IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-000831

First-tier Tribunal No: EA/09172/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:

On 11th of June 2024

Before

UPPER TRIBUNAL JUDGE JACKSON

Between

ROSLYN SCOTT
(NO ANONYMITY ORDER MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr G Dingley of Counsel, instructed on a direct access basis
For the Respondent: Mr D Clarke, Senior Home Office Presenting Officer

Heard at Field House on 30 May 2024

DECISION AND REASONS

1. The Appellant appeals with permission against the decision of First-tier Tribunal Judge Robinson promulgated on 13 January 2023 in which the Appellant's appeal against the decision to refuse her application as a Zambrano carer under Appendix EU dated 26 July 2022 was dismissed.

2. The Appellant first entered the United Kingdom in 2010 with leave to enter as a Tier 4 (General) Student. Thereafter she applied for an EEA Residence Card in 2012 as a Zambrano carer of her son, a British citizen residing in the United Kingdom. Although initially refused, the Appellant's appeal against the refusal was successful and she was issued with an EEA Residence Card valid from 1 February 2014 to 31 January 2019. The Appellant subsequently applied for and was granted leave to remain under Appendix FM from 18 August 2018 to 18 March 2021. The latest application made on 30 June 2021 was under Appendix EU as a Zambrano carer.

3. The Respondent refused the application the basis that the Appellant did not meet the requirements of Appendix EU as a Zambrano carer, in particular because she had leave to remain under Appendix FM as at the specified date and date of application, such that she could not therefore meet all three elements of that definition in Annex 1 to Appendix EU.

4. Judge Robinson dismissed the appeal in a decision promulgated on 13 January 2023 on all grounds. In summary, the First-tier Tribunal referred to the decision in Akinsanya v Secretary of State for the Home Department [2022] EWCA Civ 37 confirming that Zambrano rights only arise where a third country national did not otherwise have a right to reside in a Member State and therefore the refusal of the Appellant's application on the basis that she had leave to remain under Appendix FM was not in conflict with the jurisprudence on Zambrano rights. The decision was in accordance with the clear requirements of Appendix EU and the Appellant was not within the personal scope of the EU Withdrawal Agreement such that she could not benefit from any of the provisions therein. The First-tier Tribunal did not consider Article 8 of the European Convention on Human Rights as this was a new matter to which the Respondent had not consented.

The appeal

5. The Appellant initially appealed on twelve separate grounds of appeal, which were, during the course of an earlier case management hearing, distilled down to two issues as follows:

   (1) Whether the First-tier Tribunal erred in law in concluding that the Appellant was precluded from relying in part upon a period in which she had held non-Appendix EU leave, namely leave to remain under Appendix FM to the Immigration Rules, in support of her application under the EU Settlement Scheme as a person with a Zambrano right to reside; and

   (2) Whether the First-tier Tribunal erred in law in concluding that the Appellant did not come within the scope of Article 10 of the Withdrawal Agreement, and, as such, she was precluded from relying on proportionality.

6. At the oral hearing, Mr Dingley confirmed that these remained the only two live issues from the original twelve grounds of appeal and relied on his skeleton argument in support of them. In relation to the first ground of appeal, the core of the Appellant's appeal was that the First-tier Tribunal were required to take into account that she had previously been recognised as a Zambrano carer, between at least 2014 and 2019 when she held an EEA Residence Card as such, but said on the facts to have been from 2012 and continuing to date. The Appellant in particular claims that her rights as a Zambrano carer were crystallised prior to 2017 and the specified date. Reliance for these propositions was placed in the ECJ case of E. K. v Staatssecretaris van Justitite en Veiligheid (Directive 2003/109/EC), Case C0624/20 in which it was found that there was a right to rely on an earlier period of leave as a Zambrano carer and the Respondent's refusal of the application amounted to an interference with the freedom of movement of a Union citizen by virtue of retained EU law prior to exit day. These submissions were said to be consistent with the decision in Akinsanya & Anor v Secretary of State for the Home Department [2024] EWHC 469 (Admin) ("Akinsanya (No.2)").

7. In oral submissions, Mr Dingley accepted that domestic authority on Zambrano carers was against the Appellant on the basis that a person who held leave to

remain under Appendix FM was excluded. However, he submitted that using a purposive interpretation approach to the requirements of Appendix EU to implement the right of free movement which was protected by the EU Withdrawal Agreement, the application of the strict rule about not having leave in another category was not in accordance with protecting the rights of those that existed under EU law as at the specified date of 31 December 2020. Mr Dingley however confirmed that there was no broader challenge to the requirements of Appendix EU or implementation of the EU Withdrawal Agreement.

8. I questioned Mr Dingley on the legal basis upon which the First-tier Tribunal could have used a purposive approach to interpretation of Appendix EU to the Immigration Rules and/or how the decision in EK could have been taken into account in this context after the United Kingdom's withdrawal from the EU. Mr Dingley referred me first to general principles and the preamble to the EU Withdrawal Agreement and then to section 5 of the Retained EU Law (Revocation and Reform) Act 2023. That section was, in substance, a change to terminology about retained EU case law and refers back to the substantive provisions regarding this in section 6 of the European Union (Withdrawal) Act 2018.

9. Section 6(1) of the European Union (Withdrawal) Act 2018 provides, inter alia, that a court or tribunal is not bound by any principles laid down, or decisions made, on or after completion day by the European Court, subject to specific exceptions. For present purposes, Mr Dingley accepted that the exceptions to consideration of assimilated case law were those in sections 2 and 3 of the Act, neither of which applied to Appendix EU to the Immigration Rules. Contrary to the primary submission that the First-tier Tribunal could and should have had regard to EK, Mr Dingley appeared to confirm that primary legislation prevented any such reliance.

10. In relation to the second ground of appeal, Mr Dingley accepted that following the Court of Appeal's decision in Siddiqa v Entry Clearance Officer [2024] EWCA Civ 248, he could not logically make the argument that the Appellant was within the personal scope of the EU Withdrawal Agreement. However, he did seek to distinguish this on the facts on the basis that the Appellant had a previous right as a Zambrano carer such that he continued to rely on the EU Withdrawal Agreement as an aid to interpretation of Appendix EU for the purposes of ground 1 of this appeal.

11. On behalf of the Respondent, Mr Clarke relied on the skeleton argument filed and emphasised a number of further points. In relation to the first ground of appeal, the Respondent's position is that Appendix EU contains an clear and unambiguous requirement that an applicant can not hold leave to remain outside of the EU Settlement Scheme, the Appellant held leave under Appendix FM as at the specified date and date of application and therefore she could not meet the requirements of the scheme rules. As a matter of principle, this was confirmed in Sonkor (Zambrano and non-EUSS leave) Ghana [2023] UKUT 276 (IAC) and Akinsanya. The Appellant's rights as a Zambrano carer fell away on 18 August 2018 when she was granted leave to remain under Appendix FM. In terms of the First-tier Tribunal's jurisdiction to consider as a ground of appeal whether the decision was in breach of the scheme rules, that was the end of the matter.

12. In any event, the First-tier Tribunal had no jurisdiction to consider further whether the requirements of Appendix EU were lawful or whether they were in accordance with ECJ authority after exit day. Mr Clarke further distinguished the facts in EK as not involving a Zambrano carer who had later been granted a different form of

leave to remain and as such, it did not assist the Appellant's claim even if it could be taken into account.

13. In relation to the second ground of appeal, the Respondent's position is that the Appellant is not within the personal scope of the EU Withdrawal Agreement, as confirmed in Siddiqa, Sonkor and Akinsanya (No 2), Zambrano carers were not recognised within the EU Withdrawal Agreement, such that Article 18 of the same can not assist the Appellant. This point, now seemingly accepted by the Appellant, also undermines her reliance on the EU Withdrawal Agreement in the first ground of appeal.

Findings and reasons

14. The available grounds of appeal open to the Appellant to challenge the Respondent's decision are set out in the Immigration (Citizens' Rights Appeals) (EU Exit) Regulations 2020. Regulation 6 identifies the right of appeal for the current circumstances and Regulation 8 sets out the grounds of appeal as follows:

8.- (1) An appeal under these Regulations must be brought on one or both of the following grounds.

(2) The first ground of appeal is that the decision breaches any right which the appellant has by virtue of –

(a) Chapter 1, or Article 24(2) or 25(2) of Chapter 2, of Title II of Part 2 of the withdrawal agreement,

(b) Chapter 1, or Article 23(2) or 24(2) of Chapter 2, of Title II of Part 2 of the EEA EFTA separation agreement,

(c) Part 2 of the Swiss citizens' rights agreement.

(3) The second ground of appeal is that –

(a) …;

(b) where the decision is mentioned in regulation 3(1)(c) or (d), it is not in accordance with residence scheme immigration rules;

…

15. The first ground of appeal is that the First-tier Tribunal erred in law in dismissing the Appellant's appeal on the basis that the decision was in accordance with the residence scheme immigration rules (Appendix EU) in circumstances where the Appellant claims to have had a crystallised Zambrano right to reside and therefore her leave under Appendix FM should not preclude her application being successful. In support of that ground, the only authority relied upon by the Appellant is the ECJ case of EK, it being accepted that the Appellant can not meet the clear wording of Appendix EU (which requires as part of the definition of person with a Zambrano right to reside, that they are a person *"without leave to enter or remain in the UK, unless this was granted under [Appendix EU]"*) and it being accepted that all domestic authority is against her on this point.

16. The only ground of appeal available to the Appellant was whether the decision was in accordance with the residence scheme rules, and it is accepted that on its

face, it was – she can not meet the clear and unambiguous requirement that she did not have leave to enter or remain in the United Kingdom, there being no dispute that she had leave under Appendix FM at all relevant times for this application. The First-tier Tribunal did not err in law in dismissing the appeal on this basis and in any event, went further and considered that the requirements of Appendix EU were not in conflict with the Zambrano jurisprudence, by reference in particular to Akinsanya which confirmed that a Zambrano right only arose when a third country national parent did not otherwise enjoy a right to reside in the Member State in question.

17. The facts in Akinsanya and Akinsanya (No 2) were also on all fours with the present appeal, in that they involved a person with a previously recognised Zambrano right to reside who had subsequently been granted leave to remain under Appendix FM prior to the specified date of 31 December 2020. The existence of a previous right did not continue for the purposes of a later application under Appendix EU as the Zambrano right to reside had effectively been extinguished by a grant of leave to remain under Appendix FM.

18. For the Appellant to seek to go behind the clear wording of Appendix EU and domestic authority on the issue of leave to remain in another category after being a Zambrano carer, she would have to establish that (i) there was a basis upon which the First-tier Tribunal erred in law in failing to take into account ECJ case law after EU exit day; (ii) the case of EK supported her claim and was not in conflict with domestic jurisprudence; and (iii) in any event, that the appeal could have been allowed on that basis in accordance with regulation 8 of the Immigration (Citizens' Rights Appeals) (EU Exit) Regulations 2020.

19. Mr Dingley was wholly unable to set out any basis upon which the case of EK could lawfully have been taken into account by the First-tier Tribunal or how an appeal could have been allowed on that basis. The rather vague references to general principles was not specific enough and did not properly take into account the fact that the UK has left the EU, such that the ECJ case law and principles are not relevant to the interpretation of domestic law such as Appendix EU. Reliance on unspecified parts of the preamble to the Withdrawal Agreement does not assist in circumstances where it was accepted that the Appellant does not fall within the scope of the Withdrawal Agreement (and nor would any other Zambrano carer) and can not therefore be used as any kind of aid to interpretation of provisions which are outside of its scope. The attempted distinction on the facts because the Appellant previously had a Zambrano right to reside has no merit, at the relevant time (both the specified date and date of application) the Appellant did not have a Zambrano right to reside (in accordance with Appendix EU or the Immigration (European Economic Area) Regulations 2016) as she had leave to remain under Appendix FM.

20. Mr Dingley's final submission to rely first on the Retained EU Law (Revocation and Reform) Act 2023 did not provide any substantive basis for reliance on ECJ case law after exit day and the cross reference back to the European Union (Withdrawal) Act 2018 which it amended only led to his acceptance that the circumstances in this appeal were not ones to which there was any application of retained or assimilated law (the definition depending on which Act was considered) from the ECJ. The circumstances fell within section 6(1) of the European Union (Withdrawal) Act 2018 without any of the exceptions applying, such that the case of EK from 2022, after exit day, could not be taken into account.

21. In these circumstances, there is no basis upon which the First-tier Tribunal could have taken into account the ECJ case of EK when considering whether the residence scheme rules were met and it did not err in law in failing to do so. It is not necessary to consider whether the facts of EK did support the Appellant's in circumstances where it can not be considered at all. The provisions of Appendix EU and relevant domestic law were all properly considered by the First-tier Tribunal, with the only lawful and rational outcome being that the appeal was dismissed as the decision was in accordance with the residence scheme rules, which were also consistent with domestic Zambrano jurisprudence.

22. The issue in the second ground of appeal is whether the Appellant could benefit from any of the provisions in the EU Withdrawal Agreement, in particular Article 18(1)(r) which makes provision for an assessment of proportionality. At the hearing, Mr Dingley accepted on behalf of the Appellant that she does not fall within the personal scope of the EU Withdrawal Agreement and can not therefore benefit from Article 18 or otherwise. In these circumstances, I do not set out in full the relevant provisions, including those in Article 10 of the EU Withdrawal Agreement, which as confirmed in Sonkor and Akinsanya (No 2) do not include a person who is a Zambrano carer (even if that were to be accepted at the relevant date for this Appellant, which for the reasons set out in ground 1, are not). As further confirmed in Celik v Secretary of State for the Home Department [2023] EWCA Civ 921 and Siddiqa, a person not within the personal scope of the Withdrawal Agreement can not benefit from any of the provisions therein.

23. The First-tier Tribunal did not err in law in finding that the Appellant could not derive assistance from the Withdrawal Agreement for the reasons set out in paragraph 23 of the decision. For the avoidance of doubt, this was not, as was the focus of the Appellant's skeleton argument because she was not an EEA or UK citizen, this was only the first part of the reasoning to explain why she did not fall within Article 10(1)(a) to (d) of the Withdrawal Agreement. The First-tier Tribunal then went on to explain that she was also not within the personal scope as a family member in Article 10(1)(e) and did not reside inside or outside the host state at the appropriate time for those purposes. Any appeal under the EU Withdrawal Agreement was bound to fail.

Notice of Decision

The making of the decision of the First-tier Tribunal did not involve the making of a material error of law. As such it is not necessary to set aside the decision.

The decision to dismiss the appeal is therefore confirmed.

G Jackson

Judge of the Upper Tribunal
Immigration and Asylum Chamber

3rd June 2024