



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2024-002522

First-tier Tribunal No: EU/50109/2023

THE IMMIGRATION ACTS

Decision & Reasons Issued:

On 22nd of October 2024

Before

DEPUTY UPPER TRIBUNAL JUDGE L MURRAY

Between

GRISELDA PIRE
(NO ANONYMITY ORDER MADE)

Appellant

and

Secretary of State for the Home Department

Respondent

Rule 34 Decision at Field House on 9 October 2024

DECISION AND REASONS

Introduction

1. The Appellant appeals against a decision of First-tier Tribunal Judge Fenney promulgated on 5 March 2024.

Rule 34 Decision

2. Rule 34 of the Tribunal Procedure (Upper Tribunal) Rules 2008 permits the Upper Tribunal to make a decision without a hearing.
3. I observed by my Order of 19 July 2024:
 1. The Appellant seeks permission to appeal against the decision of First-tier Tribunal Judge Feeney (the FTTJ). The Appellant is an Albanian citizen who appealed under the Immigration Citizen's Rights Appeals

(EU Exit) Regulations 2020 against a decision of the Respondent to refuse her application under the EU Settlement Scheme (EUSS). She applied as a person with a Zambrano right to reside on the basis that she is the primary carer of her British child. The only issue in the case was whether she met the definition of 'a person with a Zambrano right to reside' contained in Annex EU throughout the continuous qualifying period. Reliance was placed by the Respondent on Velaj v. SSHD [2022] EWCA Civ 767. The Respondent's position was that the Appellant would not in fact have been required to leave the UK because following the birth of her British daughter, leave under the parent route of Appendix FM would have been granted if the Appellant had applied for it.

2. The decision of FTTJ Feeney was promulgated on 5 March 2024. She dismissed the Appellant's appeal because she found that the Appellant would make an application under Appendix FM and it was accepted that such an application would be likely to succeed. On 11 March 2024 the decision of Mr Justice Eyre in Akinsanya & Anor, R (On the Application Of) v Secretary of State for the Home Department [2024] EWHC 469 (Admin) was handed down. The grounds rely on this authority and argue that the FTTJ and Respondent were misguided in their interpretation of applicable law. Mr Justice Eyre held at paragraph 110 after having reviewed the authorities that, to the extent 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 law applicable before the departure of the United Kingdom from the European Union. In issuing version 6 of the Guidance the Respondent was proceeding on the basis of a mistaken belief that a person who did not have leave to remain but had a realistic prospect of obtaining such leave could not be a *Zambrano* carer for the purposes of EU law. That misunderstanding was combined with and flowed from a flawed understanding of the effect of the decision in *Velaj*. That misunderstanding affected the terms of version 6 of the Guidance and the way in which paragraph (a)(iii) of the Annex 1 definition was applied.
3. It is not in dispute that the Appellant had neither made an application under Appendix FM nor had leave at the date of application or at all. Judge Feeney did not have the benefit of the High Court decision in Akinsanya and held that the Respondent's guidance was correct. As this part of the guidance has now been held to be incorrect it follows that the FTTJ arguably erred in determining the sole issue in the appeal against the Appellant.

4. By the same Order I directed:

1. It is my preliminary view that the decision did involve the making of an error of law as set out above and that the decision of the First-tier Tribunal should be set aside without a hearing under rule 34 of the Tribunal Procedure (Upper Tribunal) Rules 2008. The appropriate course of action would be to retain and allow the appeal in the Upper Tribunal.

2. Unless within 14 working days of the issue of these directions there is any written objection to this course of action, supported by cogent argument, the Upper Tribunal will proceed to determine the appeal without an oral hearing and allow the appeal.
3. In the absence of a timely response by a party, it will be presumed that it has no objection to the course of action proposed.
5. Neither the Respondent nor the Appellant responded and is considered to have no objection to the proposed course of action. I have borne in mind the circumstances of when the common law duty of fairness requires a hearing and the overriding objective that the Upper Tribunal deal with cases fairly and justly and am satisfied that it is appropriate to proceed under rule 34.
6. I set the decision aside and re-make it allowing the appeal.

Signed

L Murray

Judge L Murray
Deputy Upper Tribunal Judge

9 October 2024