



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM
CHAMBER

Case No: UI-2023-001857

First-tier Tribunal No:
EA/50807/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:

On 7th of February 2024

Before

UPPER TRIBUNAL JUDGE NORTON-TAYLOR

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

A Z

(ANONYMITY DIRECTION MADE)

Respondent

Representation:

For the Secretary of State: Ms A Ahmed, Senior Presenting Officer

For AZ: Unrepresented and no appearance

Heard at Field House on 5 February 2024

DECISION AND REASONS

Introduction

1. To make my decision easier to read, I will call the appellant in this case “the Secretary of State” and the respondent will be called “Ms Z”.
2. The Secretary of State appeals against the decision of First-tier Tribunal Judge Power (“the judge”). The judge made two decisions: first, he allowed Ms Z’s appeal against the Secretary of State’s refusal of her application made under the Immigration (European Economic Area) Regulations 2016 (“the 2016 Regulations”); secondly, he dismissed Ms Z’s appeal against the Secretary of State’s refusal of her application made under the EUSS (Appendix EU to the Immigration Rules).
3. In respect of the second decision, Ms Z has not challenged it before the Upper Tribunal and I do not need to deal with it now. The judge concluded that because Ms Z had leave to remain in the United Kingdom on Article 8 grounds, she could not therefore rely on the Zambrano principle for a right to reside: see paragraph 54 of the judge’s decision. I would add that the decision of the Upper Tribunal in Sonkor (Zambrano and non-EUSS leave) [2023] UKUT 00276 (IAC), the judge was clearly correct in his decision.
4. Having obtained information from Ms Ahmed at the hearing on 5 February 2024, I am satisfied that Ms Z continues to have leave to remain in this country, having been granted an extension from 23 August 2023 until 23 February 2026.

Procedural matters

5. There is quite a long history to this case. It has been adjourned number of times for various reasons which I do not need to set out in detail here. I mention three particular aspects of that history.

6. First, Ms Z had been represented by solicitors, but they came off the record in late November 2023.
7. Secondly, Ms Z did not attend the hearing on 5 February 2024. Having checked with our records, I was satisfied that the notice of hearing had been sent to her email address. There was no correspondence from her to indicate that she either wanted to attend the hearing, but could not, or that she expressly did not want to attend. I considered whether it was fair to proceed in her absence, having regard to rule 38 of the Procedure Rules. I concluded that it was fair to proceed in that way. She was aware of the hearing and not contacted the Tribunal in any way (for example, she had not stated that she was attempting to find new legal representation). The issues in this case are now clear and it has been ongoing for a considerable period of time. It is in the interests of all concerned that there is a resolution to the case.
8. Thirdly, the Secretary of State had applied to amend his original grounds of appeal. That application was made on or around 13 November 2023 and I granted permission by a decision sent out on 10 December 2023. The amended ground of appeal relates to the ability of the judge to have considered the Zambrano principle in Ms Z's appeal under the 2016 Regulations. I will return to that shortly.

The judge's decision

9. The judge concluded that Ms Z met the requirements of regulation 16 of the 2016 Regulations at all material times. This meant that she had a Zambrano right to reside in the fact that she also had leave to remain on Article 8 grounds did not prevent her from having a right to reside under EU law: see paragraphs 50-52 of the judge's decision.

Grounds of appeal

10. The original grounds of appeal challenge the judge's approach to the Zambrano principle in circumstances where the individual already had leave to remain on another basis.
11. The amended ground of appeal raised a more fundamental challenge. It asserted that, as result of the revocation of the 2016 Regulations 1 January 2021 and the Immigration and Social Security Co-ordination (EU Withdrawal) Act 2020 (Consequential, Saving, Transitional and Transitory Provisions) (EU Exit) Regulations 2020 ("the 2020 Regulations"), the judge was not permitted to have considered the Zambrano principle at all. This part of the challenge was supported by the Tribunal decision in Osunneye (Zambrano; transitional appeal rights) [2023] UKUT 00162 (IAC).

Rule 24

12. There was no written response to this from Ms Z, but that is not at all surprising given that she did not by that time have legal representation.

The hearing

13. I received brief submissions from Ms Ahmed. She relied on all of the grounds of appeal and emphasised the fact that Ms Z still has leave to remain on Article 8 grounds.
14. Following those submissions, I reserved my decision.

Conclusions

15. On the basis of the Secretary of State's amended ground of appeal, it is clear to me that the judge was not permitted to consider the Zambrano principle at all and that he therefore erred in law when allowing Ms Z's appeal under the 2016 Regulations.

16. I appreciate that Ms Z is not a lawyer and that the legal provisions in her case are relatively complicated. My conclusion in the last paragraph is based on the following legal steps which I will describe in the plainest language I can.
17. Because Ms Z's application was made under the 2016 Regulations, schedule 3 to the 2020 Regulations applies. Paragraph 5 of schedule 3 relates to decisions made by the Secretary of State after 31 December 2020, as happened in this case.
18. I then have to look at Paragraph 6 of schedule 3. This sets out which parts of the 2016 Regulations remained in force (in other words, still applied) from 1 January 2021 in cases that were still going on.
19. Next I look at paragraph 6(cc)(bb) of schedule 3. This relates to appeals to the First-tier Tribunal like the one that which Ms Z had before the judge. That part of the 2020 Regulations says that a person who has an appeal against a decision by the Secretary of State made after 31 December 2020 can rely on the 2016 Regulations or the Withdrawal Agreement, but not in respect of the Zambrano principle. That is because the Zambrano principle was not saved within the 2016 Regulations after they were revoked (removed) 1 January 2021 31 and the Withdrawal Agreement did not include a Zambrano right to reside.
20. The decision in Osunneye explains the process which I have just described. I am satisfied that that case was correctly decided and that what it says about the 2020 Regulations applies in Ms Z's case.
21. This all means that the judge was simply not allowed to consider the Zambrano principle when he considered Ms Z's case. In turn, that means that the judge was not permitted to allow her case under the 2016 Regulations or the Withdrawal Agreement on the basis of a Zambrano right to reside.
22. So, the judge made a legal mistake and I set aside (overturn) his decision.

Next steps

23. I have now to decide what to do next with Ms Z's case. I appreciate that she did not attend the hearing and is not legally represented. However, I have already concluded that it was fair to proceed in her absence in relation to the error of law question.
24. Quite separately, I have considered whether I should go on and re-make the decision in a case myself without having another hearing. I have decided that I should go on and re-make the decision. I say this for the following reasons.
25. First, it seems to me unlikely that Ms Z will want to engage with any further hearing because of: (a) the fact that she does not have legal representation and would probably find it very difficult to get any such representation in the near future; and (b) for the reasons I will set out shortly, there is no way in which she can succeed in her case now in light of the legal position which I have described earlier.
26. I now re-make the decision in Ms Z's case and I dismiss her appeal for the following reasons.
27. As mentioned earlier, her appeal under the EUSS was dismissed by the judge and there was no challenge to that part of his decision. In any event, as I have already explained, there is no way in which Ms Z could succeed under the EUSS.
28. In relation to her case under the 2016 Regulations, the reasons I have already set out for why the judge made legal mistake mean that Ms Z's case cannot possibly succeed even when I look at it again for myself. Because the Secretary of State's decision on her 2016 Regulations application was made after 31 December 2020, I am not able to consider the Zambrano principle.
29. Further, I cannot consider Article 8 in this case because the law does not allow me to do so. Ms Z will know that she already has leave to remain until 2026, so she does have some form of security.
30. Therefore, I dismiss Ms Z's appeal.

Anonymity

31. The judge made an anonymity direction on the basis that Ms Z had been the subject of alleged domestic violence, which in turn had an impact on her and possibly her child. On that basis I maintain the direction.

Notice of Decision

The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law.

I set aside the decision of the First-tier Tribunal.

I re-make the decision by dismissing the appeal under the 2016 Regulations.

H Norton-Taylor

Judge of the Upper Tribunal

Immigration and Asylum Chamber

Dated: 5 February 2024