IAC-AH-KRL-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: EA/00504/2020

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 23 August 2021	**On 11 October 2021**

Before

UPPER TRIBUNAL JUDGE SHERIDAN

Between

MELISSA SANCIO MEJIA
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr D Krushner, Counsel (no instructing solicitor)
For the Respondent: Mr C Avery, Senor Home Office Presenting Officer

DECISION AND REASONS

1. This has been a remote hearing to which both parties have consented. The form of remote hearing was video by Microsoft Teams (V). A face to face hearing was not held because it was not practicable and all issues could be determined in a remote hearing. I did not experience any difficulties, and neither party expressed any concern, with the process.

2. The appellant is a citizen of the Philippines who, in November 2019, applied for a derivative residence card under regulations 20 and 16 of the Immigration (EEA) Regulations 2016 ("the 2016 Regulations").

3. The 2016 Regulations were revoked on 31 December 2020 by the Immigration and Social Security Co-ordination (EU Withdrawal) Act 2020 (Consequential, Saving, Transitional and Transitory Provisions) (EU Exit) Regulations. However, paragraph 6 of Schedule 3 provides that regulation 20 of the 2016 Regulations continues to apply for the purposes of considering applications for a derivative residence card made before 31 December 2020. As the appellant applied for a derivative residence on November 2019 this appeal must be decided under the 2016 Regulations.

4. In relevant part, the 2016 Regulations state:

> 20.— Issue of a derivative residence card
> (1) The Secretary of State must issue a person with a derivative residence card on application and on production of—
> (a) a valid national identity card issued by an EEA State or a valid passport; and
> (b) proof that the applicant has a derivative right to reside under regulation 16.
>
> 16.— Derivative right to reside
> (1) A person has a derivative right to reside during any period in which the person—
> (a) is not an exempt person; and
> (b) satisfies each of the criteria in one or more of paragraphs (2) to (6).
> …
> (5) The criteria in this paragraph are that—
> (a) the person is the primary carer of a British citizen ("BC");
> (b) BC is residing in the United Kingdom; and
> (c) BC would be unable to reside in the United Kingdom or in another EEA State if the person left the United Kingdom for an indefinite period

5. Regulation 16(5) implements into domestic legislation a principle of European law, derived from the CJEU case *Ruiz Zambrano v Office national de l'emploi* (Case C-34/09) [2012] QB 265, which is frequently referred to as the "Zambrano principle". The Zambrano principle was succinctly summarised by the Supreme Court in *Patel v Secretary of State for the Home Department* [2019] UKSC 59 as follows:

> "In Zambrano, the Court of Justice of the European Union ("the CJEU") held that a third-country (ie non-member state) national parent ("TCN" parent), of a Union citizen child resident in Union territory, was entitled to a right of residence to avoid the child being deprived of the genuine enjoyment of the substance of their Union citizenship rights on removal of the TCN parent. The principle extends to dependents who are not children, and has been applied

> even where the Union citizen has not exercised their right of free movement. The right of residence is a "derivative right", that is, one derived from the dependent Union citizen. A key to this derivative right is the deprivation of the benefits of the Union citizenship as a result of the Union citizen being compelled, by the TCN's departure, to leave Union territory."

6. Regulation 16(5) must be interpreted so far as possible compatibly with EU law. See paragraph 3 of *Patel*.

7. The factual matrix in this case is not in dispute. It is common ground that:

   a. The appellant is the primary carer of a British citizen child (who was naturalised as a British citizen in July 2019).

   b. If the appellant were to leave the UK her child would have no realistic alternative other than to do the same as there is no one else to care for him.

   c. The appellant is not lawfully in the UK but previously, between August 2013 and February 2016, had limited leave to remain under Appendix FM of the Immigration Rules on the basis of her relationship with her child.

8. The respondent refused the appellant's application on the basis that she could make an application for leave under Appendix FM of the Immigration Rules, which would have a realistic prospect of success, and a derivative right to reside is a right of last resort which only applies if a person has no other means to remain lawfully in the UK.

9. The appellant appealed to the First-tier Tribunal where her appeal came before Judge of the First-tier Tribunal Cockburn ("the judge"). Following a detailed analysis of *Patel*, the judge dismissed the appeal. Her reasons, in summary, were that (a) the respondent does not presently intend to remove the appellant and has invited her to apply for leave under the Immigration Rules; (b) the appellant's evidence was that she would seek legal advice with a view to applying for leave under the Rules; and (c) because of the foregoing, it is not a consequence of refusing the appellant a derivative residence card that she (and her son) will be compelled to leave the UK.

10. The grounds of appeal argue that the judge misinterpreted *Patel* (and the CJEU *Zambrano* jurisprudence), as well as regulation 16(5), by dismissing the appeal because the appellant did not face imminent removal and could make an application under Appendix FM.

11. A similar issue was recently considered in the High Court in *Akinsanya, R (On the Application Of) v Secretary of State for the Home Department* [2021] EWHC 1535 (Admin). This case concerned an applicant who had limited leave to

remain under Appendix FM but nonetheless applied under the EU Settlement Scheme for indefinite leave to remain under Appendix EU on the basis of the Zambrano principle. The respondent argued that because the appellant had leave to remain (and therefore did not face compulsion to leave the territory of the UK or EU) the Zambrano principle was not applicable. This argument was rejected by Moystn J, who, inter alia, noted that the appellants in *Zambrano* itself did not face compulsion to leave the EU (as they had a limited residence permit). Moystn J found that neither CJEU nor UK jurisprudence (including *Patel*) supports the view that limited leave to remain under national law is a "Zambrano extinguishing factor". In paragraph 41 he described the suggestion that a grant of limited leave extinguishes the Zambrano principle as "a fallacy" and in paragraph 51 he stated:

> "My conclusion is that nothing decided in the CJEU or domestically since the decision in Zambrano supports the theory that the existence of a concurrent limited leave to remain of itself automatically extinguishes a claim for Zambrano residence. On the contrary, it is clear to me from the facts of Zambrano itself that the CJEU tacitly acknowledged that a limited national leave to remain, and a wider Zambrano right to remain, in many cases can and will coexist."

12. Plainly, if Moystn J is correct that having limited leave to remain does not extinguish a claim for a derivative right to reside under the *Zambrano* principle it follows that having a realistic prospect of being granted limited leave to remain also does not extinguish a claim for a Zambrano derivative right of residence.

13. Recognising the extent to which *Akinsanya* undermines the respondent's position, Mr Avery applied for an adjournment on the basis that the respondent has been granted permission to appeal in *Akinsanya*, and the hearing in the Court of Appeal is listed for 7-8 December 2021. Mr Krushner opposed the adjournment application on the basis that it would not be until next year that the Court of Appeal judgment is handed down and we do not know the basis upon which permission has been granted. I refused the application given that it is likely to be at least six months before the Court of Appeal judgment is published and the respondent has not provided any information about the scope of the appeal.

14. I have carefully reviewed *Akinsanya* and agree entirely with the reasoning given by Moystn J about the scope of the Zambrano principle. For the reasons given by Moystn J, the fact that the appellant could apply (with a realistic prospect of success) for leave under the Immigration Rules is irrelevant to the question of whether she is entitled to a derivate right to reside. The judge therefore fell into error by treating as relevant to whether the appellant was entitled to a derivative right to reside an issue (whether the appellant faced removal and/or whether she could apply for leave under Appendix FM) that was irrelevant.

15. The agreed/non-contested facts can yield only one answer, which is that the appellant is entitled to a derivative residence card. This is because the appellant, who is not an exempt person as defined in the regulation 16(7)(c), meets all of the conditions of regulation 16(5). First, she is the primary carer of a British citizen child and therefore she satisfies 16(5)(a). Second, her child is residing in the UK and therefore she satisfies 16(5)(b). Third, her child would be unable to reside in the UK (or in the EEA) if she leaves the UK for an indefinite period and therefore she satisfies16(5)(c). As the conditions of regulation 16(5) are satisfied, she is entitled to a derivative residence card under regulation 20(1).

Notice of decision

16. The decision of the First-tier Tribunal involved the making of an error of law and is set aside. I re-make the decision and allow the appeal.

Signed

D. Sheridan
Upper Tribunal Judge Sheridan

Dated: 2 September 2021