



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

**Case Nos: UI-2023-004309**  
**UI-2023-004310**  
**UI-2023-004311**  
**First-tier Tribunal Nos:**  
**EA/10854/2022**  
**EA/10855/2022**  
**EA/02086/2023**

**THE IMMIGRATION ACTS**

**Decision & Reasons Issued:**  
**On the 07 December 2023**

**Before**

**UPPER TRIBUNAL JUDGE O'CALLAGHAN**  
**DEPUTY UPPER TRIBUNAL JUDGE CHAMBERLAIN**

**Between**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Appellant

**and**

**JULIANA OPARE**  
**EZRA OPARE**  
**ETHAN-ISAAC NELSON**  
**(NO ANONYMITY ORDER MADE)**

Respondents

**Representation:**

For the Appellant: Mr A Basra, Senior Presenting Officer  
For the Respondents: No attendance

**Heard at Field House on 21 November 2023**

**DECISION AND REASONS**

**Introduction**

1. The parties are referred to as they were before the First-tier Tribunal. Ms Opare and her minor children are referred to as the "appellants" and the Secretary of State for the Home Department as the "respondent".
2. The respondent appeals a decision of the First-tier Tribunal (Judge of the First-tier Tribunal Turner) sent to the parties on 4 September 2023 allowing the appellants' appeal in respect of an adverse EU Settlement Scheme decision.

3. The first appellant, Ms Opare, wrote to the Upper Tribunal prior to the error of law hearing and confirmed that she was unable to attend. Following a request, she was permitted to file and rely upon written submissions dated 17 November 2023.

### **Brief Facts**

4. The first appellant is a national of Ghana. She is presently aged 37. The second and third appellants are her minor children, aged 8 and 3 respectively. They are also nationals of Ghana. A third child, aged 7, is a British citizen.
5. On 19 August 2019 the first appellant submitted an application to the respondent for limited leave to remain on human rights (article 8 ECHR) grounds. By a decision dated 16 October 2019 the respondent granted the first appellant 30 months' limited leave to remain on the ten-year parent route under paragraph D-LTRPT.1.2. of Appendix FM of the Immigration Rules. The second and third appellants were granted limited leave to remain in line. Leave initially expired on 15 April 2022 but consequent to a variation application the three appellants enjoy leave to remain in this country until 14 November 2025.
6. In 2022 the first appellant applied under the EUSS asserting that she was a person with a *Zambrano* right to reside. She explained in her written submissions that she made this application following advice from the respondent's EU Settlement Scheme helpline to switch immigration routes and apply under the EUSS. It is unclear as to what precise information the first appellant provided to the helpline.
7. The second and third appellants were dependent upon their mother's application. All three appellants were refused status under the EUSS by decisions of the respondent dated 26 October 2022. The respondent detailed, *inter alia*:

"You have applied under the scheme as a 'person with a Zambrano right to reside' (as defined in Annex 1 to Appendix EU) on the basis that you are the primary carer of a British citizen.

To qualify under the scheme for settled status on that basis, you must, at the date of application, meet the eligibility requirements in condition 3 of rule EU11 of Appendix EU.

To qualify under the scheme for pre-settled status on that basis, you must, at the date of application, meet the eligibility requirements in condition 1 of rule EU14 of Appendix EU.

You do not meet the requirements of either of those provisions for the reasons set out below.

...

You have claimed to have a continuous qualifying period in the UK, during which you met the definition of a 'person with a Zambrano right to reside', between 17 June 2016 and 11 April 2022. However, you did not meet the definition throughout this period.

The reason that your application has been refused is that, at the specified date set out above, you did not satisfy paragraph (b) of the definition of a 'person with a Zambrano right to reside' as, for the purposes of a continuous qualifying period in the UK as a 'person with a Zambrano right to reside', an applicant cannot rely on any period in which they held non-Appendix EU leave. Our records show that you were granted leave to enter or remain in the United Kingdom on 16 October 2019 valid until 15 April 2022, under Appendix FM outside the Immigration Rules.

As this means your application as a 'person with a Zambrano right to reside' cannot succeed, we have not considered the rest of the eligibility requirements for this category of the EU Settlement Scheme.

It is considered that the information available does not show that you meet the eligibility requirements for settled status set out in rule EU11 or for pre settled status set out in rule EU14 of Appendix EU to the Immigration Rules. This is for the reasons explained above."

### **Decision of the First-tier Tribunal**

8. Following a paper consideration undertaken at Taylor House Judge Turner allowed the appeal, reasoning, *inter alia*:

"22. For the purpose of this appeal, I find that at the time of the application, there had been no reconsideration of the provisions. The guidance set out in Akinsanya applies. The Appellants were not excluded from applying for residence under EUSS as Zambrano carers by virtue of their limited leave to remain, noting the clear wording of regulation 16(7) of the EEA Regulations.

...

24. The Appellants meet the eligibility requirements for an EUSS residence card.

25. The Appellant accepted in her letter which provided further information to the Respondent that at the time of her application she has not completed a period of five years as a Zambrano carer for the purpose of settled status. I find that she meets the criteria for pre-settled status".

### **Grounds of Appeal**

9. By grounds dated 7 September 2023 the respondent submits:

- The First-tier Tribunal failed to identify how the appellants satisfied the requirements of Appendix EU of the Immigration Rules for settled or pre-settled status.

10. This ground is expanded at paragraph (g) of the grounds:

“g) It is not disputed that the Appellant was granted leave to remain under Appendix FM [of] the Immigration Rules from 16 October 2019 until 15 April 2022 and currently has further leave to remain granted under Appendix FM until 14 November 2025. As a result, it is submitted that the Appellants cannot satisfy the requirements of Appendix EU either at the specified date or date of application. It remains the case that holding or being granted leave in another capacity, as asserted in the Reasons for Refusal Letter, meant that the application was bound to fail under Appendix EU of the Immigration Rules. It is submitted that it has not been demonstrated that the Appellants would not be successful in any future application, under Appendix FM of the Immigration Rules. Therefore, it has not been demonstrated that the children the lead Appellant cares for would be compelled to leave the UK. It is submitted that the Appellants appeals should have been dismissed under the Immigration Rules as a result”.

## **Law**

11. Article 20 of the Treaty on the Functioning of the European Union is to be interpreted as precluding a Member State from refusing a third-country national a right of residence and a work permit in circumstances where her minor, dependent children are nationals of, and are resident in, that Member State. Refusals will, in such circumstances, deprive the children of the genuine enjoyment of the substance of their rights as EU citizens: *C-34/09 Ruiz Zambrano v Office National de l'Emploi (ONEm)* EU:C:2011:124 [2012] Q.B. 265.
12. The EUSS is an immigration regime of the United Kingdom introduced by the respondent in 2019, by means of Appendix EU of the Rules, to enable EU, EEA and Swiss citizens, and their family members, resident in the United Kingdom by 31 December 2020, to obtain the immigration status required to continue to work and live in this country.
13. As explained at paragraph EU1, the Appendix ‘sets out the basis on which an EEA citizen and their family members, and the family members of a qualifying British citizen, will, if they apply under it, be granted indefinite leave to remain or limited leave to enter or remain’. ‘EEA citizen’ includes citizens of the European Union.
14. Paragraph EU11 of Appendix EU is concerned with ‘persons eligible for indefinite leave to enter or remain ... as a person ... with a Zambrano right to reside.’ It confirms that an applicant ‘meets the eligibility requirements’

if they are ‘a person with a Zambrano right to reside’: Condition 3(v) to Paragraph EU11.

15. A ‘Person with a Zambrano right to reside’ is a defined term in Annex 1 to Appendix EU. It means:

‘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 the criteria in:

(i) paragraph (5) of that regulation; or

(ii) 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 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 granted under another part of these Rules.**’ [Emphasis added].

16. Regulation 16 of the Immigration (European Economic Area) Regulations 2016 is concerned with ‘derivative right to reside’ and addresses the position of persons to whom the *Zambrano* judgment applies.

17. At the material time, regulation 16(5) of the Immigration (European Economic Area) Regulations 2016 provided:

‘(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.**’ [Emphasis added]

18. An appeal can only be concluded in the appellants' favour if they are able to establish that the respondent's decision to refuse their applications under the EUSS was (1) contrary to the Immigration Rules which apply to that scheme, or (2) contrary to the agreement between the United Kingdom and the European Union which followed the United Kingdom's exit from the European Union ('the Withdrawal Agreement'). These are the only two grounds available to the appellants. If they cannot succeed on these grounds, their appeals must be dismissed.

## **Decision**

19. The first appellant has provided a careful and thoughtful letter, referred to as written submissions, dated 17 November 2023, by which she explains that she was unable to attend the error of law hearing as she could not secure absence from her place of work.
20. She requested that this Tribunal consider her "timeline pertaining to" her immigration submissions. We have read these submissions with care.
21. *Zambrano* carers do not fall within the scope of the EU Withdrawal Agreement. Consequently, the relevant ground of appeal in these proceedings is Regulation 8(3)(b) of the Immigration (Citizens' Rights Appeals) (EU Exit) Regulations 2020: that the respondent's decision is not in accordance with "residence scheme Immigration Rules", namely Appendix EU of the Rules.
22. The question on appeal is whether the respondent's decision was in accordance with Appendix EU.
23. In seeking to answer this question Judge Turner was required to consider whether the first appellant met the definition of a "person with a *Zambrano* right to reside" established in Annex 1 to Appendix EU: "an applicant must be without leave to enter or remain granted under another part of the Immigration Rules".
24. We acknowledge that Judge Turner did not at the time of her decision have the benefit of the guidance from the Upper Tribunal in *Sonkor (Zambrano and non-EUSS leave)* [2023] UKUT 00276 (IAC). Though the decision in *Sonkor* was promulgated in April 2023 it was only reported by the Upper Tribunal in November 2023. As a reported decision it is one that the First-tier Tribunal must follow, and the Upper Tribunal considers authoritative.
25. In *Sonkor*, the Upper Tribunal reasoned, inter alia:

'12. Mr Appiah [Counsel for the Ms Sonkor] sought to rely on the Court of Appeal's judgment in *Akinsanya* as authority for the proposition that the Secretary of State had misunderstood the import of the

2016 Regulations and their relationship with the EUSS on matters relating to *Zambrano* when framing the rules, and when taking the decision under challenge in these proceedings. He submitted that Mr Deller had merely invited us to adopt the same erroneous understanding of the EUSS as the Secretary of State had in *Akinsanya*. See para. 8 of his skeleton argument:

“It is respectfully submitted that it is difficult to see how the approach to the present appeal cannot follow the conclusions of Court of Appeal which found that the Respondent erred in law in [her] approach and that (contrary to Home Office policy) a primary carer of a UK citizen child may have a *Zambrano* right to reside even where they are entitled to limited leave to remain on another basis.”

13. The difficulty with that submission is that *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. Whereas regulation 16(7) of the 2016 Regulations prevented a person with indefinite leave to remain from enjoying a right to reside as a *Zambrano* carer (thereby entitling putative *Zambrano* carers with limited leave to remain to be granted a right to reside on *Zambrano* grounds under those Regulations), paragraph (b) of the Annex 1 definition of a *Zambrano* carer carved out holders of limited, as well as indefinite, leave to remain from the scope of the EUSS *Zambrano* provisions. What *Akinsanya* did not do was find the paragraph (b) requirement in the Annex 1 definition of a “person with a *Zambrano* right to reside...” to be unlawful. The Court did not quash the rule and declined to be drawn into a discussion as to whether the Secretary of State had misdirected herself in framing the EUSS. That depended on what the Secretary of State was intending to achieve, the Court held. There were any number of reasons why the Secretary of State may have wanted to adopt a different approach: see para. 57.
14. We have emboldened the words in the definition of a “*Zambrano* right to reside” at para. 9 since they lie at the heart of our operative analysis. The appellant held leave granted under Appendix FM at the time of her EUSS application. She continues to hold leave in that capacity, pursuant to section 3C of the 1971 Act. In his written and oral submissions before us, Mr Deller relied on the barrier to the appellant succeeding established by paragraph (b) in the Annex 1 definition. We agree that paragraph (b) is dispositive of these proceedings against the appellant. Since the appellant held leave under Appendix FM at the time of her application (and, extended by section 3C, at the date of the appeal before us), she is unable to be a person who meets the definition of “*Zambrano* right to reside”. She cannot satisfy the requirement that she does not hold leave to enter or remain granted under another part of the rules. By holding

another form of leave, the appellant disqualified herself from being able to succeed as a *Zambrano* carer under Appendix EU. That is dispositive of all issues in this appeal.'

26. In simple terms, a '*Zambrano* applicant' under the EUSS who holds leave to remain issued outside of the EUSS 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.
27. Nothing in *R (Akinsanya) v Secretary of State for the Home Department* [2022] EWCA Civ 37, [2002] 2 WLR 681 calls for a different approach.
28. We conclude that for the reasons detailed in *Sonkor* the Judge materially erred in law in respect of her approach to, and reliance upon, the Court of Appeal judgment in *Akinsanya*, which does not establish an approach contrary to the established definition in Appendix FM.
29. We are satisfied that Judge Turner materially erred in law. We set aside the decision.

### **Re-making the Decision**

30. We proceed to re-make the decision. As the first appellant enjoyed existing leave to remain issued outside of the EUSS on 31 December 2020 and at the date of her application, she did not meet the requirements of the EUSS and so her appeal must properly be dismissed. We rely upon the guidance provided by the Upper Tribunal in *Sonkor*.
31. In the circumstances the second and third appellants' appeals must properly be dismissed in line.

### **Notice of Decision**

32. The decision of the First-tier Tribunal sent to the parties on 29 August 2023 is subject to material error of law. The decision of the First-tier Tribunal is set aside in its entirety.
33. The decision is re-made. The appellants' appeals are dismissed.

*D O'Callaghan*  
**Judge of the Upper Tribunal**  
Immigration and Asylum Chamber

**30 November 2023**



Appeal Numbers: UI-2023-004309  
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