IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2024-000836

First-tier Tribunal No:
EA/50459/2023
LE/01655/2023

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 3 July 2024

Before

UPPER TRIBUNAL JUDGE MANDALIA

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

NAMAZ UDDIN SHIHAB
(NO ANONYMITY DIRECTION MADE)

Respondent

Representation:
For the Appellant: Mr P Lawson, Senior Home Office Presenting Officer
For the Respondent: Mr Namaz Shihab, in person, unrepresented

Heard at Birmingham Civil Justice Centre on 25 June 2024

DECISION AND REASONS

Introduction

1. The appellant in the appeal before me is the Secretary of State for the Home Department ("SSHD") and the respondent to this appeal is Mr Namaz Shihab. However, for ease of reference, in the course of this decision I adopt the parties' status as it was before the FtT. I refer to Mr Shihab as the appellant, and the Secretary of State as the respondent.

2. The appellant is a national of Bangladesh. On 12 July 2021 he made an application under the EU Settlement Scheme as a 'person with a

Zambrano right to reside'. The application was refused by the respondent for reasons set out in a decision dated 19 January 2023.

3. The respondent said that in order to qualify under the scheme for settled status as a 'person with a Zambrano right to reside' (as defined in Annex 1 to Appendix EU) on the basis that the appellant is the primary carer of a British citizen, he must, at the date of application, meet the eligibility requirements in condition 3 of rule EU11 of Appendix EU. The respondent said that the requirement that the appellant must meet the definition of a 'person with a Zambrano right to reside' throughout the continuous qualifying period was not met by the appellant. The appellant claimed to have a continuous qualifying period in the UK during which he met the definition of a 'person with a Zambrano right to reside', between 25 May 2017 and 12 July 2021. The respondent said that while EU law applied in the UK, a primary carer of a British citizen could only have a Zambrano right to reside in the UK if denying that right to reside would compel the British citizen to leave the UK, the EEA and Switzerland. The respondent said the requirement is not met:

> "…because from the information and evidence provided or otherwise available, it is considered that [AIN] or [ABN] would not in practice be compelled to leave the UK, the EEA and Switzerland if you were required to leave the UK for an indefinite period. This is because Home Office records show that you were granted leave to remain in the UK under Appendix FM of *(sic)* outside the Immigration Rules on 10 Nov 2017 which expired on 10 May 2020 before 11pm on 31 December 2020.
>
> We have carefully considered whether, on the balance of probabilities, you are likely then to have qualified for further leave in either the same or a different route. From the information and evidence provided or otherwise available, it is considered that this is so because based on evidence provided, you are still residing with your British children as a family unit and there has been no material change in your circumstances.
>
> Therefore, absent a material change in circumstances if a later application was made under the family route under Appendix FM, it is reasonable to conclude that this application would be successful. Therefore, you have not demonstrated you would have been in fact required to leave the UK for an indefinite period."

4. The appellant's appeal against that decision was allowed by First-tier Tribunal Judge Thapar for reasons set out in a decision dated 15 December 2023. The judge heard evidence from the appellant. Her findings and conclusions are set out at paragraphs [13] to [22] of the decision. The judge noted the appellant had previously been granted leave to remain until 10 May 2020, and said at paragraph [13] that the reality is that the appellant was without lawful status at the time of his application on 12 July 2021. The judge referred to the evidence regarding the health of the appellant's partner and children. At paragraph [21] she said:

> "The Respondent raised no challenge to these stated circumstances and the Appellant's position that his wife and children would be compelled to leave the UK if the Appellant was to leave for an indefinite period because of the extensive care required by his son which cannot be met by his partner alone. The Appellant's position was supported by medical evidence and

school records, I have no reason to find that the Appellant's evidence is not credible, his evidence was unchallenged and therefore I find the Appellant has established that if he was to leave the UK for an indefinite period his partner and children would also leave the UK. I find this is so given the significant health needs of the Appellant's son.

The grounds of Appeal

5. The respondent claims the FtT Judge misunderstood the Secretary of State's position in respect of the possibility of a successful application under Appendix EU. The respondent claims the authorities that were referred to by the Judge, the Court of Appeal decisions in *Akinsanya v SSHD* [2022] EWCA Civ 37 and in *Velaj v SSHD* [2022] EWCA Civ 767, support the respondent's position that the derivative right to reside as a *Zambrano carer* is one of last resort. The appellant had previously held leave under Article 8 and his position before Judge Thapar was only strengthened by the passage of time. Thus, the respondent claims, the question of whether the British citizen child would be compelled to leave should the appellant leave the UK for an indefinite period was not properly addressed.

6. Permission to appeal was granted by Deputy Upper Tribunal Judge Skinner on 6 April 2024. He said:

> "2. The Secretary of State's primary ground is that the Judge misunderstood the Secretary of State's case. That position was set out in the decision letter of 19 January 2023. That letter is not terribly well expressed, but it seems to me that the case that was being put was tolerably clear and as follows. The Secretary of State refused the Appellant's application under the EU Settlement Scheme as a Zambrano carer of his two British citizen children on the basis that the Appellant did not meet – throughout the continuous qualifying period of 25 May 2017 to 12 July 2021 - the requirement in sub-paragraph (a)(iii) of the definition of a 'person with a Zambrano right to reside'. This was because for part of that period (10 November 2017 to 10 May 2020) the Appellant had leave under Appendix FM and so for that period (at least) it could not be said that the British citizen children would be compelled to leave the UK, EEA or Switzerland. It was also considered reasonable to conclude that, once that period of leave expired, the Appellant would have been granted further leave and so, again, the British citizen children would not have been compelled to leave the UK, EEA or Switzerland during this further part of the continuing qualifying period.
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> 3. The approach taken by the Judge was to assess whether the Appellant's children would be compelled to leave the UK, EEA and Switzerland, but, at least arguably, she made that assessment only prospectively, on the date of the application (see para. 16) and not throughout the continuous qualifying period. It therefore seems to me arguable that, as submitted by the Secretary of State, the Judge failed to consider the case that was being argued.
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> 4. I also observe that the Judge in para.16 correctly identifies that the test (or more accurately part of the test) is whether the Appellant's children's carers would in fact leave the UK. She then does not answer that question, but rather approaches the matter on the hypothetical assumption that the Appellant would do so, contrary to the approach mandated by the Court of

> Appeal in Velaj. I accordingly also consider it to be arguable that, as the Respondent suggests in the Grounds of Appeal, that the Judge failed to appreciate the position identified from the case law, including Velaj."

The Hearing of the Appeal

7. At the outset of the hearing of the appeal before me, Mr Lawson applied for an adjournment. He submits the respondent wishes to consider his position in appeals such as this in light of the decision of Eyre J in *R (Akinsanya & Aning-Adjei) v SSHD* [2024] EWHC 469 (Admin). Eyre J noted that Appendix EU gave effect to the EU Settlement Scheme and provided for certain categories of person, including *Zambrano* carers, to be entitled to leave to remain in the UK following Brexit. He held that to the extent that the revised Appendix EU and the respondent's guidance were based on the view that a realistic prospect of obtaining leave excluded the *Zambrano* right, they were based on a misunderstanding of the pre-Brexit law. However, the decisions in the claimants' cases turned on the exclusion of those who already had leave to remain under a provision other than Appendix EU. Mr Lawson submits that although Eyre J refused permission to appeal to the Court of Appeal and the respondent has not renewed the application for permission, it remains unclear whether the claimants are seeking permission from the Court of Appeal.

8. Mr Lawson also drew my attention to a recent unreported decision of the Upper Tribunal in *SSHD v Maisiri* promulgated on 21 June 2024 in which a panel of judges (Upper Tribunal Judge Hanson and Upper Tribunal Judge Blundell) held, in summary, that it is not incumbent on a decision maker who is considering the application 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.

9. When pressed, Mr Lawson said that the respondent does not seek an adjournment so that the respondent can consider the merits of this appeal in light of the decisions referred to. What is in effect being sought, is a general stay of the appeal, so that the respondent can consider his overall position in light of the decisions referred to, and any potential appeals to the Court of Appeal.

10. The application for an adjournment is entirely spurious and will serve no useful purpose other than to delay the consideration of this appeal for some indefinite period. There are in my judgement, no reason, let alone good reason, to adjourn the hearing of the appeal. The appellant is unrepresented. The respondent is under a duty to help the Upper Tribunal to further the overriding objective and cooperate with the Upper Tribunal generally. The overriding objective is to deal with cases fairly and justly, in ways which are proportionate to the importance of the case, the complexity of the issues, and the anticipated costs and resource of the parties. Dealing with cases fairly and justly includes avoiding delay.

11. In any event, I note that although the respondent said in his decision that the appellant was, on a balance of probabilities, likely to qualify for further leave under Appendix FM outside the immigration rules, the principal reason for refusing the application was that the appellant claimed to have a continuous qualifying period in the UK during which he met the definition of a 'person with a Zambrano right to reside', between 25 May 2017 and 12 July 2021. However, for part of that period (10 November 2017 to 10 May 2020) the appellant had leave under Appendix FM and so for that period (at least) it could not be said that the British citizen children would be compelled to leave the UK, EEA or Switzerland.

12. Mr Lawson simply adopted the grounds of appeal without any elaboration. Mr Shihab did not respond to the issues of law that arise in this appeal. He submits the FtT judge allowed the appeal and it was open to her to do so, for the reasons that she gave.

Decision

13. I have already set out the background to this appeal in the introduction. The appellant's immigration history, insofar as it is apparent, is set out in paragraph [2] of the decision of Judge Thapar:

> "…The Appellant arrived in the United Kingdom ("UK") on 24 October 2009 as a student. The Appellant married his partner in the UK on 23 June 2014, they have three children together, born in 2017, 2020 and 2022. The Appellant's partner and children are British citizens. The Appellant was granted leave to remain in the UK on 10 November 2017 valid until 10 May 2020.

14. On 12 July 2021 the appellant made an application under the EU Settlement Scheme as a 'person with a Zambrano right to reside'. The covering letter to that application is a letter from Londonium Solicitors dated 29 June 2021. They claim that the appellant "could not extend his leave" after 10 May 2020, without further explanation. The application was refused by the respondent on 19 January 2023.

15. Judge Thapar referred to the case advanced by the respondent at paragraph [3] of her decision. She said:

> "The Respondent states the Appellant does not meet the requirements for status as a person with a Zambrano right to reside on the basis that he is a primary carer of a British citizen because in practice the Appellant's British children would not be required to leave the UK. The Respondent asserts this is because the Appellant was granted leave to remain in the UK under Appendix FM of the Immigration Rules from 10 November 2017 until 10 May 2020. The Respondent concluded on balance the Appellant was likely to qualify for further leave under Appendix FM because his family life with his partner and children is continuing with no material change in his circumstances. The Respondent found it was reasonable to conclude that an application under Appendix FM would be successful. Consequently, the Appellant has not demonstrated that he would be required to leave the UK indefinitely. The Respondent did not dispute the facts as presented by the Appellant of his circumstances in the UK."

16. There were therefore two strands to the respondent's refusal. First, the appellant was granted leave to remain in the UK under Appendix FM of the Immigration Rules from 10 November 2017 until 10 May 2020. During that period, the appellant's British children would not be required to leave the UK. Second, the appellant was likely to qualify for further leave under Appendix FM and it is reasonable to conclude that an application under Appendix FM would be successful.

17. Under paragraph EU11 of Appendix EU of the Immigration Rules, to be eligible for indefinite leave, the appellant needed to have completed a continuous qualifying period of 5 years as a "person with a Zambrano right to reside". The term "person with a Zambrano right to reside" is defined in Annex 1 to Appendix EU. As at the date of the respondent's decision (19 January 2023), the definition of a 'person with a Zambrano right to reside' was as follows:

> "a person who has satisfied the Secretary of State by evidence provided that they are (and for the relevant period have been) or (as the case may be) for the relevant period they were:
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> (a) resident for a continuous qualifying period in the UK which began before the specified date and throughout which the following criteria are met:
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> (i) they are not an exempt person; and
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> (ii) they are the primary carer of a British citizen who resides in the UK; and
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> (iii) the British citizen would in practice be unable to reside in the UK, the European Economic Area or Switzerland if the person in fact left the UK for an indefinite period; and
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> (iv) they do not have leave to enter or remain in the UK, unless this was granted under this Appendix or in effect by virtue of section 3C of the Immigration Act 1971; and
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> (v) they are not subject to a decision made under regulation 23(6)(b), 24(1), 25(1), 26(3) or 31(1) of the EEA Regulations, unless that decision has been set aside or otherwise no longer has effect; or
>
> (b) …
>
> in addition:
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> (a) 'relevant period' means here the continuous qualifying period in which the person relies on meeting this definition; and
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> (b) unless the applicant relies on being a person who had a derivative or Zambrano right to reside or a relevant EEA family permit case, the relevant period must have been continuing at 2300 GMT on 31 December 2020; and
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> (c) where the role of primary carer is shared with another person in accordance with sub-paragraph (b)(ii) of the entry for 'primary carer' in this table, the reference to 'the person' in sub-paragraph (a)(iii) above is to be read as 'both primary carers'

18. First the individual must have been resident for a continuous qualifying period in the UK which began before the specified date. In addition, as is apparent from the criteria set out in (a)(iii) of the definition, throughout the continuous qualifying period in the UK, the criteria is that the British citizen would in practice be unable to reside in the UK, the European Economic Area or Switzerland if the person in fact left the UK for an indefinite period. Here, the appellant had leave to remain in the UK that was valid between 10 November 2017 and 10 May 2020. During that period the appellant's child would not in practice, have been unable to reside in the UK. The appellant and his family were entitled to lawfully remain in the UK during that period. A person who has leave to remain (other than in narrow exceptions not applicable in this case) does not fall within the definition of a person with a Zambrano right to reside in Annex 1 to Appendix EU. In summary, as the appellant had leave to remain under Appendix FM or outside the immigration rules between 10 November 2017 and 10 May 2020 he could not be a person with a Zambrano right to reside as defined, until after 10 May 2020.

19. Judge Thapar referred to the decision of the Court of Appeal in *Akinsanya* [2022] EWCA Civ 37. There, the Court of Appeal held that the Home Office had erred in its understanding of regulation 16(7) of the 2016 Regulations in defining 'a person with a Zambrano right to reside' for the purposes of the EUSS and Appendix EU. The guidance referred to, did not alter the fact that, in summary, an applicant would only be eligible to make an application as a Zambrano carer where they, by the end of the transition period (on 31 December 2020) and throughout the relevant period, did not hold leave to enter or remain in the UK (unless this was under Appendix EU), and met the other relevant requirements of Regulation 16 of the 2016 Regulations. 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.

20. The Upper Tribunal in *Sonkor (Zambrano and non-EUSS leave)* [2023] UKUT 00276 (IAC). The Upper Tribunal held:

    a. 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. and

    b. Nothing in *R (Akinsanya) v Secretary of State for the Home Department* [2022] 2 WLR 681, [2022] EWCA Civ 37 calls for a different approach.

21. The focus in the decision of Judge Thapar was upon the appellant and his family and whether the appellant's children would be required to leave the UK if the appellant was to leave for an indefinite period. She did not address the prior question of whether throughout the continuous qualifying period in the UK, the appellant met the definition of a 'person with a Zambrano right to reside'.

22. Although the respondent's claim that the appellant was likely to qualify for further leave under Appendix FM and it is reasonable to conclude that an application under Appendix FM would be successful, is now undermined by the decision of Eyre J in *R (Akinsanya & Aning-Adjei) v SSHD*, that is immaterial because the appellant's application was bound to fail for the first of the reasons given by the respondent.

23. It follows that in my judgment, the judge erred by finding that the appellant's continuous qualifying period began in February 2017, when it could only have begun after 28 May 2020 when his leave under Appendix FM expired. This is a clear legal error and consequently, the decision of the FtT cannot stand and must be set aside.

Remaking the decision

24. As to disposal, I can re-make the decision in relation to the appellant's appeal pursuant to section 12(2)(b)(ii) of the Tribunals, Courts and Enforcement Act 2007. By virtue of section 12(4) of that Act, I may make any decision which the FtT could make if it were re-making the decision and may make such findings of fact as I consider appropriate.

25. Under Regulation 8 of the Immigration (Citizens Rights) (EU Exit) Regulations 2020, two grounds of appeal are available to the appellant. The first is that the respondent's decision was not in accordance with the EU Withdrawal Agreement. The second is that it is not in accordance with the residence scheme Immigration Rules, i.e. Appendix EU.

26. An argument based on the EU Withdrawal Agreement cannot succeed as those claiming a *Zambrano right* are not within the scope of the EU Withdrawal Agreement. *See paragraph 7 of Sonkor (Zambrano and non-EUSS leave)* [2023] UKUT 00276 (IAC).

27. An argument based on Appendix EU cannot succeed because, for the reasons explained above, the continuous qualifying period began after 10 May 2020 and therefore the necessary periods have not been accrued. That precludes the appellant from the definition of *'a person with a Zambrano right to reside'* as set out in Annex 1 of Appendix EU, and the appeal cannot succeed on remaking.

28. It follows that I dismiss the appellant's appeal against the decision of the respondent to refuse his application under the EU Settlement Scheme as a 'person with a Zambrano right to reside'.

Notice of Decision

29. The decision of First-tier Tribunal Judge Thapar dated 15 December 2023 is set aside.

30. The decision is remade in the Upper Tribunal.

31. The appellant's appeal against the respondent's decision dated 19 January 2023 is dismissed.

V. L Mandalia
Upper Tribunal Judge Mandalia

Judge of the Upper Tribunal
Immigration and Asylum Chamber

26 June 2024