



**Upper Tribunal
(Immigration and
Asylum Chamber) Appeal**
Number: EA/00190/2021
UI-2021-000959

THE IMMIGRATION ACTS

**Heard at Manchester
on 27 September 2022**

**Decision and Reasons
Promulgated
on 4 December 2022**

Before

**Upper Tribunal Judge Bruce
Deputy Upper Tribunal Judge Sills**

Between

Secretary of State for the Home Department

Appellant

and

**Boladele Peter Olusori
(Anonymity Direction Not Made)**

Respondent

DECISION AND REASONS

Representation:

For the Appellant: Mr Bates
For the Respondent: In person

Introduction

1. We shall refer to the parties as they were before the First-Tier Tribunal, with Mr Olusori as the Appellant (A), and the Secretary of State as the Respondent (R). R appeals against the decision (the Decision) of First-Tier Tribunal Judge Cole (the Judge) dated 19 August 2021, allowing A's appeal against the refusal to grant him leave to remain under the

Immigration Rules of the EU Settlement Scheme (EUSS), namely Appendix EU.

Factual Background

2. A is a citizen of Nigeria, born on 28 November 1974. He is the primary carer of a British citizen child. He was granted leave to remain on the basis of his family life with his daughter on 28 April 2015. This was extended until 28 April 2020. On 10 February 2020 A applied for leave to remain under Appendix EU, as 'a person with a Zambrano right to reside'. R refused the application on 10 November 2020 on the basis that there was a realistic prospect that an application for leave to remain under Appendix FM relying on ECHR Article 8 would succeed.
3. The Judge allowed the appeal on the basis of the decision in the case of Akinsanya, R (On the Application Of) v Secretary of State for the Home Department (Rev 3) [2021] EWHC 1535, which gave the following declaration:
 1. *The Secretary of State erred in law when providing, in Annex 1 to Appendix EU to the Statement of Changes to the Immigration Rules HC 395 as amended, that the definition of a "person with a Zambrano right to reside" includes paragraph (b) "a person without leave to enter or remain in the UK, unless this was granted under this Appendix."*
 2. *The Guidance issued by the Secretary of State (1) "Free Movement Rights: derivative rights of residence" (version 5.0 of 2 May 2019) and (2) "EU Settlement Scheme: person with a Zambrano right to reside" (version 4.0 of 27 April 2021) is legally erroneous insofar as it states that a person who has limited leave to enter or remain in the UK cannot also have a derivative right to reside by virtue of regulation 16(1) of the Immigration (European Economic Area) Regulations 2016, by satisfying the criteria in regulation 16(5) of those Regulations.*
4. On the basis of this decision, the Judge found that neither current leave to remain, nor the possibility of a future grant of leave to remain, could extinguish a claim for a Zambrano right to reside. The Judge consider that A had enjoyed a Zambrano right to reside for over 5 years and so was now entitled to indefinite leave to remain under Appendix EU of the Immigration Rules.
5. Permission to appeal was granted by UT Judge Macleman on the basis that the Court of Appeal had issued its decision in the case of Akinsanya [2022] EWCA Civ 37.

The Hearing

6. At the hearing, Mr Bates relied on the Court of Appeal decision in Akinsanya. After hearing from A, we informed him that we were bound

by that decision, and that as a result we would be allowing R's appeal on the basis that the Judge had made a material error of law, remaking the decision dismissing his appeal, and that our written reasons would follow.

Findings

7. To explain our decision, it is necessary to explain what the Court of Appeal held in Akinsanya. That case considered a difference between the provisions of the EEA Regs and Appendix EU giving rise to an important question of principle. The EEA Regs only excluded those with indefinite leave to remain from a Zambrano right to reside. On the face of it, the Regs would not have excluded A, though his application was under the EUSS scheme and not the EEA Regs. In contrast, under Appendix EU, the definition of a 'person with a Zambrano right to reside' excluded someone with 'leave to remain in the UK unless granted under the EUSS. As A had previously been granted and still had leave to remain other than under Appendix EU when he applied under Appendix EU, he could not meet that definition. The Court of Appeal considered both whether the formulation under the Appendix EU conflicted with the Zambrano jurisprudence, and the significance of the difference between the EEA Regs and Appendix EU.
8. The Court of Appeal held that where domestic law accords to domestic carers a right to reside, Zambrano rights do not arise. For present purposes, that means that Appendix EU, and the decision to refuse A a Zambrano right to reside made under those Rules, are not in conflict with the Zambrano jurisprudence. The Court of Appeal then went on to consider the significance of the difference between the EEA Regs and Appendix EU as set out above and made the following order:

"The Secretary of State erred in law in her understanding of regulation 16 of the Immigration (European Economic Area) Regulations 2016 when providing, in Annex 1 to Appendix EU to the Statement of Changes to the Immigration Rules HC 395 as amended, that the definition of a 'person with a Zambrano right to reside' includes paragraph (b) 'a person without leave to enter or remain in the UK, unless this was granted under this Appendix'."
9. So, while the provisions of the Appendix EU are not consistent with the EEA Regs, they do not breach any principles of the Zambrano jurisprudence. R has subsequently confirmed that the provisions of Appendix EU will not be amended.
10. What this means for A is that he cannot show that the decision to refuse his application under the Appendix EU breaches those Immigration Rules or the terms of the Withdrawal Agreement. It follows that the Judge erred in law in finding otherwise. We set aside the Judge's decision. We remake that decision and dismiss A's appeal.

11. As we raised at the hearing, it will now be for A to consider making an application for leave to remain on the basis of his family life with his daughter under the Immigration Rules and Appendix FM in particular, as he has done successfully before.

Notice of Decision

The determination of the First-tier Tribunal contains a material error of law and is set aside.

We remake the decision and dismiss the appeal.

Signed

Date 24

A handwritten signature in black ink, appearing to be 'Sills', written in a cursive style.

October 2022

Deputy Upper Tribunal Judge Sills