



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

Case No: UI-2023-001571

First-tier Tribunal No: EA/00107/2021

**THE IMMIGRATION ACTS**

**Decision & Reasons Issued:**

**On 25<sup>th</sup> of September 2024**

**Before**

**UPPER TRIBUNAL JUDGE HANSON**

**Between**

**SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Appellant

**and**

**MOHAMMAD SISAWO**  
**(Anonymity direction not made)**

Respondent

**Representation:**

For the Appellant: In person.

For the Respondent: Ms Z Young, a Senior Home Office Presenting Officer.

**Heard at Phoenix House (Bradford) on 20 September 2024**

**DECISION AND REASONS**

1. The Secretary of State appeals with permission a decision of First-Tier Tribunal Judge Cole ('the Judge'), promulgated on 5 January 2023, in which he allowed Mr Sisawo's appeal against the refusal of his application for leave to remain in the UK under the EU Settlement Scheme (EUSS) as a 'Zambrano person' with a right to reside.
2. Mr Sisawo is a citizen of Gambia born on 18 December 1977. The Judge records it was accepted by the Secretary of State that he is the primary carer of a British citizen child, his daughter Ellie. His application for leave to remain was refused, however, as it was not accepted that Ellie will be compelled to leave the UK if his application failed, as Mr Sisawo would not be required to leave the UK as there is a realistic prospect of his obtaining leave to remain under Appendix FM of the Immigration Rules.
3. The Judge sets out findings from [14] of the decision under challenge. The Judge notes Mr Sisawo has been in the UK for around 18 years and has had sole responsibility for the care of Ellie since being granted a Residence Order in August 2012 as a result of the child's mother's inability to care for their daughter due to her own personal issues [16].

4. Mr Sisawo previously had leave to remain under Appendix FM, valid until 12 July 2020, and made the application leading to the decision under challenge on 22 August 2020 after his previous leave expired.
5. The Judge finds at [18] that there is no other person who could care for Ellie in the UK so that if her father had to leave this country she will be compelled to leave with him.
6. The Judge finds the issue for resolution was whether in fact Mr Sisawo would have to leave the UK. The Judge notes at [20] that the Secretary of State's position is that as Mr Sisawo previously had leave under Appendix FM he could simply apply for such leave once again. It was submitted he is highly likely to be granted such leave under Appendix FM and so there is no reason to conclude that he will be required to leave the UK, as a result of which his application under Appendix EU as a person with a Zambrano right to reside could not succeed.
7. At [22] the Judge finds that Mr Sisawo is highly likely to be granted leave to remain under Appendix FM as he has sole responsibility for his British child and it will be unreasonable for his child to leave the UK. It is found there are no suitability issues and therefore no real bar to his claim that he will be required to leave the UK, although from [22] the Judge notes that the situation is actually more complex.
8. Mr Sisawo claims that he could not afford to make an Appendix FM application and that even if he applied for a fee waiver, and even if it was granted, his situation while waiting for a decision was relevant. The Judge analyses Mr Sisawo's financial situation and states that is more likely than not that he would be granted a fee waiver.
9. The Judge notes, however, that Mr Sisawo's leave expired on 12 July 2020 and that he did not currently have leave to remain as he does not benefit from section 3C as his EUSS application was made after his previous leave expired and thus once the current appeal is determined he will be left without the right to work, liable to removal, with no leave to remain.
10. The Judge notes Mr Sisawo's claim that even if successful with the fee waiver he will be forced to wait for around a year without the right to work and without any form of lawful status in the UK which was found to be made out on the evidence [36]. The Judge finds at [37] that would lead to Mr Sisawo being unable to support himself and his daughter resulting in a situation which will become so unbearable that he will be compelled to leave the UK with his daughter.
11. The Judge records at [38] finding this a difficult case to assess, and it being finely balanced, but concludes that on balance Mr Sisawo had proved that he would in fact be forced to leave the UK if the appeal were to be dismissed.
12. The Secretary of State sought permission to appeal asserting the Judge had made a material misdirection on a material matter in failing to apply the considerations in Velaj v Secretary of State the Home Department [2022] EWCA Civ 767, and in giving undue weight to immaterial matters when considering the practical impact of refusal of the current application at [27 - 38] which are said to be irrelevant to compulsion in light of the failure of the Judge to undertake the relevant assessment set out in Velaj.
13. The application for permission to appeal was not admitted by another judge of the First-Tier Tribunal notwithstanding it being one day out of time and an apology and explanation being provided by the Secretary of State. Time was not extended and the application not admitted as the judge on that occasion considered the grounds to be misconceived as the Judge made a careful and detailed assessment of the circumstances and gave adequate reasons for

finding Mr Sisawo would be compelled to leave the UK if his appeal were to be dismissed.

14. The application was renewed to the Upper Tribunal in slightly recast terms. It is asserted the Judge had erred in having inadequate regard to the correct legal test established by case law as to whether, as a matter of fact, the above respondent's British child will be compelled to leave the UK, given the possibility of making an application for alternative leave and the realistic prospects of such an application succeeding. The grounds assert that requires a fact sensitive rather than hypothetical exercise as confirmed by the Court of Appeal in Akinsanya and Velaj. The grounds assert the Judge had regard to irrelevant considerations such as cost of application, delay to any application caused by disputes about destitution fee waiver and any intervening appeal processes without considering other remedies. The recast grounds assert the test is that the British child will be unable to remain were the primary carer to leave indefinitely, not whether the practical consequences of a right of residence were afforded immediately to the above respondent which is said is not the required test. It is stated the test is not whether Mr Sisawo and his daughter would feel forced to leave but that they would actually be so forced. The Grounds assert the fact the situation has not already come to pass is counter indicative that it would not do so if the appeal failed.
15. Time was extended and permission to appeal granted by Upper Tribunal Judge O'Callaghan on 8 November 2023 on the base it is arguable the Judges misconstrued the relevant test, but with the need for the Secretary of State to address materiality.

#### Discussion and analysis

16. Since the grant of permission to appeal Mr Justice Eyre, sitting in the Administrative Court, handed down his decision on 11 March 2024 in the case of R (on the application of (1) Olorunfunmilayo Oluwaseun Akinsanya and (2) Naomi Aning-Adjei v Secretary of State the Home Department [2024] EWHC 469.
17. The Upper Tribunal has also handed down and reported its decision in the case of Secretary of State for the Home Department v Maisiri [2024] UKUT 235 the head note of which reads:  
*It is not incumbent on a decision maker who is considering the application or appeal of a person who is said to have a Zambrano right to reside to assess whether that person stands a realistic prospect of securing leave to remain under another provision of the Immigration Rules, including Appendix FM. The Secretary of State's guidance entitled EU Settlement Scheme: person with a Zambrano right to reside has been wrong in suggesting otherwise from 14 December 2022 to date.*
18. That accurately reflects the findings in the body of the determination which also found no merit in the Secretary of State's arguments based upon Velaj. That finding is material to the grounds in this appeal which place reliance on that particular decision of the Court of Appeal.
19. In light of the above decisions, I find it is not made out the Judge has erred in law in a manner material to the decision to allow the appeal and dismiss the appeal.
20. Miss Young confirmed she had spoken to a senior colleague about the appeal in advance of the hearing and that the two options were either that she sought leave to withdraw the appeal or for it to be dismissed by the Upper Tribunal. At

this stage of the proceedings, to give clarity and understanding to Mr Sisawo, who is a litigant in person, I stated I will dismiss the appeal.

**Notice of Decision**

21. Appeal dismissed.

**C J Hanson**  
Judge of the Upper Tribunal  
Immigration and Asylum Chamber

**20 September 2024**