before us.
9. Mr Thoree submits the appellant is the primary carer of LP, a British citizen, and she is therefore exempt from immigration control because she had an EU right to be in the UK. He referred to s7 of the Immigration Act 1988, which provided that a person shall not under the principal Act require leave to enter or remain in the United Kingdom in any case in which he is entitled to do so by virtue of an enforceable EU right or of any provision made under section 2(2) of the European Communities Act 1972. He submits the appellant did not need to take any steps to be recognised as someone protected by Directive 2004/38/EC on the right of citizens and their family members to move and reside freely within the territory of member states. He submits the appellant had a parallel right to reside in the UK under the underlying Directive given the length of her presence in the UK, and with leave to remain granted to her under Appendix FM of the immigration rules. Mr Thoree submits that Judge Davey reached a decision that was lawful and open to him.

### Decision

10. There is no dispute as to the relevant factual background. It is uncontroversial that the appellant is the primary carer of her daughter and that the appellant had been granted leave to remain in the UK valid until 9 August 2021, on family and private life grounds under the immigration rules, rather than the 2016 EEA Regulations or the EU Settlement Scheme.
11. Mr Thoree's reliance on s7 of the Immigration Act 1988 is misconceived. That provision was modified by Regulation 12(g) of The Citizens' Rights (Application Deadline and Temporary Protection) (EU Exit) Regulations 2020 to omit the reference to "of an enforceable EU right or" in section 7(1) of the 1988 Act, and, repealed by Schedule 1 of the Immigration and Social Security Co-ordination (EU Withdrawal) Act 2020.
12. Here the appellant clearly made an application under the EU Settlement Scheme as a person with a Zambrano right to reside. The application was refused and the respondent expressly said that from the information available, the appellant does not meet the requirements of the scheme. The only ground of appeal available to the appellant under The Immigration (Citizens' Rights Appeals) (EU Exit) Regulations 2020, is that the decision to refuse Indefinite Leave to Remain "is not in accordance with residence scheme immigration rules". That is, Appendix EU of the Immigration Rules; (regulation 8(3)(b) refers). The issue for the First-tier Tribunal was therefore whether the decision of the respondent was in accordance with Appendix EU.
13. Paragraph EU11 of Appendix EU as at 2 March 2021 when the appellant made her application set out the eligibility requirements for indefinite leave to remain as, *inter alia*, a person with a Zambrano right to reside. The applicant had to meet one of seven conditions. Importantly, a 'Zambrano right to reside' is defined in Annex 1 to Appendix EU as follows:

“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;
    - (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 (our emphasis)

14. Crucially, under the definition set out in Annex 1, a person who has satisfied the Secretary of State that by the specified date they are a person with a Zambrano right to reside must be without leave to enter or remain in the UK unless that was granted under Appendix EU. Here, the appellant was not granted leave to remain under Appendix EU, but on family and private life grounds under Appendix FM.
15. Judge Davey referred to the decision of the Court of Appeal in *Akinsanya*. There, the Court of Appeal held that the Home Office had erred in its understanding of regulation 16(7) of the 2016 Regulations in defining ‘a person with a Zambrano right to reside’ for the purposes of the EUSS and Appendix EU. The guidance referred to, did not alter the fact that, in summary, an applicant would only be eligible to make an application as a Zambrano carer where they, by the end of the transition period (on 31 December 2020) and throughout the relevant period, did not hold leave to enter or remain in the UK (unless this was under Appendix EU), and met the other relevant requirements of Regulation 16 of the 2016 Regulations. *Akinsanya* concerned the disparity between the Secretary of State’s understanding of the 2016 Regulations and the effect of Appendix EU, insofar as each concerned Zambrano carers holding some form of existing, non-EUSS leave to remain.
16. The issues that arise in this appeal have now been determined by the Upper Tribunal in *Sonkor (Zambrano and non-EUSS leave)* [2023] UKUT 00276 (IAC). The Upper Tribunal held:

- a. A Zambrano applicant under the EUSS who holds non-EUSS limited or indefinite leave to remain at the relevant date is incapable of being a “person with a Zambrano right to reside”, pursuant to the definition of that term in Annex 1 to Appendix EU of the Immigration Rules. and
  - b. Nothing in *R (Akinsanya) v Secretary of State for the Home Department* [2022] 2 WLR 681, [2022] EWCA Civ 37 calls for a different approach.
17. The focus of the First-tier Tribunal Judge should have been upon whether the decision to refuse indefinite leave to remain “is not in accordance with the residence scheme immigration rules”. The appellant had leave to remain under Appendix FM and paragraph (b) in the Annex 1 definition of ‘a person with a Zambrano right to reside’ precludes the appellant from being granted leave to remain under EUSS. In our judgment, the appellant cannot on any legitimate view satisfy the requirement that she does not hold leave to remain granted under another part of the rules. She could not therefore meet the eligibility requirements set out in Appendix EU.
  18. We are satisfied that the decision of the FtT is vitiated by a material error of law and must be set aside.
  19. Given the nature of the error of law, and as the appellant had limited leave to remain under Appendix FM when she made her application, which precludes her from the definition of ‘a person with a Zambrano right to reside’ as set out in Annex 1 of Appendix EU, the appeal cannot succeed on remaking.
  20. It follows that we dismiss the appeal.

### **Notice of Decision**

21. The decision of First-tier Tribunal Judge Davey promulgated on 24 May 2023 is set aside.
22. The decision is remade in the Upper Tribunal.
23. The appellant’s appeal against the respondent’s decision dated 16 May 2021 is dismissed

**V. L Mandalia**  
**Upper Tribunal Judge Mandalia**

Judge of the Upper Tribunal  
Immigration and Asylum Chamber

**5 December 2023**

