IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-003287
First-tier Tribunal No:
EA/12623/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 07 August 2024

Before

UPPER TRIBUNAL JUDGE LINDSLEY
UPPER TRIBUNAL JUDGE HOFFMAN

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

N'GOUAMBRA CELINE BILE
(NO ANONYMITY ORDER MADE)

Respondent

Representation:
For the Appellant: Mr M Parvar, Senior Home Office Presenting Officer
For the Respondent: None

Heard at Field House on 23 July 2024

DECISION AND REASONS

Introduction

1. The claimant is a citizen of Cote d'Ivoire born on 25th October 1977. She had leave to enter or remain in the UK from 23rd July 2013 until 2nd November 2021. She applied on 23rd October 2022 to remain in the UK on the basis of a Ruiz Zambrano v Office National de L'Emploi [2011] Imm AR 521 right to reside which was said to exist between 14th May 2007 and 30th June 2021, as the carer for her daughter, a British citizen. This application was refused on 25th November 2022. Her appeal against the decision was allowed by First-tier Tribunal Judge Ian Howard in a determination promulgated on the 2nd June 2023.

2. Permission to appeal was granted by Judge of the First-tier Tribunal Parkes on 16th July 2023 on the basis that it was arguable that the First-tier judge had erred in law in the approach of Appendix EU Annex 1 in failing to take the Immigration Rules at their normal meaning.

3. The matter came before us to determine whether the First-tier Tribunal had erred in law, and if so to decide if any such error was material and whether the decision should be set aside.

Submissions – Error of Law & Remaking

4. The Secretary of State argues in grounds of appeal, in short summary, as follows. It is argued that the First-tier Tribunal erred in law because Appendix EU Annex 1 only permitted those with a Zambrano right to succeed in qualifying if they did not have non-Appendix EU leave to remain. This is in keeping with the dicta of the Court of Appeal in R (Akinsanya) v Secretary of State for the Home Department [2022] EWCA Civ 37 and Velaj v Secretary of State for the Home Department [2022] EWCA Civ 767 that a Zambrano right is one of last resort. The only right of appeal was that the appeal was not in accordance with the EUSS Immigration Rules and so the appeal could not be allowed on any other basis that this was not the case. It was not permissible for the First-tier Tribunal to find that the Immigration Rules did not reflect the law as that Tribunal felt that it should be: this would be a matter for judicial review and not a statutory appeal. Mr Parvar added that the Secretary of State placed reliance on Sonkor (Zambrano and non-EUSS leave) [2023] UKUT 276 which holds that the EUSS makes limited provision for a Zambrano carer to have leave to remain under domestic law, and that this is compatible with Akinsanya; and specifically that: "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."

5. The claimant submitted a brief response to the grounds of appeal/Rule 24 notice. This outlines that the claimant's daughter was born on 14th May 2007, and that the claimant did not have any leave to remain until 22nd July 2013. She seeks to rely upon the fact that for this period of time she was a Zambrano carer, and so claims that the First-tier Tribunal were correct to allow the appeal. She explained that it was very hard to have been in the UK for so long without indefinite leave to remain and that she had applied under the EUSS on advice from a solicitor for this reason.

6. At the end of the hearing we explained to the parties that the First-tier Tribunal had erred in law giving brief reasons, but we did not give an oral judgement but instead set out our reasoning in writing below. We also explained that as this was a case where the result of the remaking was clear from the nature of the error, and there could only be one result once the error was found we needed no further submissions at a separate hearing to remake the appeal. Neither side disagreed with this analysis.

Conclusions – Error of Law & Remaking

7. The First-tier Tribunal finds, correctly, that the claimant must show that she satisfies, on the balance of probabilities, the EUSS Immigration Rules as is set out at paragraph 7 of the decision.

8. At paragraph 9 of the decision of the First-tier Tribunal it is noted that the Secretary of State accepts the claimant is the primary carer for her British citizen daughter. It is also set out that the reasons for refusal are that she was not present in the UK for the whole of the qualifying period under the Immigration (European Economic Area) Regulations 2016. At page 2 of 5 of the reasons for refusal letter it states that the claimant was refused EUSS status because she held leave under Appendix FM of the Immigration Rules between July 2013 and November 2021 and so did not have a continuous Zambrano right to reside beginning before the specified date of 31st December 2020, and thus she could not satisfy the requirement of EU11 of Appendix EU that she did not hold leave to remain which was granted outside the EUSS.

9. The First-tier Tribunal fails to consider whether this reasoning is correct, or not, but instead sets out the reasoning of the Court of Appeal in Akinsanya which was a case which considered whether certain beneficiaries of the Zambrano route under the Immigration (European Economic Area) Regulations 2016 were excluded under Appendix EU. Ultimately it was concluded by the Court of Appeal in Akinsanya that legally the Zambrano route was one which arose when the carer had no domestic or other right to reside. Following setting out extracts from Akinsanya the First-tier Tribunal states, at paragraphs 20 and 21 of the decision, that the Secretary of State's position that the grant of leave under the Immigration Rules cannot be part of the qualifying period is "in error" and that the claimant is entitled to succeed in her appeal without giving any reasons. We find that these conclusions fail to apply the relevant Immigration Rules set out at Appendix EU and fails to provide any adequate reasoning for the decision. We therefore set aside the decision of the First-tier Tribunal.

10. We now turn to remake the decision. We conclude that the claimant cannot succeed in her appeal because she was granted leave to remain under Appendix FM of the Immigration Rules between 2013 and 2021. This means that at the specified date, 31st December 2020, she held leave to remain granted under a non-EUSS part of the Immigration Rules and therefore did not have a Zambrano right to reside. As a result she did not have a continuous qualifying period at the date of application under the scheme because at the specified date, and between 2013 and 2021, she held leave under Appendix FM and so she does not meet the definition of a person with a Zambrano right to reside at Annex 1 of Appendix EU which requires at (b) that she should be "without leave to enter or remain in the UK granted under another part of these Rules". As set out in Sonkor this definition was not found

to be unlawful and the Rules were not quashed. The appeal must therefore be dismissed.

Decision:

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

2. We set aside the decision of the First-tier Tribunal.

3. We re-make the decision in the appeal by dismissing it under the Immigration Rules.

Fiona Lindsley

Judge of the Upper Tribunal
Immigration and Asylum Chamber

23rd July 2024