IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-004311
First-tier Tribunal No:
EA/06833/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 19 May 2023

Before

UPPER TRIBUNAL JUDGE BLUNDELL

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

JOHN JANER CARDONA RIANO

Respondent

Representation:
For the Appellant: Mr Clarke, Senior Presenting Officer
For the Respondent: Mr Thoree, Solicitor, of Thoree & Co

Heard at Field House on 17 April 2023

DECISION AND REASONS

1. The Secretary of State appeals, with the permission of Upper Tribunal Judge Pickup, against the decision of First-tier Tribunal Judge Shakespeare. By her decision of 5 January 2022, Judge Shakespeare ("the judge") allowed Mr Riano's appeal against the Secretary of State's refusal of his application for Indefinite Leave to Remain under paragraph EU11 of the Immigration Rules.

2. To avoid confusion, I shall refer to the parties as they were before the judge: Mr Riano as the appellant, and the Secretary of State as the respondent.

Background

3. The relevant facts are not in dispute. The appellant is a Colombian national. He was born on 16 August 1982. On 25 October 2020, he applied for settled status on the basis that he had completed a continuous qualifying period of five years in the UK as a person with a Zambrano right to reside (Ruiz Zambrano v Office national de l'emploi (Case 34/09) [2012] QB 265). He stated that he was a joint primary carer who shared responsibility for a British citizen child. He named his daughter – a British citizen who was born in 2009 – as the relevant person.

4. The appellant claimed that he provided his daughter with financial and emotional support and that he nurtured her. He stated that care was shared with his daughter's mother, who was a naturalised British citizen who was born in Iran. The appellant stated that he was separated from his daughter's mother but that he continued to have face to face contact with her twice weekly pursuant to a court order. The appellant stated that he would take his daughter with him to Colombia in the event that his application was refused, and that he would do so in order that they could continue to enjoy their family life together.

5. Various documents were submitted in support of the appellant's application, one of which was his biometric residence permit. That showed that he had leave to remain in the United Kingdom which was valid from 27 October 2018 to 27 April 2021. It is not in issue between the parties that this leave to remain was granted in recognition of the appellant's family life with his daughter.

6. The appellant's application was refused by the Secretary of State on 31 March 2021. Her reasons for refusing the application were materially as follows:

> *One of the requirements for qualifying for settled or pre-settled status as a person with a Zambrano right to reside is that you do not already hold leave to enter or remain in the UK, unless this was granted under the EU Settlement Scheme.*
>
> *Our records show that you currently hold leave to enter the UK valid until 27 April 2021 . This leave was granted under Family/private life not under the EU Settlement Scheme. This means you cannot qualify as a person with a Zambrano right to reside.*
>
> *As your existing leave to enter or remain means your application cannot succeed, we have not considered the rest of your application.*

The Appeal to the First-tier Tribunal

7. The appellant appealed to the First-tier Tribunal and his appeal was heard by the judge, sitting at Taylor House on 3 December 2021. The appellant was represented by Mr Thoree, as he was before me. The respondent was represented by counsel.

8. The judge refused the Secretary of State's application to adjourn the appeal to await the decision of the Court of Appeal in SSHD v Akinsanya [2022] EWCA Civ 37; [2022] QB 482, which was to be heard on 7 December 2021. She noted that the appellant's bundle contained material relating to Family Court proceedings, in breach of the Family Procedure Rules 2010. She required Mr Thoree to file and serve an amended bundle in which those documents had been omitted.

9. The judge then proceeded to hear the appeal. She heard evidence from the appellant and submissions from the representatives before reserving her decision.

10. In her reserved decision, the judge turned firstly to the appellant's leave to remain and she found as follows:

[33] The first question I consider is the matter of the Appellant's leave to remain in the UK. The Appellant says that his leave to enter the UK expired on 27 April 2021. That date is referenced in the reasons for refusal letter and as such is not disputed by the Respondent. I therefore find that the Appellant had leave to enter at the date of the decision, 31 March 2021, but that this leave expired on 27 April 2021. Therefore, at the date of the hearing before me the Appellant did not have leave. Under regulation 9 of the Immigration (Citizens' Rights Appeals) (EU Exit) Regulations 2020 I am permitted to consider any matter which I think relevant to the substance of the decision, including a matter arising after the date of the decision. On that basis I am satisfied that the Appellant now meets the requirements of paragraph (b) of the definition of 'person with a Zambrano right to reside' at Annex 1 of Appendix EU because he does not have leave to enter or remain in the UK. In my judgment it is not necessary for me to consider the status of the pending appeal in Akinsanya in this regard, because either the requirement is unlawful and will be subject to change, in line with Mostyn J's decision, or the Appellant meets it because he now has no leave to enter or remain. Either way, the Appellant is successful on this point. _

11. Having resolved that issue in the appellant's favour, the judge considered the remaining requirements of regulation 16 of the Immigration (EEA) Regulations 2016. She accepted that the appellant was not an exempt person [34]; that he was the primary carer of his daughter [38]; and that the appellant's daughter would be compelled to leave the UK in the event that the appellant was returned to Colombia [39]-[42]. So it was that the judge accepted that the appellant met the definition of a person with a Zambrano right to reside in Annex 1 to Appendix EU of the Immigration Rules, and she allowed the appeal accordingly.

The Appeal to the Upper Tribunal

12. The respondent sought permission to appeal. Her application was refused by the FtT. She recast her renewed grounds of appeal in the following concise terms:

The First-tier Tribunal erred in law in allowing the appellant's appeal under the Citizens' Rights Appeals Regulations as neither available ground of appeal could succeed; and it failed to have proper regard to a material matter in that the appellant enjoyed (and enjoys) continuing leave pending his appeal after an in time application (the subject of this appeal) before expiry of his previous leave to remain granted pursuant to Article 8 ECHR. The holding of such leave prevents the assertion of a Ruiz Zambrano derivative right, and although the associated rule was held by the Administrative Court to be unlawful, it was never quashed and is the subject of an imminent announcement on a policy review after the Court of Appeal dismissed the Secretary of State's challenge. In the interim the impugned decision was not in breach of Scheme rules and raised no Withdrawal Agreement rights which could be breached.

13. The grounds of appeal noted that the challenge was brought on a protective basis pending the announcement of the review which was to take place following the

decision of the Court of Appeal in SSHD v Akinsanya. I note that the result of that review was announced five days after the grounds were lodged, and I will return to the respondent's current position in due course.

14. Permission was granted by Judge Pickup, who considered the grounds to be arguable notwithstanding the Court of Appeal's decision in SSHD v Akinsanya.

15. The appeal came before Upper Tribunal Judge Jackson in January this year but it was adjourned because Mr Thoree had not been properly notified of the hearing. Mr Clarke confirmed at that hearing that the respondent intended to pursue the appeal because the Immigration Rules had consistently precluded the appellant from meeting the terms of EU11 or EU14 as he was a person with leave to remain at the date of application and decision. He indicated his intention to rely on a Home Office guidance note entitled *EU Settlement Scheme: person with a Zambrano right to reside*, version 6, dated 14 December 2022. Judge Jackson recorded all of this in a note which she issued following the adjourned hearing.

16. So it was that the appeal came before me on 17 April, when the representation was the same as it had been before Judge Jackson. I had noted in advance of the hearing that the respondent had issued a new version of the guidance note mentioned by Judge Jackson; version 7 of that guidance was issued on 12 April 2023. I informed the parties at the outset of the hearing that I had seen this note and that I intended to have regard to it as representing the respondent's current position. Mr Thoree did not have it, although Mr Clarke confirmed that he had sent it to him by email on 14 April. Mr Thoree was able to locate a copy on the internet and was satisfied, having perused it briefly, that he required no further time.

Submissions

17. Mr Clarke submitted that the appellant could not succeed on any legitimate view of the case and that the judge had misdirected herself in law in concluding otherwise. The appellant evidently had no rights under the Withdrawal Agreement and the only issue was therefore the Immigration Rules. The appellant had been refused because he held leave to remain at the date of the respondent's decision. Paragraph EU11 stated in terms that its conditions had to be met at the date of application and it was indisputable that the appellant had leave at that point.

18. It was, in any event, common ground that an application for further leave to remain had been made before the expiry of the appellant's leave in April 2021. That application attracted the protection of section 3C of the Immigration Act 1971. The appellant had been granted further leave subsequently. The result was that the appellant had held leave to remain at all material times and the judge had erred in concluding that his leave had expired, even if she had been correct to consider the position after the date of application.

19. Mr Thoree submitted that the appellant's leave had expired by the date of the hearing and that the extension of leave by section 3C was immaterial. The appellant's right to reside on Zambrano grounds had crystallised at the point of his daughter's birth in 2009 and it made no sense for him to be prevented from applying and exposed to the hostile environment. Mr Thoree accepted that the Immigration Rules stated that their requirements were to be met at the date of application but there should, he submitted, be 'some sort of leeway'. The appellant had already accumulated five years' qualifying residence as a

Zambrano carer and there was nothing to compel him to make the application. He had an inalienable right to reside. There was no error in the judge's decision.

20. Mr Clarke responded briefly, inviting me to consider carefully what had been said in Akinsanya, at [55] of Underhill LJ's judgment in particular.

21. I reserved my decision at the conclusion of the submissions.

Legal Framework

22. The appellant contended before the FtT that he met the requirements for Indefinite Leave to Remain in paragraph EU11 of Appendix EU of the Immigration Rules. At all material times, that paragraph has provided materially as follows:

EU11. Persons eligible for indefinite leave to enter or remain as a relevant EEA citizen or their family member, or as a person with a derivative right to reside or with a Zambrano right to reside EU11. The applicant meets the eligibility requirements for indefinite leave to enter or remain as a relevant EEA citizen or their family member (or as a person with a derivative right to reside or a person with a Zambrano right to reside) where the Secretary of State is satisfied, including (where applicable) by the required evidence of family relationship, that, at the date of application and in an application made by the required date, one of conditions 1 to 7 set out in the following table is met:

(1) …
(2) …
(3) (a) The applicant:
(i) …
(ii) …
(iii) …
(iv) …
(v) is a person with a Zambrano right to reside; or
(vi) is a person who had a derivative or Zambrano right to reside; and

(b) The applicant has completed a continuous qualifying period of five years in any (or any combination) of those categories; and

(c) Since then no supervening event has occurred in respect of the applicant

[…]

23. The requirements in the main body of Appendix EU are supplemented and defined by a lengthy Annex. At the date of the appellant's application and until 9 November 2022, that Annex defined a 'person with a Zambrano right to reside' in the following way:

a person who has satisfied the Secretary of State, including (where applicable) by the required evidence of family relationship, that, by the specified date, they are (and for the relevant period have been), or (as the case may be) for the relevant period in which they rely on having been a person with a Zambrano right to reside (before they then became a person who had a derivative or Zambrano right to reside) they were:

(a) resident for a continuous qualifying period in the UK with a derivative right to reside by virtue of regulation 16(1) of the EEA Regulations, by satisfying:

(i) the criterion in paragraph (1)(a) of that regulation; and

(ii) the criteria in:

(aa) paragraph (5) of regulation 16 of the EEA Regulations; or

(bb) paragraph (6) of that regulation where that person's primary carer is, or (as the case may be) was, entitled to a derivative right to reside in the UK under paragraph (5), regardless (where the person was previously granted limited leave to enter or remain under paragraph EU3 of this Appendix as a person with a Zambrano right to reside and was under the age of 18 years at the date of application for that leave) of whether, in respect of the criterion in regulation 16(6)(a) of the EEA Regulations, they are, or (as the case may be) were, under the age of 18 years; and

(b) without leave to enter or remain in the UK, unless this was granted under this Appendix

24. On 9 November 2022, by paragraph APP EU11 of HC719, the respondent amended this definition. In the Explanatory Memorandum to the Paper, at paragraph 7.32, she stated that the change had been made in the wake of the decisions in SSHD v Akinsanya and Velaj v SSHD, so as to 'uncouple' the Immigration Rules from the Immigration (EEA) Regulations 2016. The current definition is in the following terms:

a person who has satisfied the Secretary of State by evidence provided that they are (and for the relevant period have been) or (as the case may be) for the relevant period they were:

(a) resident for a continuous qualifying period in the UK which began before the specified date and throughout which the following criteria are met:

(i) they are not an exempt person; and

(ii) they are the primary carer of a British citizen who resides in the UK; and

(iii) the British citizen would in practice be unable to reside in the UK, the European Economic Area or Switzerland if the person in fact left the UK for an indefinite period; and

(iv) they do not have leave to enter or remain in the UK, unless this was granted under this Appendix or in effect by virtue of section 3C of the Immigration Act 1971; and

(v) they are not subject to a decision made under regulation 23(6)(b), 24(1), 25(1), 26(3) or 31(1) of the EEA Regulations, unless that decision has been set aside or otherwise no longer has effect; or

(b) resident for a continuous qualifying period in the UK which began before the specified date and throughout which the following criteria are met:

(i) they are not an exempt person; and

(ii) they are under the age of 18 years (unless they were previously granted limited leave to enter or remain under paragraph EU3 of this Appendix as a person with a Zambrano right to reside and were under 18 at the date of application for that leave); and

(iii) their primary carer meets the requirements of sub-paragraph (a) above; and

(iv) the primary carer would in practice be prevented from residing in the UK if the person in fact left the UK for an indefinite period; and

(v) they do not have leave to enter or remain in the UK, unless this was granted under this Appendix or in effect by virtue of section 3C of the Immigration Act 1971; and

(vi) they are not subject to a decision made under regulation 23(6)(b), 24(1), 25(1), 26(3) or 31(1) of the EEA Regulations, unless that decision has been set aside or otherwise no longer has effect

in addition:

(a) 'relevant period' means here the continuous qualifying period in which the person relies on meeting this definition; and

(b) unless the applicant relies on being a person who had a derivative or Zambrano right to reside or a relevant EEA family permit case, the relevant period must have been continuing at 2300 GMT on 31 December 2020; and

(c) where the role of primary carer is shared with another person in accordance with sub-paragraph (b)(ii) of the entry for 'primary carer' in this table, the reference to 'the person' in sub-paragraph (a)(iii) above is to be read as 'both primary carers'

Analysis

(i) Did the First-tier Tribunal Err in Law?

25. It has never been contended that the appellant has any entitlement under the Withdrawal Agreement. The focus in the First-tier Tribunal was correctly on the only other ground of appeal available to the appellant under The Immigration (Citizens' Rights Appeals) (EU Exit) Regulations 2020, which is that the decision to refuse Indefinite Leave to Remain "is not in accordance with residence scheme immigration rules." (regulation 8(3)(b) refers).

26. There can be no doubt that the judge misdirected herself in law in considering the appellant's entitlement under the Immigration Rules. In considering whether the appellant was a person with a Zambrano right to reside, the judge correctly turned her mind to the definition in Annex 1 but she erred in her assessment of limb (b) of that definition, as set above.

27. The judge decided that the appellant did not have leave to remain because his leave to remain had expired in April 2021, but the reality was that he had made an 'in time' application for leave to remain. It was not in dispute before me that such an application engaged section 3C of the Immigration Act 1971 and served to create what has in the authorities been called a 'statutory extension of the original leave': JH (Zimbabwe) v SSHD [2009] EWCA Civ 78; [2009] Imm AR 499, at [35]. If the judge was correct to assess the appellant's circumstances at the date of the hearing, therefore, she erred in law in concluding that he was without leave to enter or remain at that point.

28. It is equally clear, however, that the judge erred in law in considering the appellant's circumstances at the date of the hearing before her. As is apparent from the opening words of paragraph EU11 itself, the position is to be considered as at 'the date of application'. The date of application is defined in the Immigration Rules at paragraph 6. It cannot be interpreted to mean the date of

the hearing before an appellate body. By paragraph 6.2 of the Rules, that term refers (in a case such as the present) to the date on which the paper application form was sent by post by Royal Mail. This is therefore a rule which specifies a 'fixed historic timeline' (see AQ (Pakistan) v SSHD [2011] EWCA Civ 833; [2011] Imm AR 832) and circumstances which arise after the date of application cannot go to satisfy such a rule. Even if the judge had been correct to conclude that the appellant's leave had expired by the date of the hearing before her, therefore, the rule did not permit her to take that into account.

29. It follows that the judge erred in her consideration of limb (b) of the definition of a person with a Zambrano right to reside. I set aside [33] of her decision accordingly.

(ii) Remaking the Decision on the Appeal

30. Having set aside the judge's assessment of limb (b), I shall remake the decision on the appeal in that respect. I must consider whether the decision to refuse ILR 'is not in accordance with residence scheme immigration rules', that being the only ground of appeal pursued in this appeal.

31. A question necessarily arises about the version of the Immigration Rules which I must consider. The law in that respect is as stated by Lord Brown in Odelola v SSHD [2009] UKHL 25; [2009] 1 WLR 1230. The Immigration Rules are statements of policy and, unless they specify to the contrary the changes 'take effect whenever they say they take effect with regard to all leave applications, those pending no less than those yet to be made.': [39].

32. It is quite clear from the implementation section of HC719 that the pre-existing Rules were preserved in certain respects and for certain categories of cases. In respect of the changes made by paragraphs APP EU1 to APP EU26, however, the Paper simply stated that they 'shall take effect on 9 November 2022'. It is therefore the amended definition of a person with a Zambrano right to reside, as reproduced at [24] above, which I must apply.

33. In light of that amendment, the second conclusion of the Court of Appeal in SSHD v Akinsanya loses any purchase which it might otherwise have had. As Judge Pickup noted when he granted permission to appeal, the Court's first conclusion in that case was that the Secretary of State was correct in her submission that a Zambrano right to reside only arose where the carer had no domestic or other EU law right to reside in the UK. It held, therefore, that a person such as the appellant who had limited leave to remain in the UK was not entitled to a Zambrano right to reside. The court's second conclusion, however, was that the Secretary of State had erred in her understanding of regulation 16 of the Immigration (EEA) Regulations 2016 when she framed the Immigration Rules in a manner which excluded a person with limited leave to remain from the definition of person with a Zambrano right to reside.

34. Because the Secretary of State has amended the Immigration Rules with immediate effect from 9 November 2022, I need not confront the potentially difficult question of whether the respondent would have been entitled to submit that the appellant was unable to satisfy limb (b) of the previous definition in circumstances in which the Court of Appeal had held that part of the Rules to be legally erroneous. The 'coupling' between the 2016 Regulations and the Immigration Rules which gave rise to that error has now been corrected, and

there was no argument before me that the current Rules are unlawful for any reason. Given the limited grounds of appeal available in an appeal of this nature, I very much doubt that any such argument could have availed the appellant in any event.

35. The result is that the appellant cannot meet the Rules in their current form. He enjoyed leave to remain at the date of his application and, although in my view that is the proper temporal focus of the enquiry, he has enjoyed leave to remain at all times thereafter. That leave was granted under Appendix FM of the Immigration Rules. He is therefore unable to meet paragraph (b)(v) of the current definition. That fact means that he is not a person with a Zambrano right to reside and is not entitled to ILR under the Immigration Rules.

36. Mr Thoree relied in his closing remarks on what he described as the appellant's 'inalienable' right to reside in the UK under EU Law. The difficulty with that submission is that the UK has withdrawn from the European Union and the appellant has no such right under the Withdrawal Agreement. Insofar as he wishes to rely on any such right which might previously have existed, he can only do so through the Immigration Rules, and he cannot meet those Rules for the reasons I have set out.

37. In the circumstances, I will remake the decision on the appellant's appeal by dismissing it under the Immigration Rules.

Notice of Decision

The decision of the First-tier Tribunal is set aside. The decision on the appeal is remade by dismissing it.

M.J.Blundell

Judge of the Upper Tribunal
Immigration and Asylum Chamber

28 April 2023