



**Upper Tribunal
(Immigration and Asylum
Chamber)**

**Appeal Number: UI-2022-
002772
On appeal from: EA/01800/2021**

THE IMMIGRATION ACTS

**Heard at Field House
On 21st October 2022**

**Decision & Reasons Promulgated
On 11th December 2022**

Before

**UPPER TRIBUNAL JUDGE GLEESON
DEPUTY UPPER TRIBUNAL JUDGE CHANA**

Between

THE SECRETARY OF STATE FOR THE DEPARTMENT

Appellant

and

**SANDRA MILENA HOYOS GIRALDO
(NO ANONYMITY DIRECTION MADE)**

Respondent

Representation:

For the appellant: Mr Steven Walker, a Senior Home Office Presenting Officer

For the respondent: Mr Adrian Berry of Counsel, instructed by Wilson Barca Solicitors

DECISION AND REASONS

1. The Secretary of State appeals with permission against the decision of the First-tier Tribunal, allowing the claimant's appeal against her decision on 5 October 2020 to refuse the claimant's application for a permanent right of residence under the EU Settlement Scheme (EUSS)

application, with reference to Appendix EU. The claimant is a citizen of Colombia.

Background

2. It is accepted that the claimant is the sole primary carer of her British citizen daughter, born in October 2011, now 11 years old. At the date of application, she was on the path to settlement under Appendix FM (private and family life) with leave granted on 12 March 2015 and extended to 29 May 2020.
3. On 6 March 2020, the claimant applied for further leave, but under Appendix EU as a *Zambrano* carer, rather than under Article 8 ECHR. The claimant asserted that she was entitled to settled status under the EUSS on *Zambrano* grounds with reference to Regulation 16(5) of the Immigration (European Economic Area) Regulations 2016.

Refusal letter

4. The Secretary of State refused the claimant's application because she was not satisfied that the claimant required *Zambrano* leave. *Zambrano* leave was a last resort and was not appropriate here. The claimant had previously had Article 8 ECHR leave to remain and there was a realistic prospect that she would be granted further such leave.
5. As at the date of EU Exit on 31 December 2020, that was the basis on which the claimant was resident in the UK and she was therefore unable to meet the requirements of either rule EU11 of Appendix EU (settled status) or EU14 (pre-settled status).
6. The Secretary of State's decision was confirmed on administrative review on 20 January 2021. The claimant appealed to the First-tier Tribunal.

First-tier Tribunal decision

7. First-tier Judge Norris found that the claimant had demonstrated that she could meet the requirements of Regulation 16(5). The Secretary of State's decision was not in accordance with the law and the appeal was allowed.
8. The Secretary of State appealed to the Upper Tribunal.

Grounds of appeal

9. The Secretary of State argued that there was no question of a breach of Withdrawal Agreement rights and no statutory basis for allowing the appeal under the Citizens' Rights Regulations 2020.
10. She relied on the decision of the Court of Appeal in *Akinsanya v Secretary of State for the Home Department* [2022] EWCA Civ 37, in

which Regulation 16(7) had not been quashed, although she acknowledged that Regulation 16 was the subject of an ongoing review.

Permission to appeal

11. Permission to appeal was granted by First-tier Tribunal Judge Aziz on 12 May 2022 on the following grounds:

“The grounds assert that the Judge erred in that she failed to identify an available ground of appeal under which the EUSS appeal under the Citizens Rights Regulations 2020 could have succeeded. I acknowledge that following *Akinsanya v Secretary of State for the Home Department* [2022] EWCA Civ 37 that the law in this area is in a state of flux, with the Secretary of State being required to rewrite the Immigration Rules for *Zambrano* carers. However, reading paragraphs 6.11 and 6.12 of the Decision and Reasons, there is an arguable error of law in that the decision lacks clarity in highlighting the statutory basis for allowing the appeal under the 2020 Regulations.”

Regulation 16 of the EEA Regulations

12. Regulation 16(1) provides that:

“16 (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); ...”

13. The claimant satisfies Regulation 16(2)-(6). The subsection relevant to her is Regulation 16(5) which regulates the position of third country national carers of British citizen children, that is to say, *Zambrano* carers. There is no dispute that this claimant meets the requirements of that Regulation.

14. Regulation 16(7) sets out the categories of ‘exempt persons’: those with a right to reside under another provision of the EEA Regulations; who have the right of abode under section 2 of the Immigration Act 1971, or do not require it by reason of section 8 of that Act (diplomatic status); or those with indefinite leave to enter or remain. There is no mention of persons who, like this claimant when she made her application, have limited leave to remain.

The decision in *Akinsanya*

15. In *Akinsanya*, Lord Justice Underhill (with whom Lord Justice Bean and Lady Justice Andrews agreed) held at [57] that:

“57. ...Notwithstanding the analysis above, the fact remains that if at any time a *Zambrano* carer loses their right to reside as a matter of domestic law, the *Zambrano* right will arise (assuming, that is, that the effect of the carer leaving will be that the EU citizen child also has to do so): *Zambrano* is always waiting in the wings, and so long as the *Zambrano* circumstances obtain the carer can never be put in a position where their residence is unlawful. If the Secretary of State's purpose in wanting to "understand the *Zambrano* jurisprudence" was indeed to restrict rights under the EUSS to people whose right to reside at the relevant dates directly depended on *Zambrano*, then her approach was consistent with the EU case-law. But if her intention was to extend those rights to all those carers whose removal would result in an EU citizen dependant having to leave the UK, then the exclusion of carers who currently had leave to remain on some other basis would evidently be inconsistent with that purpose. What the Secretary of State's purpose was is not something that this Court can answer. But fortunately it is not necessary for us to do so because of my conclusion on ground 2, with which I understand Bean and Andrews LJ to agree.”

16. Ground 2 concerned the proper construction of Regulation 16 of the EEA Regulations. Mr Blundell for the Secretary of State had accepted at [61] that the natural meaning of Regulation 16 was that a person with limited leave to remain was entitled to a derivative right to reside. Underhill LJ held at [66] that the provisions of Regulation 16(7) which defined 'exempt persons' were too clear to be extended to those with limited leave to remain.

Analysis

17. Mr Walker accepted at the hearing that, applying *Akinsanya*, the First-tier Tribunal Judge did not err in allowing the appeal, as at the date of decision, the claimant did not have indefinite leave to remain and was a *Zambrano* carer. If the claimant were removed, her daughter would be unable to remain in the UK without her.
18. On that basis, the Secretary of State's appeal falls to be dismissed and the First-tier Tribunal decision upheld.

DECISION

19. For the foregoing reasons, our decision is as follows:

The making of the previous decision involved the making of no error on a point of law. We do not set aside the decision but order that it shall stand.

Signed [Sureta Chana](#)

Date: 2 November 2022

Deputy Upper Tribunal Judge Chana