



IAC-AH-V1

**Upper Tribunal
(Immigration and Asylum Chamber)** **Appeal Number: EA/04750/2021
UI-2021-000655**

THE IMMIGRATION ACTS

**Heard at Field House
On the 26 August 2022**

**Decision & Reasons Promulgated
On the 11 October 2022**

Before

UPPER TRIBUNAL JUDGE KAMARA

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**HASIME BARDHI
(ANONYMITY DIRECTION NOT MADE)**

Respondent

Representation:

For the Appellant: Mr P Deller, Senior Home Office Presenting Officer

For the Respondent: Mr PV Thoree, solicitor, Thoree & Co Solicitors

DECISION AND REASONS

Introduction

1. This is an appeal against the decision of Designated Judge of the First-tier Tribunal Woodcraft, promulgated on 18 August 2021. Permission to appeal was granted by Upper Tribunal Judge Macleman on 10 January 2022.

Anonymity

2. No direction has been made previously, and there is no reason for one now.

Background

3. The respondent is the primary carer of her British citizen children (G and A). She was previously granted two periods of leave to remain on human rights grounds, with the second period of leave expiring on 3 July 2020. On 1 May 2020, the respondent applied for a Derivative Residence card on a Zambrano basis, under the EU Settlement Scheme. That application was refused on 15 January 2021. According to the decision letter, the Secretary of State considered that the respondent had a realistic prospect of success if an application for leave to remain under Appendix FM was made and as such, she did not meet the eligibility requirements for settled status as set out in either EU11 or EU14 of Appendix EU.

The decision of the First-tier Tribunal

4. It was accepted that on behalf of the Secretary of State, that the respondent was the primary carer of G and A. The appeal was allowed on the basis that the respondent met the requirements of Regulation 16 of the Immigration (European Economic Area) Regulations 2016, as the judge considered that the issue in the case had been settled in *Akinsanya* [2021] EWHC 1535 (Admin).

The grounds of appeal

5. The grounds of appeal argued that the judge fundamentally misconstrued the Zambrano right. Furthermore, the judge had followed *Akinsanya* which related to an EUSS applicant with current leave and addressed the question of compulsion to leave, in relation to which the Secretary of State's appeal was being heard in December 2021. It was said that the Secretary of State's position was that the derivative right was one of last resort in the situation where the risk of the claimant leaving was theoretical pending the possibility of seeking stay on another basis.
6. Permission to appeal was granted on the following basis:
 1. *The essential question was whether an application for a residence card, based on Zambrano, is a right only of last resort.*
 2. *There is scope for debate on whether that issue is adequately resolved in the FtT's decision, or by Akinsanya [2021] EWHC 1535 (Admin).*
 3. *Parties are directed within 14 days of the date this decision is issued to update their position in light of further proceedings in the Court of Appeal in Akinsanya.*
7. The respondent did not file a Rule 24 response. On the eve of the hearing, the Secretary of State filed a detailed position statement by email, in which she maintained that the decision of the First-tier Tribunal contained a material error of law.

The hearing

8. The submissions of the representatives can be summarised as follows. Mr Deller confirmed that the Secretary of State was pursuing her appeal because the appellant had leave to remain in the UK when she applied under the EUSS and still did, owing to the operation of Section 3C of the 1971 Act. He explained that a concession given in a similar case, known to all present, was probably wrongly given. Mr Thoree sought to defend the decision of the First-tier Tribunal, stating that it was correct at the time and that it should not make a difference that matters had moved on. Many other cases had resulted in a grant of ILR on identical facts. The judge concluded that Regulation 16 was satisfied and that was all that was required. On *Akinsanya*, Mr Thoree stated that the only exclusion related to indefinite leave to remain and therefore an in-time application should not prevent a successful variation from limited leave to remain to settlement under the EUSS. He added that an invalid application for administrative review was made prior to an appeal being lodged which meant that the respondent's leave was extinguished prior to the appeal. In reply, Mr Deller stated that the administrative review application was too late, but this did not matter as the damage had already been done by the application under the EUSS being made prior to the expiry of leave. There had been much confusion as to the outcome of *Akinsanya*, however the Court of Appeal had agreed that an application under the EUSS was a right of last resort, and this justified the Secretary of State's position. The scheme Rules were lawful. At the end of the hearing, I indicated that I was satisfied that there was a material error of law in the decision of the First-tier Tribunal and that the decision was set aside. After seeking the views of the representatives, I agreed to remit the matter to the First-tier Tribunal for a de novo hearing.

Decision on error of law

9. The decision letter states that it was not accepted that the respondent met the requirements of regulation 16(5) of the Immigration (European Economic Area) Regulation 2016 because:

“In order to demonstrate that G would be unable to reside in the UK or EEA if you left the UK for an indefinite period, you must be able to show that you would be required to leave the UK as you have no other means to remain lawfully in the UK as her primary carer. “

10. The judge rightly recognised that the issue was whether the respondent was entitled to apply under the EUSS for permanent residence as a Zambrano carer. His error was in finding at [15] that she '*does not have any right to remain limited or otherwise.*' This was not the case. At the time the application was made under the EUSS, the respondent had extant discretionary leave to remain. As no decision had been made on the EUSS application prior to that leave expiring, it was extended pending a decision on the EUSS application, as well as the bringing of this appeal. In addition, on the specified date of 31 December 2020, the application under the EUSS was still undecided.

11. The 1971 Act was amended, with the addition of sections 3C (2) (ca), (cb) and (d) to include appeals pending under the Immigration (Citizens' Rights Appeals) (EU Exit) Regulations 2020 as well as when an administrative review could be sought or is pending.
12. Given the judge's erroneous understanding of the respondent's immigration history, his conclusion based on that misunderstanding, that there was a derivative right to reside under regulation 16 cannot stand. Owing to that misunderstanding, there was no consideration by the judge as to whether the respondent's children would be compelled to leave the Union, the fact that the respondent has limited leave to remain being just one aspect of the test of compulsion.
13. Like the respondent, in this case the claimant in *Akinsanya* had leave to remain under Appendix FM when the application under the EUSS was made. The claimant in *Akinsanya* was again refused under the EUSS after the Secretary of State reviewed the decision and has been granted permission to judicially review that decision. In addition, an application has been made for permission to appeal the decision in *Velaj* [2022] EWCA Civ 767, which also has some relevance here. In these circumstances, I acceded to Mr Thoree's request to remit the appeal to the First-tier Tribunal.

Decision

The making of the decision of the First-tier Tribunal did involve the making of an error of on a point of law.

The decision of the First-tier Tribunal is set aside.

The appeal is remitted, de novo, to the First-tier Tribunal to be reheard at Hatton Cross, with a time estimate of 3 hours by any judge except Designated Judge Woodcraft.

Signed: T Kamara
Upper Tribunal Judge Kamara

Date: 5 September 2022