IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-003850
FtT No: EA/04442/2020

THE IMMIGRATION ACTS

Decision & Reasons Issued:

On 6th of December 2024

Before

UPPER TRIBUNAL JUDGE O'CALLAGHAN
UPPER TRIBUNAL JUDGE SHERIDAN

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MARTHA OFOSUA NYARKO
(NO ANONYMITY ORDER MADE)

Respondent

Representation:
For the Appellant: Mr P Deller, Senior Presenting Officer
For the Respondent: Mr H Broachwalla, Counsel, instructed by Lawfare Solicitors

Heard at Field House on 4 November 2024

DECISION AND REASONS

Introduction

1. This appeal raises an issue of law: did the issuing of a *Zambrano* carer residence card to Ms Nyarko by the Secretary of State curtail previously issued leave to remain granted on article 8 grounds under Appendix FM of the Immigration Rules.

2. Consequent to *Zambrano* carers not falling within the scope of the Withdrawal Agreement Ms Nyarko filed her appeal with the First-tier Tribunal under regulation 8(3)(b) of the Immigration (Citizens' Rights Appeals) (EU Exit) Regulations 2020 on the sole ground that the respondent's decision of 28 August 2020 was not in accordance with Appendix EU of the Immigration Rules.

3. First-tier Tribunal Judge Gaskell ("the Judge") allowed Ms Nyarko's appeal by a decision sent to the parties on 31 July 2023.

4. The Secretary of State was granted permission to appeal by the Upper Tribunal on 30 October 2023.

5. The panel adjourned an error of law hearing held on 14 June 2024 consequent to Mr Deller confirming the Secretary of State's records indicated the earlier grant of leave to remain on article 8 ECHR grounds was issued to Ms Nyarko consequent to a human rights (article 8) application and not following an application for a derivative residence card, as understood by Ms Nyarko. The hearing proceeded before the panel on 4 November 2024 and at its conclusion the parties were directed to file written submissions addressing issues arising during the hearing. Following applications by both parties to amend directions, the Secretary of State filed her written submissions, with attendant documents, on 25 November 2024 and Ms Nyarko reciprocated on 27 November 2024.

6. We are grateful to Mr Deller and Mr Broachwalla for their oral and written submissions in this matter.

Relevant Facts

7. Ms Nyarko is a national of Ghana and aged 48. She resides with her daughter who was born in 2008 and is a British citizen. In these proceedings the child's father has been accepted as playing no role in his daughter's life.

8. Ms Nyarko entered the United Kingdom in September 2004 as a visitor and overstayed. She was encountered at a workplace in October 2012. Subsequently she made various human rights and derivative residence card applications. In 2016, she was granted appeal rights in respect of the Secretary of State's fourth refusal of an derivative residence card application. Her appeal was dismissed by First-tier Tribunal Judge Fox on 23 February 2018. Judge Fox found her to be an incredible witness and unable to establish to the requisite standard that she was the primary carer of her child. This conclusion was reached, in part, consequent to inconsistency in her evidence as to whether her daughter's father had abandoned the family in 2009. Judge Fox noted a letter sent by her to the Secretary of State whilst in detention referencing the father as having a close relationship with his daughter. It was also observed that the father had acknowledged his daughter's birth in 2009, sponsored his daughter's application for a British passport the following month and secured child benefit to be paid to Ms Nyarko's bank account. The Upper Tribunal refused permission to appeal.

9. In February 2018, Ms Nyarko applied for leave to remain on human rights (article 8 ECHR) grounds. The Home Office General Case Information Database ("GCID") records the application being received on 7 March 2018. A decision was made on 20 July 2018 to grant Ms Nyarko leave to remain under Appendix FM of the Rules, with such leave expiring on 20 January 2021. Valuable documents consisting of two Ghanian passports and a birth certificate were sent to Ms Nyarko's then legal representatives, Pishon Gold Solicitors, on 26 July 2018. The documents were returned, recorded as undelivered. On 6 August 2018 documents, including Ms Nyarko's biometric residence permit ("BRP"), were sent to Pishon Gold Solicitors' new office address. On 23 August 2018, these documents were returned undelivered to the Home Office. Further efforts to send documents to Pishon Gold Solicitors were unsuccessful, with them being returned undelivered on 20 September and 17 October 2018.

10. GCID records Ms Nyarko writing to the Home Office by letter which was received on 18 October 2018. She confirmed that she was no longer represented by Pishon Gold Solicitors. She detailed that she had not received her BRP, which was subsequently dispatched to her home address on 22 October 2018. We have not been informed that it was returned to the Home Office undelivered. Ms Nyarko has provided no

evidence as to whether the BRP was received by her or if not, why she did not again chase for it.

11. On her case, Ms Nyarko submitted her fifth application for a derivative residence card, relying upon her being a *Zambrano* carer, on 25 August 2018 as she unaware that she had been granted leave to remain. The Secretary of State refused the application by a decision dated 20 June 2019 observing that there is "a significant overlap between where a person wishes to remain in the United Kingdom on the basis of family life with a British citizen" and that they can "apply under Appendix FM 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". Ms Nyarko enjoyed extant leave to remain and so the Secretary of State concluded that the application founded upon a derivative right to reside was properly to be refused. To date, Ms Nyarko has not explained in these proceedings as to why she did not contact the Home Office to clarify the existence of a previous grant of leave to remain. We observe that she previously approached the Home Office in respect of receiving her BRP.

12. Ms Nyarko exercised statutory appeal rights, and the matter came before First-tier Tribunal Judge Farmer as a paper appeal, absent attendance by the parties. By a decision dated 3 December 2019, Judge Farmer considered the judgment of Green J (as he then was) in *R (Zewdu) v Secretary of State for the Home Department* [2015] EWHC 2148 and concluded:

> "7. I find that the same analysis applies. Once the respondent undertook his assessment and found that the regulation is engaged and all the requirements are met, it was not open to him to then issue a document under Article 8 and refuse the appellant's application. By doing so he was circumventing his obligations under Regulation 20(1) and I accept the submission on the appellant's behalf that this is unlawful.
>
> 8 In all the circumstances I allow the appeal under Regulation 20 and 16(5) and (8) of the Immigration (European Economic Area) Regulations 2016. The appellant is entitled to a derivative residence card in line with her application and the respondent's conclusions that she satisfies the criteria."

13. We observe that Judge Farmer proceeded from [5] onwards of her decision on the erroneous basis that leave under article 8 was granted upon considering a derivative rights (*Zambrano* carer) application

where in fact the grant related to the human rights application made in March 2018. Consequently, as accepted by Mr Broachwalla, the judgment in *Zewdu* held no relevance on the facts arising.

14. The Secretary of State did not appeal the decision of the First-tier Tribunal and issued a derivative residence card to Ms Nyarko on 9 January 2020. This was despite Ms Nyarko not satisfying the requirements of a *Zambrano* carer under the Immigration (European Economic Area) Regulations 2016 as she herself was not required to indefinitely leave the United Kingdom as she held extant limited leave to remain. Consequently, her daughter was not required to accompany her and reside indefinitely outside the United Kingdom or a member state of the European Union. We observe that consequent to her daughter's British citizenship and the previous grant of leave under Appendix FM there was at this time a realistic prospect of Ms Nyarko obtaining further leave on article 8 grounds if she were to apply for it. The derivative residence card is valid until 9 January 2025.

15. By an application submitted on 11 February 2020, Ms Nyarko applied for settled status under the EUSS as a person with a *Zambrano* right to reside, relying on her residence as a single parent living with a British citizen child. She detailed by means of the application form that there was "no other person in the UK to look after my daughter and she will therefore have to accompany me if I am required to leave the UK". The application was made under Appendix EU11 to the Rules.

16. The Secretary of State refused Ms Nyarko's application by a decision dated 28 August 2020 observing, *inter alia*, that records showed Ms Nyarko currently held leave to remain in the United Kingdom on article 8 grounds. Consequently, Ms Nyarko was considered not to qualify as a person with a *Zambrano* right to reside.

First-tier Tribunal Decision

17. The appeal came before the Judge sitting at Taylor House on 19 June 2023. Both parties were represented. The Judge recorded at [3] of his decision that there was no dispute between the parties that, at all material times, Ms Nyarko met the requirements firstly of regulation 16 of the 2016 Regulations and then Appendix EU11 of the Rules. The appropriateness of the concession made by the Secretary of State in both fact and law is addressed below.

18. Before the Judge, Ms Nyarko relied upon the Court of Appeal judgment in *Akinsanya v Secretary of State for the Home Department* [2022] EWCA Civ 37; [2022] QB 482 as establishing that the language of regulation 16(7)(c)(iv) of the 2016 Regulations, which provided that persons with indefinite leave to remain were not entitled to the *Zambrano* right to reside, was too clear and explicit to be construed as covering persons with limited leave to remain as well and that, therefore, a person with limited leave to remain was not thereby precluded from applying for a right to reside under regulation 16 of the 2016 Regulations. Consequently, it followed that the Secretary of State had erred in law in her understanding of regulation 16 when providing, in Annex 1 to Appendix EU to the Immigration Rules, that "a person with a Zambrano right to reside" did not include a person with leave to enter or remain in the United Kingdom, unless such leave was granted under Appendix EU.

19. The Judge recorded at [11] of his decision:

> "16. ... Accordingly, Mr Otchie [Ms Nyarko's counsel] submits that even if the initial 2018 decision had been lawful (Judge Farmer found that it was not), the grant of limited leave to remain at that time would not preclude the grant of a residence card under Regulation 16 of the 2016 Regulations or under Paragraph 11 of Appendix EU"

20. The Judge agreed with the submission advanced on behalf of Ms Nyarko:

> "13. ... Firstly, the respondent should not rely on the grant of limited leave in 2018 as a reason for refusal now because that grant was unlawful. Secondly, even if that grant [had] been lawful the decision currently under appeal is fundamentally flawed because the grant of limited leave in 2018 does not preclude the grant of a residence card now.
>
> 14. The parties are agreed that the appellant meets the requirement for the grant of [an] EU residents [sic] card as a person with a Zambrano right to reside. There is no lawful impediment to the grant of such a card and according [sic] this is this [sic] appeal is allowed."

21. We observe that the appeal before the Judge concerned Ms Nyarko's application for status under the EUSS, and not for an EEA residence card.

Grounds of Appeal

22. The Secretary of State contends that the First-tier Tribunal exceeded its statutory function by stepping outside the unambiguous factual matrix of the appeal and had no locus to "go behind" whether leave to remain granted under Appendix FM of the Rules ought to have been granted – it was enough that it was. The First-tier Tribunal was therefore "absolutely restricted" by the statutory grounds of appeal being limited to whether the decision was not in accordance with a Rule, and could not permissibly undertake a quasi-public law assessment as to the background to, or the appropriateness of, the grant of leave under Appendix FM.

23. Ms Nyarko drafted and filed a rule 24 response where she identified, *inter alia*, that she relied upon a five-year period in which she met the requirement of a *Zambrano* carer and so was entitled to settled status, such time running from January 2013 when her daughter returned to the United Kingdom following a visit to Ghana. We observe Judge Fox's adverse decision is dated 11 January 2018.

Witness statement evidence

24. By a witness statement dated 1 July 2024, Ms Julie Isherwood, an agent or servant of the Secretary of State, confirmed GCID as recording a human rights application for leave to remain on family/private life grounds being made by Ms Nyarko on 26 February 2018. Her legal representatives at this time are identified as Pishon Gold Solicitors. The Secretary of State granted Ms Nyarko leave to remain in July 2018, such leave running to 20 January 2021. GCID further records two Ghanian passports and a British birth certificate being dispatched to Pishon Gold Solicitors on 26 July 2018.

25. Mr Broachwalla did not challenge on Ms Nyarko's behalf the admittance of Ms Isherwood's statement under rule 15(2A) of the Tribunal Procedure (Upper Tribunal) Rules 2008. Nor was the admission of GCID records filed by Mr Deller contested. We consider Mr Broachwalla to have acted correctly in adopting such approach.

Law

26. Section 1(4) of the Immigration Act 1971:

> "(4) The rules laid down by the Secretary of State as to the practice to be followed in the administration of this Act for regulating the entry into and stay in the United Kingdom of persons not having the right of abode shall include provision for admitting (in such cases and subject to such restrictions as may be provided by the rules, and subject or not to conditions as to length of stay or otherwise) persons coming for the purpose of taking employment, or for purposes of study, or as visitors, or as dependants of persons lawfully in or entering the United Kingdom."

27. Section 3(1)(c) of the 1971 Act is concerned with permissible conditions that may be attached by the Secretary of State to limited leave to enter or remain:

> "(1) Except as otherwise provided by or under this Act, where a person is not a British citizen
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> ...
>
> (c) if he is given limited leave to enter or remain in the United Kingdom, it may be given subject to all or any of the following conditions, namely -
>
> (i) a condition restricting his work or occupation in the United Kingdom;
>
> (ia) a condition restricting his studies in the United Kingdom;
>
> (ii) a condition requiring him to maintain and accommodate himself, and any dependants of his, without recourse to public funds;
>
> (iii) a condition requiring him to register with the police;
>
> (iv) a condition requiring him to report to an immigration officer or the Secretary of State; and
>
> (v) a condition about residence."

28. Section 3(3) of the 1971 Act:

> "(3) In the case of a limited leave to enter or remain in the United Kingdom,—

(a) a person's leave may be varied, whether by restricting, enlarging or removing the limit on its duration, or by adding, varying or revoking conditions, but if the limit on its duration is removed, any conditions attached to the leave shall cease to apply; and

(b) the limitation on and any conditions attached to a person's leave (whether imposed originally or on a variation) shall, if not superseded, apply also to any subsequent leave he may obtain after an absence from the United Kingdom within the period limited for the duration of the earlier leave."

29. Regulation 16 of the 2016 Regulations concerned *Zambrano* carers:

"(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.

..."

30. Schedule 3 paragraph 1 of the 2016 Regulations:

"Leave under the 1971 Act

1. Where a person has leave to enter or remain under the 1971 Act which is subject to conditions and that person also has a right to reside under these Regulations, those conditions do not have effect for as long as the person has that right to reside."

Discussion

31. We find that the Judge's conclusion that the grant of limited leave on article 8 grounds in 2018 was unlawful to be an error of fact and law. Mr Broachwalla informed the panel, on instruction, that Ms Nyarko had no recollection as to the precise nature of the application made on her behalf in February 2018. We are not required to consider the veracity of Ms Nyarko's contention as Mr Broachwalla further accepted, on instruction, that a human rights application was made on article 8 grounds in February 2018, accompanied by a fee exemption application. Additionally, Mr Broachwalla accepted, on instruction, that a grant letter was issued by the Secretary of State in July 2018. On the evidence before us, the Judge's conclusion that the grant of limited leave issued by the Secretary of State in February 2018 was perverse. The conclusion was erroneously founded upon a mistaken understanding that limited leave to remain under Appendix FM was issued in relation to a derivative rights (*Zambrano* carer) application.

32. Secondly, the Judge erred in relying upon the Court of Appeal judgment in *Akinsanya* as establishing that a grant of limited leave to remain existing at the date of application - before or by the "required date" of 23.00 GMT on 31 December 2020 - does not preclude the grant of status under Appendix EU11. The Upper Tribunal confirmed in *Sonkor (Zambrano and non-EUSS leave)* [2023] UKUT 00276 (IAC) that the EUSS makes limited provision for certain *Zambrano* carers to be entitled to leave to remain, as a matter of domestic law. A *Zambrano* applicant under the EUSS who holds non-EUSS limited or indefinite leave to remain at the relevant date is incapable of being a "person with a *Zambrano* right to reside", pursuant to the definition of that term in Annex 1 to Appendix EU of the Rules. At [12]-[15] the panel explained that nothing in *Akinsanya* calls for a different approach.

33. A question for this panel is whether the issuing of a residence card by the Secretary of State on 9 January 2020 to Ms Nyarko curtailed existing leave to remain, or whether such leave continued.

34. We observe the following relevant dates:

i) The Secretary of State issued leave to remain under Appendix FM on 20 July 2018 valid until 20 January 2021;

ii) Ms Nyarko applied for a derivative residence card as a *Zambrano* carer on 25 August 2018;

iii) Following a successful appeal the Secretary of State issued Ms Nyarko with a derivative residence card on 9 January 2020, valid until 9 January 2025;

iv) Ms Nyarko applied for settled status under the EUSS on 11 February 2020, a date before the "required date";

v) The Secretary of State refused the application for status under the EUSS on 28 August 2020.

35. Mr Broachwalla submitted that the natural consequence of schedule 3 paragraph 1 of the 2016 Regulations is that leave previously issued to Ms Nyarko under Appendix FM could not "co-exist" with her right to reside under the Regulations, as the former was subject to a condition as to length of stay which enjoyed no effect upon Ms Nyarko being issued with a derivative residence card.

36. In the alternative, Mr Broachwalla submitted that if the length of stay is not a condition under the 1971 Act, Ms Nyarko's right to reside under the Regulations meant that the conditions attached to her leave to remain enjoyed no effect upon the issuing of the derivative residence card and so the purpose of the grant of leave to remain became redundant. It enjoyed no purpose.

37. Mr Broachwalla contended that in the circumstances Ms Nyarko did not enjoy leave to remain on article 8 grounds when she applied under the EUSS on 11 February 2020.

38. Residence under both the Immigration (European Economic Area) Regulations 2006 and 2016 was established under a regime existing parallel to leave to enter or remain granted under the statutory regime established by the 1971 Act, as confirmed by section 7(1) of the Immigration Act 1988:

> "A person shall not under the [Immigration Act 1971] require leave to enter or remain in the United Kingdom in any case in which he is entitled to do so by virtue of an enforceable EU right or of any provision made under section 2(2) of the European Communities Act 1972."

39. Section 7(1) provided an exemption from any obligation to obtain leave to enter and remain for all persons whose rights of entry and residence

flowed from EU law. It covered directly effective rights and rights under implementation measures adopted in the United Kingdom. This dual approach catered for the possibility of differences between EU law and implementation measures.

40. We note that section 7 was omitted on 31 December 2020 by schedule 1(1) paragraph 1 of the Immigration and Social Security Co-ordination (EU Withdrawal) Act 2020, a date after Ms Nyarko's EUSS application was refused.

41. That parallel regimes existed is confirmed by schedule 3 paragraph 1 of the 2016 Regulations, whereby a right to reside under the Regulations does not curtail previously granted leave to enter or remain under the 1971 Act, it simply establishes that conditions attached to such leave "do not have effect for as long as the person has that right to reside".

42. There is no mechanism under the 1971 Act, or any other Immigration Act, for leave to enter or to remain to come to end prior to its expiry date consequent to the reasoning underpinning the grant having become "redundant" as submitted by Mr Broachwalla. The 1971 Act identifies the power of the Secretary of State to vary extant leave to enter or remain, and curtailment is variation of a person's limited leave by restricting its duration under section 3(3).

43. At no time either before or after the issuing of the derivative residence card on 9 January 2020 did the Secretary of State take steps to restrict the duration of the leave to remain granted on 20 July 2018. On the facts arising, Ms Nyarko's limited leave was not curtailed by the issuing of the derivative residence card, nor was it varied in any other form.

44. Accordingly, as at the date of Ms Nyarko's application for status under the EUSS, and also at the date of the Secretary of State's subsequent decision, she held leave to remain on article 8 grounds and therefore was incapable of being a person with a *Zambrano* right to reside, pursuant to the definition of that term in Annex 1 to Appendix EU of the Rules.

45. Mr Broachwalla's alternative submission enjoys no merit. For the reasons detailed above, schedule 3 paragraph 1 of the 2016 Regulations is incapable by its terms of curtailing limited leave to remain.

46. In the circumstances, the decision of the Judge is subject to material error law and is properly to be set aside. The only answer available to the panel on remaking the decision is to dismiss Ms Nyarko's appeal.

47. It is unfortunate that the Secretary of State was only recently willing to provide a coherent account of the circumstances arising from the grant of leave in 2018 and subsequent efforts to provide Ms Nyarko with her status document and BRP. Clarity as to events was provided some time after the hearings before Judge Farmer and Judge Gaskell. What is clear to us on considering the evidence now presented is that Ms Nyarko did not satisfy the requirement for a derivative residence card in January 2020, as she enjoyed limited leave to remain in this country and at this date there existed no requirement that her daughter leave the United Kingdom with her and relocate to Ghana. From at least the date leave to remain was granted in July 2018 Ms Nyarko was not a *Zambrano* carer on a correct understanding of EU law: *R (Akinsanya and Aning-Adjei) v Secretary of State for the Home Department* [2024] EWHC 469 (Admin), at [117].

48. We make a further *obiter* observation. We accept that the reference to "conditions" in schedule 3 paragraph 1 of the 2016 Regulations may properly be directed to the condition of "length and stay" permitted by section 1(4) of the 1971 Act as well as to the conditions further elaborated upon at section 3(1) and (3). However, the Regulation is in clear terms; conditions imposed upon a grant of limited leave do not have effect for as long as the person has a right to reside under the Regulations. Merely being issued with an EEA or derivative residence card is not sufficient by itself as establishing a right to reside. For the reasons addressed in the paragraph above, from at least the date she was granted limited leave to remain in the United Kingdom, Ms Nyarko did not satisfy the requirements to be a *Zambrano* carer and consequently did not enjoy a right to reside under the Regulations. She did not enjoy the benefit of Schedule 3 paragraph 1 of the 2016 Regulations and so the condition of time placed upon her grant of leave continued to have effect until leave expired on 21 January 2021.

49. An issue arose during the hearing in November 2024 as to whether Ms Nyarko currently enjoys "section 3C leave" in these proceedings. Though not falling within the scope of the appeal, there was concern that Ms Nyarko understand her present position being mindful of the significant delay in the Secretary of State providing evidence as to the grant of limited leave to remain in 2018.

50. The purpose of leave under section 3C of the 1971 Act is to prevent a person who makes an in-time application to extend their leave from becoming an overstayer while they are awaiting a decision on that application and while any appeal or administrative review they are entitled to is pending.

51. Section 3C(1):

> (1) This section applies if -
>
> (a) a person who has limited leave to enter or remain in the United Kingdom applies to the Secretary of State for variation of that leave.
>
> (b) the application for variation is made before the leave expires; and
>
> (c) the leave expires without the application for variation having been decided.

52. The key requirement is that an application be made to vary existing limited leave to enter or remain. Section 3C leave could not previously be established in regard to an application for an EEA/ derivative residence card as this was not an application to extend or vary leave. Such application sought confirmation that rights under the 2016 Regulations were being exercised and therefore an applicant did not require leave to enter or remain.

53. The application under the EUSS was an application to vary leave. However, it was refused before the expiry of existing limited leave, and consequently the benefit of the statutory provision was not triggered. Mr Broachwalla submitted that the word “decided” in section 3C(1)(c) should be read expansively and so not be limited to the Secretary of State’s refusal of an application. He submitted that the “the application for variation having been decided” be interpreted to include the date of a final decision on appeal by a Tribunal. However, such reading is contrary to the clear and ordinary meaning of the words in this subsection. The benefit flows from leave expiring <u>without the application for variation having been decided</u>. The intention of the statutory provision is to extend a person’s existing leave until an application is decided or withdrawn.

54. Consequently, Ms Nyarko does not enjoy the benefit of section 3C leave and her limited leave to remain expired on 21 January 2021.

Notice of Decision

55. The decision of the First-tier Tribunal sent to the parties on 31 July 2023 is subject to material error of law and is set aside in its entirety.

56. The decision is remade. Ms Nyarko's appeal is dismissed.

D O'Callaghan
Judge of the Upper Tribunal
Immigration and Asylum Chamber

3 December 2024