UT Neutral citation number: [2023] UKUT 00162 (IAC)

Osunneye (Zambrano; transitional appeal rights)

Upper Tribunal
(Immigration and Asylum Chamber)

Heard at **Field House**

THE IMMIGRATION ACTS

Heard on **21 April 2023**
Promulgated on **30 May 2023**

Before

UPPER TRIBUNAL JUDGE SMITH

Between

ADEKUNLE OLUWASEUN OSUNNEYE
(NO ANONYMITY DIRECTION MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Osunneye appeared in person
For the Respondent: Ms A Nolan, Senior Home Office Presenting Officer

1. *Following the UK's withdrawal from the EU, the Immigration (European Economic Area) Regulations 2016 are continued for transitional purposes by statutory instruments including the Immigration and Social Security Coordination (EU Withdrawal) Act 2020 (Consequential, Saving, Transitional and Transitory Provisions) (EU Exit) Regulations 2020 (SI 1309/2020).*

2. *Paragraph 5 of Schedule 3 to the 2020 Regulations deals with "Existing appeal rights and appeals". Paragraph 6 of Schedule 3 then sets out the specified provisions of the EEA Regulations 2016. Neither regulation 16*

nor 20 of the EEA Regulations are included in that schedule. Regulation 36 relating to appeal rights is. Schedule 2 to the EEA Regulations is also amongst the provisions continued as modified. At paragraph 6(cc), the modifications to that schedule are set out.

3. *Those provisions draw a distinction between appeals which arise before or are against decisions taken before 31 December 2020 (paragraphs 5(1)(a) to (c)) and those against decisions taken after 31 December 2020 (paragraph 5(1)(d)).*

4. *Contrary to the unreported decision in Secretary of State for the Home Department v Oluwayemisi Janet James (UI-2021-000631; EA/05622/2020), the right of appeal against a decision made prior to 31 December 2020 therefore continues in force until finally determined (see in that regard paragraph 5(2) of Schedule 3 to the 2020 Regulations).*

5. *Part Four of the Withdrawal Agreement is concerned with transitional provisions which apply during the transition or implementation period between the date of the Withdrawal Agreement and 31 December 2020.*

6. *Part Four of the Withdrawal Agreement applies "Union law" during the transition period. The Zambrano right is a derivative one which depends on Article 20 Treaty for the Functioning of the European Union (TFEU). The TFEU is part of "the EU Treaties". It is continued in force during the transition period.*

DECISION AND REASONS

PROCEDURAL BACKGROUND

1. By a decision promulgated on 16 December 2022, the Upper Tribunal (myself and Deputy Upper Tribunal Judge Malik KC) found there to be an error of law in the decision of First-tier Tribunal Judge N M Paul dismissing the Appellant's appeal against a decision made by the Respondent on 22 September 2020, refusing his application for a derivative residence card as the primary carer of a British Citizen child. The Tribunal gave directions for the re-making of the decision in this Tribunal. A copy of the Tribunal's decision is appended hereto for ease of reference.

2. The appeal came back before me on 31 January 2023 for re-making. On that occasion, the Respondent raised a new issue relating to the Tribunal's jurisdiction to determine the appeal. A supplementary skeleton argument was submitted by the Respondent in which she sought to argue that the Tribunal no longer had jurisdiction to decide the appeal as regulation 16 of the Immigration (European Economic Area) Regulations 2016 ("the EEA Regulations") had not survived the revocation of the EEA Regulations after 31 December 2020. An issue was also raised about the Respondent's preparedness for the hearing as the Respondent had not had sight of the Appellant's bundle before the First-tier Tribunal.

3. The Appellant then as now appeared in person. I was conscious that it would be unfair for me to dismiss his appeal for want of jurisdiction without giving him the opportunity to take advice on or be given time to consider the issue. I was also told by Mr Melvin who appeared for the Respondent on that occasion that the issue of jurisdiction was to be determined in another case by a Presidential panel shortly after the hearing. He sought an adjournment so that I could consider the issue with the benefit of a decision following full argument on that issue. I agreed to the adjournment not simply for that reason but also because the Respondent did not have all the necessary documents from the Appellant in order to proceed. I gave directions for the Appellant to serve those documents and gave the Respondent the opportunity to apply for a further adjournment in the event that the decision of the Presidential panel to which he had referred had not been promulgated prior to the hearing before me (if that decision was still thought to be relevant).

4. The resumed hearing of the appeal was relisted before me on Friday 21 April 2023. On Thursday 13 April 2023, the Respondent sought a further adjournment. She did so on the basis that the decision of the Presidential panel had recently been promulgated but not yet reported. She wished to rely on that decision but considered that it would be unfair for the Appellant to have to deal with it without further time. The decision in question is Secretary of State for the Home Department v Oluwayemisi Janet James (UI-2021-000631; EA/05622/2020) ("James"). In James, the Tribunal concluded that it did not have jurisdiction to re-determine Ms James' appeal in not dissimilar circumstances to the current appeal.

5. I issued a Note on 14 April 2023 informing the Appellant of the decision in James (and appending it) and inviting him to consider whether he wished to seek an adjournment of the hearing on 21 April or whether he wished to proceed. I indicated that I would be content to adjourn if he wished to make that application but equally that, if the Respondent were correct, an adjournment would "simply prolong matters to no benefit" which would ultimately be a waste of the Appellant's time and money.

6. As it was, the Appellant did not seek an adjournment. Instead, he submitted a supplementary skeleton argument advancing his position that in James the Tribunal did not conclude that it had no jurisdiction; alternatively, the decision was contrary to decisions in other (unreported) cases, and/or was wrong in law.

7. At the outset of the hearing before me, I indicated to the parties that, unless they raised an objection, I intended to determine the jurisdiction issue on the basis of the parties' positions as set out in their supplementary skeleton arguments together with my own reading of James (and as appropriate the unreported decisions to which the Appellant referred) and the relevant legislative provisions. Both parties were content to proceed in that way in relation to the jurisdiction issue.

8. I also indicated that since the Appellant and his partner (JD) were both in court, it would be appropriate to hear their evidence and hear submissions as to the substance of the appeal so that, if I concluded that I had

jurisdiction to determine the appeal, I could go on to do so or, if I concluded that I did not, I could still make observations about the facts of the case. Those might still be relevant as I was informed in the course of the hearing that the Appellant had also made an application under the EU Settlement Scheme ("EUSS") which had been refused but was the subject of an appeal in the First-tier Tribunal which was presently stayed.

9. In addition to the oral evidence which I heard from the Appellant and [JD], I also had a number of documents filed by the Appellant to which I refer as necessary (they are not in a paginated bundle).

10. Having heard evidence from the Appellant and [JD] and submissions from both parties, I indicated that I would reserve my decision and provide that in writing which I now turn to do.

FACTUAL BACKGROUND

11. Before turning to the jurisdiction issue, it is necessary to set out the factual background to the Appellant's case as certain facts are relevant to the jurisdiction issue.

12. The Appellant entered the UK as a student on 3 October 2009. His leave in that capacity was extended to 16 October 2013. Thereafter, he overstayed.

13. Having made two applications for a residence card in 2013 and 2014 both of which were refused, and which led to appeals which the Appellant withdrew, on 20 June 2016, the Appellant applied for leave based on his family life. He was granted leave to remain until 21 April 2019.

14. On 5 April 2019, the Appellant sought further leave as an unmarried partner (I assume of [JD]). That was granted until 19 November 2021.

15. On 5 October 2019, the Appellant made an application for status under the EUSS. That was refused on 11 June 2020 which decision was upheld following administrative review on 3 July 2020.

16. On 30 June 2020, the Appellant made the application under the EEA Regulations which led to the decision under appeal made on 22 September 2020.

17. On 16 June 2021, the Appellant made an application under the EUSS which was refused. An appeal hearing in November 2021 was adjourned and that appeal remains stayed.

18. The Appellant's application under the EEA Regulations is premised mainly on his relationship with his child [P] who has behavioural problems. [P] was born in January 2016 and is therefore currently aged seven years. The Appellant claims a "Zambrano" derivative right to reside as he says that if he returned to Nigeria, [JD] and their children, in particular [P] would have to leave with him. [P] is a British citizen. [JD] is also a British citizen as is his other child born in May 2017. [JD] has a further child born in April 2012. The Appellant and [JD] now have a further young baby.

19. The Respondent's decision under appeal refused the application under the EEA Regulations on the basis that there was insufficient evidence to show that [P] lives with the Appellant, that the Appellant makes decisions in relation to his welfare or that the Appellant is financially responsible for him. The Respondent did not accept that [P] would have to leave the UK if the Appellant were not granted a derivative right of residence as he could remain with his mother ([JD]) who could continue to care for him. It was pointed out that the Appellant could make an application to remain under Appendix FM to the Immigration Rules based on his family life. The Respondent noted that the Appellant previously had leave to remain on that basis so that it was likely that such an application could succeed (in fact it appears that the Appellant still had such leave at the date of the refusal letter). It was therefore not accepted that [P] would be required to leave the UK.

JURISDICTION

20. The EEA Regulations were revoked on 31 December 2020 which coincided with "IP completion day" in relation to the UK's withdrawal from the European Union. However, some provisions of the EEA Regulations were retained for certain transitional purposes thereafter.

21. The provisions of the EEA Regulations which are relevant to my consideration are regulation 16 (which deals with the requirements for a derivative right to reside), regulation 20 (which sets out the circumstances in which the Respondent must issue a derivative residence card and which is therefore aligned with regulation 16) and regulation 36 (which sets out the rights of appeal against an adverse decision – of particular relevance here is regulation 36(5)).

22. As the Tribunal pointed out at [11] of the decision in James, the provisions of EU law which cease to apply after the UK's withdrawal from the EU include those entitling individuals to rely on a "Zambrano" derivative right to reside.

23. The EEA Regulations are continued for transitional purposes by statutory instruments including the Immigration and Social Security Coordination (EU Withdrawal) Act 2020 (Consequential, Saving, Transitional and Transitory Provisions) (EU Exit) Regulations 2020 (SI 1309/2020) ("the 2020 Regulations"). Both parties in this appeal agree that those are the relevant regulations. However, the parties disagree as to the effect of those regulations.

24. At [12] to [13] of the decision in James, the Tribunal concluded that the effect of the 2020 Regulations is that regulations 16 and 20 no longer apply to a determination of an appeal after 31 December 2020. That is because those provisions are not amongst those listed in paragraph 6 of Schedule 3 to the 2020 Regulations ("Schedule 3"). Paragraph 5 of Schedule 3 which is headed "Existing appeal rights and appeals" provides broadly that only those provisions which are included in paragraph 6 of Schedule 3 continue to apply. I will need to come back to that provision.

25. The Respondent sought permission to rely on the decision in James even though it remains unreported. I give permission to do so. As a decision of the President and Vice-President of this Tribunal it is of course highly persuasive. I do however note that the Tribunal did not have the benefit of full argument on this issue as Ms James was in person.

26. The Appellant also sought permission to rely on certain unreported decisions of this Tribunal. For the sake of completeness, I set out the titles of those cases:

- Tanjina Siddiqa v Entry Clearance Officer (UI-2022-001524; EA/02738/2021) – decision of Mrs Justice Hill and UTJ Kebede – promulgated 10 February 2023
- Secretary of State for the Home Department v Mrs Shokoria Zarmir (UI-2021-001513; EA/02205/2021) – my decision promulgated on 25 July 2022
- Secretary of State for the Home Department v Sandra Milena Hoyos Giraldo (UI-2022-002772; EA/01800/2021) – decision of UTJ Gleeson and DUTJ Chana promulgated on 11 December 2022.

27. None of those cases has any relevance to this appeal for the following reasons. They are all concerned with appeals against refusals of status under the EUSS and not derivative rights under the EEA Regulations. The transitional arrangements which apply in those cases are different. The Siddiqa case concerned an entry clearance decision in relation to an extended family member and has nothing to do with Zambrano carers. The other two cases were both concerned with the application of the judgment in R (oao Akinsanya) v Secretary of State for the Home Department [2022] EWCA Civ 37 which, as I pointed out at [9] of my error of law decision has no bearing in an appeal against a refusal under the EEA Regulations since it was concerned with the provisions of the EUSS. Two of the cases were error of law decisions only. Further and in any event, the jurisdiction issue was not raised or decided in any of those cases. As such, they have no bearing on my decision.

28. I therefore return to the 2020 Regulations since those are the applicable transitional arrangements. Schedule 3 to the 2020 Regulations provides for savings in connection with the EEA Regulations. Paragraph 1 states that, in Schedule 3, references to the EEA Regulations are to those regulations "as they had effect immediately before they were revoked" "unless provided otherwise".

29. Paragraph 3 of Schedule 3 provides for savings in relation to "pending applications for documentation under the EEA Regulations". Paragraph 3(6) continues regulation 20 of the EEA Regulations "for the purposes of considering and, where appropriate, granting an application for a derivative residence card which was validly made in accordance with the EEA Regulations 2016 before commencement day". That does not apply in this case as the Respondent had already considered and refused the Appellant's application before that date. However, this provision indicates

that it remains open to the Respondent to issue a derivative residence card even after the revocation of the EEA Regulations.

30. Paragraph 4 of Schedule 3 thereafter provides that the provisions of the EEA Regulations specified in paragraph 6 continue to apply despite the revocation of the EEA Regulations with the modifications there set out in order to determine whether an application as referred to in paragraph 3 should be granted.

31. Paragraph 5 of Schedule 3 is headed "Existing appeal rights and appeals" and is therefore particularly important for my purposes. Paragraph 5(1) is of some importance and so I set it out so far as relevant to the issue which here arises:

> **"Existing appeal rights and appeals**
> **5.**—(1) Subject to sub-paragraph (4), the provisions of the EEA Regulations 2016 specified in paragraph 6 continue to apply—
> (a) to any appeal which has been brought under the Immigration (European Economic Area) Regulations 2006 and has not been finally determined before commencement day,
> (b) to any appeal which has been brought under the EEA Regulations 2016 and has not been finally determined before commencement day,
> (c) in respect of an EEA decision, within the meaning of the EEA Regulations 2016, taken before commencement day, or
> (d) in respect of an EEA decision, within the meaning of the EEA Regulations 2016 as they continue in effect by virtue of these Regulations or the Citizens' Rights (Application Deadline and Temporary Protection) (EU Exit) Regulations 2020, which is taken on or after commencement day.
> (2) For the purposes of paragraph (1)—
> (a) an appeal is not to be treated as finally determined while a further appeal may be brought and, if such a further appeal is brought, the original appeal is not to be treated as finally determined until the further appeal is determined, withdrawn or abandoned; and
> (b) …
> …"

32. Paragraph 6 of Schedule 3 then sets out the specified provisions of the EEA Regulations 2016. As the Tribunal pointed out in James, neither regulation 16 nor 20 of the EEA Regulations are included in that schedule. Regulation 36 relating to appeal rights is. It appears that the Tribunal was not addressed about the relevance of that. It is particularly important because schedule 2 to the EEA Regulations is also amongst the provisions continued as modified. At paragraph 6(cc), the modifications to that schedule are set out as follows:

> "(aa)in relation to an appeal within paragraph 5(1)(a) to (c), in each of paragraphs 1 and 2(4), the words 'under the EU Treaties', in so far as they relate to things done on or after exit day but before commencement day, were a reference to the EU Treaties so far as they were applicable to and in the United Kingdom by virtue of Part 4 of the EU withdrawal agreement;
> (bb) in relation to an appeal within paragraph 5(1)(d), in each of paragraphs 1 and 2(4), the words 'under the EU Treaties', were a reference to 'under the Immigration (European Economic Area) Regulations 2016 as they are continued in effect by these Regulations or the Citizens' Rights (Restrictions

of Rights of Entry and Residence) (EU Exit) Regulations 2020, or by virtue of the EU withdrawal agreement…"

33. Those provisions are of importance as they draw a distinction between appeals which arise before or are against decisions taken before 31 December 2020 (paragraphs 5(1)(a) to (c)) and those against decisions taken after 31 December 2020 (paragraph 5(1)(d)).

34. That these provisions have relevance is confirmed by the Respondent's supplementary skeleton argument in this case. That points out that regulations 16 and 20 are not preserved under paragraph 6 of Schedule 3 but also accepts that regulation 36 is saved unmodified and schedule 2 to the EEA Regulations is also saved but as modified. Unfortunately, when setting out how the modifications apply (to the wording of section 84 Nationality, Immigration and Asylum Act 2002 - "Section 84" -as incorporated by schedule 2 to the EEA Regulations) the Respondent has referred to the amended wording as applies to an appeal under paragraph 5(1)(d) of Schedule 3 and not to an appeal under paragraph 5(1)(c) of Schedule 3 (as is this appeal).

35. Applying paragraph 6(cc)(aa) of Schedule 3 to the wording of schedule 2 to the EEA Regulations and Section 84 produces the following result:

> "SCHEDULE 2
> APPEALS TO THE FIRST-TIER TRIBUNAL
> 1. The following provisions of, or made under, the 2002 Act have effect in relation to an appeal under these Regulations to the First-tier Tribunal as if it were an appeal against a decision of the Secretary of State under section 82(1) of the 2002 Act (right of appeal to the Tribunal) –
> section 84 (grounds of appeal) as though the sole permitted grounds of appeal were that the decision breaches the appellant's rights under the EU Treaties in respect of entry to or residence in the United Kingdom so far as they were applicable to and in the United Kingdom by virtue of Part 4 of the EU withdrawal agreement."

I do not need to set out the remaining references to modifications to schedule 2 to the EEA Regulations. Broadly, they permit the Tribunal to consider matters as if section 84 included a ground of appeal on the above (modified) basis.

36. The issue then is how the fourth part of the EU withdrawal agreement ("the Withdrawal Agreement") applies (if at all) to this case. Part Four of the Withdrawal Agreement is concerned with transitional provisions which apply during the transition or implementation period between the date of the Withdrawal Agreement and 31 December 2020. It is no doubt for that reason that the modifications made to appeal rights under paragraph 6 of Schedule 3 distinguish as they do between decisions made and appeals brought during the transition period and decisions made after 31 December 2020.

37. Part Four of the Withdrawal Agreement applies "Union law" during the transition period. Certain provisions of the Treaties do not apply but none

are relevant to the issues in this appeal. The Zambrano right is a derivative one which depends on Article 20 Treaty for the Functioning of the European Union (TFEU). The TFEU is undoubtedly part of "the EU Treaties". It is continued in force during the transition period. It would appear therefore that the right of appeal against a decision made prior to 31 December 2020 continues in force until finally determined (see in that regard paragraph 5(2) of Schedule 3).

38. I have carefully considered how that interpretation is consistent with the removal of regulations 16 and 20 of the EEA Regulations which, as the Tribunal pointed out in James, are not part of the EEA Regulations which are preserved by the 2020 Regulations. However, the ground of appeal is not whether the Respondent's decision is contrary to the EEA Regulations but whether it accords with the EU Treaties (as now modified by what is said in paragraphs 5 and 6 of Schedule 3). As the Respondent points out in her supplementary skeleton argument, the impact of the modifications made by paragraph 6(cc) of Schedule 3 is broadly that, in relation to an application made to the Respondent before 31 December 2020 but not decided before that date, an appellant can appeal only on the basis that the Respondent's decision breaches the EEA Regulations (which no longer include regulations 16 and 20 as a result of paragraph 6 of Schedule 3) or the Withdrawal Agreement (which no longer confers any Zambrano right to reside). However, in relation to decisions taken prior to 31 December 2020 (as here) and appeals against decisions brought but not determined prior to 31 December 2020 an appellant continues to have a right of appeal on the basis that the Respondent's decision breaches the EU Treaties as they applied prior to withdrawal.

39. For those reasons, I have concluded that the Appellant continues to have an appeal which this Tribunal has the jurisdiction to determine.

40. I am fortified in my conclusion by the general interpretation provisions of the EEA Regulations as those are modified by the 2020 Regulations. Consistently with the way in which schedule 2 to the EEA Regulations has been modified as set out above, regulation 2 of the EEA Regulations is also modified to state (in summary) that things done between exit day and commencement day refer to rights conferred by the EU Treaties as continued in force during that period by Part Four of the Withdrawal Agreement but after commencement day references to the EU Treaties are omitted. It is worthy of note that the modifications do not remove the reference under the definition of an "EEA decision" to a derivative residence card.

THE APPELLANT'S CASE

41. I do not need to set out the evidence of the Appellant and [JD] in detail. They were cross-examined by Ms Nolan. The evidence which emerged from their written statements and oral testimony is as follows.

42. The Appellant, [JD] and their children (including [P]) live together as a family unit. The Appellant works full time (he has the right to do so as a

result of his earlier leave as continued by his application under the EUSS). [JD] works only part-time (although she is currently on maternity leave).

43. Notwithstanding the time spent working, I accept that the Appellant plays a pivotal role in the life of [P] in particular. The documentary evidence shows that [P] has behavioural problems. Although it appears that [P] has not yet been fully diagnosed with autistic spectrum disorder (ASD) and attention deficit hyperactivity disorder (ADHD) he has now been referred to professionals to consider this. [P] has been excluded from school on a number of occasions and is now attending a pupil referral unit between school attendances.

44. The evidence as to the Appellant's involvement with [P] is not limited to his own say-so or that of [JD]. A statement from a Community Staff Nurse with Buckingham Healthcare NHS Trust opines that the Appellant's absence "will have a significant impact on [P]'s emotional well-being, as well as impact his education as [the Appellant] has taken the role of supporting [P] with his school work".

45. A social worker, Ms Ncube, has also provided a statement dated 2 March 2023 in which she states that the Appellant is the main contact for Child and Adolescent Mental Health Services in relation to [P] and "is currently a key person in ensuring that this child remains in education and accesses support that is targeted around the child's Special Educational Needs and Neurodiversity". She also states that the Appellant "plays a role of advocacy" (as the Appellant also emphasised in his evidence) and "is a big part of the Child in Need plan that has been proposed by Social Services". Ms Ncube says that the Appellant's "availability to participate in these proposed plans are a key factor in us being able to achieve better outcomes for this child."

46. There are other reports specifically dealing with [P]'s behaviour which mention the Appellant's involvement in seeking to resolve problems but those are now quite out of date.

47. [JD] was asked in evidence why she could not continue to look after [P] if the Appellant left the UK. She accepted that she and the Appellant do co-parent [P] but said that [P] "struggles to self-regulate his emotions" and the Appellant is better able to deal with this. [P] is "able to connect with his father better as they share a male bond". She "struggles to get through to him" and "he responds better to his father". She confirmed that, although the main emphasis is on the relationship with [P], the Appellant also helps out with their other children.

48. Of course, as British citizens, neither [JD] nor the children would be required to leave the UK if the Appellant were to go. In her statement, [JD] says this about the situation which would arise in that eventuality:

> "If [the Appellant] is no longer present, [P] would be deprived of having a father, that, money cannot buy. It would reap devastating consequences for the development of our young son causing a detrimental impact on his upbringing emotionally and psychologically. It would also leave me unable to look after [P] as I would not be able to support in the financial upkeep to

meet his needs, forcing [P] either into a life of destitute poverty along with our other 3 children that we raise together or sending [P] away from the family unit and country he has been born and raised in. This would deny him of his British citizenship and his rights to access free education, health and social care and a breach of [P]'s human rights."

49. The central issue in relation to Zambrano is whether [P] would be obliged to leave the UK if the Appellant had to leave. I do not have to decide what the position would be if [JD] and the children were to remain in the UK and the Appellant were to leave. That position is covered by Article 8 ECHR. The Appellant has been given leave to remain on that basis in the past and I have no reason to suppose that he would not be given leave to remain on that basis in the future were he to apply for it. That though is not relevant to the issue here.

50. The question I have to ask myself is what would, as a matter of fact, occur. I refer to the requirements of regulation 16 of the EEA Regulations as set out at [13] of the error of law decision (which reflects EU law as it stood before the UK's withdrawal from the EU). I also refer to the Supreme Court's judgment in Patel and another v Secretary of State for the Home Department [2019] UKSC 59; [2020] Imm AR 600 ("Patel") and to the extract from that judgment set out at [14] of the error of law decision. The judgment in Patel is of particular relevance in this case as, in that case as here, the relevant child was living with both parents only one of whom would be required to leave.

51. For that reason, and because it was not clear from her written statement what the position would be in fact if the Appellant were to leave, I asked [JD] whether she would stay or leave if the Appellant went back to Nigeria. She accepted that this would be a difficult decision not least because of the potential impact on [P] of the withdrawal of the support which he is receiving from the authorities in the UK. However, she said that the family would have to move with the Appellant as she felt that they would be unable to cope without the Appellant. Although Ms Nolan sought to shake [JD]'s evidence in this regard, and [JD] continued to say that it would be a difficult decision for the reasons I have set out, she continued to insist that the family would have to move with the Appellant. I accept her evidence in that regard.

52. The Appellant as might be expected, also said that the family would have to move together. He pointed out the level of involvement which he has with [P] and said that [P]'s behaviour would be "more challenging" if he were not here. Although he recognised that [P] is now getting some support with his behavioural problems, he pointed out that he (the Appellant) is the initiator of such support as has been obtained. He also pointed out that, although [P] now has some support and has been referred for a fuller diagnosis, that support was not yet completely in place. There were still problems with [P]'s schooling. [P] had not yet had a formal diagnosis. He was still fighting to have [P] moved to a school which could better meet [P]'s needs.

53. I accept the Appellant's evidence about the role which he plays in [P]'s life. As I have noted above, that is confirmed by independent professionals (although I accept that the statements are brief, and I do not have a full report in that regard). I am however satisfied that, due to the family's circumstances, the financial and emotional support which the Appellant provides and the situation in particular in relation to [P], if the Appellant left the UK, the family would leave with him.

54. Turning back then to regulation 16(5) as it applied at the date of the Respondent's decision, the Appellant shares primary care of [P] with [JD] (in accordance with regulation 8(b)(ii)). [P] is a British citizen residing in the UK. I am satisfied that [P] would be unable to reside in the UK if the Appellant and [JD] left the UK. I am satisfied that [JD] would leave the UK with the Appellant if he returned to Nigeria, taking all four children with them. It follows that I accept that [P] would "be compelled to leave by reason of his relationship of dependency with his father" (as it was put in Patel). In reaching that finding, I pay particular regard to the strong emotional dependency which [P] has on his father as set out above.

55. For all of those reasons, I am satisfied that the Appellant meets the definition of a Zambrano carer as set out in regulation 16 of the EEA Regulations. Although regulation 16 is not preserved by the transitional arrangements which now apply, I am also satisfied that the Appellant comes within the provisions of the EU Treaties which apply to such a derivative right of residence.

56. It follows that I allow the Appellant's appeal.

NOTICE OF DECISION

The Appellant's appeal is allowed under the Immigration (European Economic Area) Regulations 2016.

L K Smith

Upper Tribunal Judge Lesley Smith

Judge of the Upper Tribunal
Immigration and Asylum Chamber

APPENDIX: ERROR OF LAW DECISION

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: UI-2021-001760
[EA/05108/2020]

THE IMMIGRATION ACTS

Heard at Field House, London	**Decision & Reasons Promulgated**
On Wednesday 16 November 2022	…**16 December 2022**……

Before

UPPER TRIBUNAL JUDGE SMITH
DEPUTY UPPER TRIBUNAL JUDGE MALIK KC

Between

MR ADEKUNLE OLUWASEUN OSUNNEYE

Appellant

-and-

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: The Appellant appeared in person
For the Respondent: Mrs A Nolan, Senior Home Office Presenting Officer

DECISION AND REASONS

BACKGROUND

1. The Appellant appeals against the decision of First-tier Tribunal Judge N M Paul promulgated 21 December 2021 ("the Decision"). By the Decision, the Judge dismissed the Appellant's appeal against the Respondent's decision dated 22 September 2020, refusing his application for a "Zambrano" right to reside under the Immigration (European Economic Area) Regulations 2016 ("the EEA Regulations"). Although the EEA Regulations have since been revoked, they are

preserved for the purpose of pending applications and appeals by transitional arrangements.

2. The Appellant's application was based on the position of his child [P] who is a British Citizen. [P] lives with his mother and the Appellant. The Respondent refused the application on the basis that the Appellant had not demonstrated by evidence that he is the primary carer of [P], that [P] would not have to leave the UK if the Appellant were required to leave as his mother [J] is also a British citizen and that the Appellant in any event had leave to remain due to his relationship with [P] and based on his Article 8 ECHR rights and would not therefore have to leave the UK. He could be expected to make a further application relying on his Article 8 rights which would have a "realistic prospect of success".

3. The Decision is a short one. The Judge found that the Appellant is not [P]'s primary carer, that [J] could in any event care for [P] in the Appellant's absence and that the Appellant also had leave to remain and was therefore excluded under the EEA Regulations.

4. The Appellant appealed on essentially three grounds which can be summarised as follows:

   Ground 1: The Judge failed to apply Regulation 16 of the EEA Regulations ("Regulation 16");
   Ground 2: The Judge relied on Home Office guidance found to be unlawful in the case of Akinsanya v Secretary of State for the Home Department [2021] EWHC 1535 ("Akinsanya");
   Ground 3: The Judge failed to have regard to the Supreme Court's judgment in Patel and another v Secretary of State for the Home Department [2019] UKSC 59 ("Patel");

5. Permission to appeal was granted by First-tier Tribunal Judge Austin on 8 February 2022 in the following terms so far as relevant:

   "… 3. The application raises an arguable ground that the decision was reached without full consideration of the Appellant's Zambrano right and whether it is extinguished by a previous grant of leave under Appendix FM."

6. The matter came before us to determine whether the Decision contains an error of law. If we were to conclude that it does, we must then decide whether the error should lead to a setting aside of the Decision and, if we set it aside, we must either re-make the decision or remit the appeal to the First-tier Tribunal to do so.

7. Having heard submissions from the Appellant and Mrs Nolan, and following discussion, Mrs Nolan conceded that the Decision contains an error of law. We accepted that concession and indicated that we would provide reasons for the concession and our acceptance of it in writing which we now turn to do.

DISCUSSION

8. We begin with the second of the Appellant's grounds. That and the terms of the grant of permission appear to have led the Respondent to consider that this appeal might have wider implications arising from Akinsanya. We do not consider that to be the case.

9. The judgment of Mostyn J in Akinsanya was appealed to the Court of Appeal ([2022] EWCA Civ 37). The Court of Appeal accepted that, under EU law, the Secretary of State was entitled to exclude from a "Zambrano" right, a person who

has only limited leave to enter or remain. However, the Secretary of State's appeal was dismissed because the Court held that the Secretary of State might have misunderstood Regulation 16(7) when framing the definition in Appendix EU to the Immigration Rules of "a person with a Zambrano right to reside". The case was therefore concerned with the interplay between Regulation 16(7) and the EU Settlement Scheme (EUSS). This appeal is not concerned with EUSS. The application was one made and decided under the EEA Regulations. Accordingly, Akinsanya is of no relevance.

10. We accept that the Court of Appeal's judgment in Velaj v Secretary of State for the Home Department [2022] EWCA Civ 767 ("Velaj") might have some bearing on this appeal but not for the reasons that the Respondent might consider it did. Velaj was concerned with an appeal under the EEA Regulations. However, Mr Velaj relied on what was said in Akinsanya as the basis for an argument that the Secretary of State intended to go further than EU law required by Regulation 16(5), in particular in the test which applied when considering Regulation 16(5)(c). The Court of Appeal however concluded that Akinsanya did not have that impact and that the guiding principles when interpreting Regulation 16(5)(c) remained those which were set out by the Supreme Court in Patel.

11. Judge Paul's findings are to be found at [8] and [9] of the Decision as follows:

> "8. The burden is on the appellant to show that he meets the requirements of the EEA Regulations. The simple answer in this case is that the appellant has not established that he is the Primary Carer under the **Zambrano** principle, because of course he shares the care of his child with the child's mother, and they are all living in a family unit. In any event according to the respondent's decision notice, he had previously been granted leave to remain under Appendix FM, and that was the correct route for a further application for leave to remain. Thus, it excluded him from being considered under the EEA Regulations.
> 9. In my view, the SSHD's analysis in this case is right, and the appellant's attempt to bypass the requirement of Appendix FM cannot succeed. The decision was properly made."

12. We take the first and third of the Appellant's grounds together as we consider that they overlap.

13. Prior to its revocation, Regulation 16 read as follows so far as relevant:

> "(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 …if the person left the United Kingdom for an indefinite period.
> …
> (7) In this regulation –
> …
> (c) An 'exempt person' is a person –
> …
> (ii) who has the right of abode under section 2 of the 1971 Act; or

...

(iv) who has indefinite leave to remain

(8) A person is the 'primary carer' of another person ('AP') if –

(a) the person is a direct relative or a legal guardian of AP ; and

(b) either –

(i) the person has primary responsibility for AP's care; or

(ii) shares equally the responsibility for AP's care with one other person who is not an exempt person.

(9) In paragraph ...5(c), if the role of primary carer is shared with another person in accordance with paragraph 8(b)(ii), the words 'the person' are to be read as 'both primary carers'."

14. In Patel, the Supreme Court said the following about the test which applies where more than one person shares the care of a child:

"28. Nor does *Chavez-Vilchez* in fact have any impact on the Shah appeal. The outcome of that appeal depends on the findings of fact by the FTT and on whether the Court of Appeal correctly identified the relevant findings for the purposes of the test of compulsion. The FTT found as a fact that Mr Shah was the primary carer of his infant son and that he, rather than the mother, had by far the greater role in his son's life (para 15). Accordingly, the child had the relevant relationship of dependency with Mr Shah. The FTT was entitled to make this finding on the facts, because the mother's evidence that Mr Shah was the primary carer of her child and that she could not assume full responsibility for him because she worked full time was not challenged. The mother's evidence that if Mr Shah was not allowed to stay in this country they would move as a family was also unchallenged. The FTT went on to reach what it called 'an inescapable conclusion' that the son would have to leave with his parents and that accordingly the requirement for compulsion was met.

29. The Court of Appeal [2018] 1 WLR 5245, however, introduced into the question of whether the son was compelled to leave the fact that the mother's decision to leave was her own choice, and that she, like her husband, would have been 'perfectly capable of looking after the child' (para 79). The Court of Appeal considered that it followed that there was no question of compulsion. Mr Blundell sought to uphold this conclusion, submitting that the mother simply wished to keep the family together and that reliance on a desire for family reunification was on the authorities not sufficient to justify a derivative right of residence (see *Dereci*, para 68; *O*, para 52; and *KA*, para 74).

30. I do not accept that submission. The overarching question is whether the son would be compelled to leave by reason of his relationship of dependency with his father. In answering that question, the court is required to take account, 'in the best interests of the child concerned, of all the specific circumstances, including the age of the child, the child's physical and emotional development, the extent of his emotional ties both to the Union citizen parent and to the third-country national parent, and the risks which separation from the latter might entail for that child's equilibrium' (*Chavez-Vilchez*, para 71). The test of compulsion is thus a practical test to be applied to the actual facts and not to a theoretical set of facts. As explained in para 28 of this judgment, on the FTT's findings, the son would be compelled to leave with his father, who was his primary carer. That was sufficient compulsion for the purposes of the *Zambrano* test. There is an obvious difference between this situation of compulsion on the child and impermissible reliance on the right to respect for family life or on the desirability of keeping the family together as a ground for obtaining a derivative residence card. It follows that the Court of Appeal was

wrong in this case to bring the question of the mother's choice into the assessment of compulsion.

31. It is likewise not relevant, contrary to the submission of Mr Blundell, that, had Mrs Shah remained in the UK with the child, Mr Shah could have had no derivative right of residence. On the facts as found by the FTT, the relevant relationship of dependency with Mr Shah was made out and that was not going to happen.

32. In those circumstances I consider that the Court of Appeal made an error of law when it treated as determinative what could happen to Mr and Mrs Shah's son if the father left the UK, rather than what the FTT had found would happen in that event. In other words, it was not open in law to the Court of Appeal to hold that Mr Shah had no derivative right of residence because the mother could remain with the child in the UK even if the father was removed."

15. Drawing together those two strands, the Judge has made the following errors.

16. First, the Judge erred in finding that the Appellant could not be a primary carer because he shares responsibility for [P]'s care with [J]. We did not hear full argument in relation to Regulation 16(8). We note that it might be said that [J] has a right of abode in the UK (as a British citizen), and is therefore herself an "exempt person". That was not however part of the Judge's reasoning. He appears to have considered that the Appellant could not be a primary carer if there were shared responsibility and his reasons are unclear. The Judge treated as determinative the fact that [P] has another carer when finding that the Appellant could not be a primary carer and failed to make a finding on the evidence (as set out at [5] of the Decision) whether in fact the necessary relationship of dependency is made out.

17. Second, and flowing from that, as the Supreme Court in Patel made clear, the test whether a British Citizen (child) will be required to leave requires consideration of what the factual position will be if an applicant is removed. The test is not whether another individual "could" care for the child but whether he or she "would". The Judge failed to consider that issue and failed to make any finding in that regard.

18. Returning to the second ground, the Judge appears to have thought that the fact of the Appellant having leave to remain "excluded him from being considered under the EEA Regulations". The fact that an applicant has any form of leave to remain might preclude a "Zambrano" application under Appendix EU succeeding (although we do not express any firm view about that since it is not relevant here). The position under the EEA Regulations, however, as confirmed by the Court of Appeal in Akinsanya, is that Regulation 16(7) precludes a "Zambrano" right only where an applicant has indefinite leave to remain. That is not the position here. Indeed, the Appellant told us that his leave to remain has now lapsed and he has not made an application for further leave based on his Article 8 ECHR rights.

19. For the foregoing reasons, the Appellant's grounds, particularly grounds (1) and (3) disclose errors of law. The second ground does not disclose an error in the terms in which it is pleaded. The Judge made no mention of any guidance issued by the Respondent. He based his decision on an exclusion under the EEA Regulations suggesting that he considered that the EEA Regulations themselves precluded the Appellant's right. That is legally incorrect.

20. Mrs Nolan's concession was based on the first and third grounds. We accept her concession for the reasons given above.

21. We discussed with the parties what should happen next. Mrs Nolan had suggested that it might be necessary for the Respondent to file a detailed skeleton argument based on Akinsanya and Velaj. However, following the discussion in that regard,

she accepted that this was not necessary as the legal principles which apply are set out in Regulation 16 and Patel.

22. The findings of fact required are limited and as we indicated to the Appellant, therefore, the appeal could either remain in this Tribunal or could be remitted to the First-tier Tribunal. We explained the implications of each course to him in terms of timing of hearings and appeal rights. Having done so, the Appellant asked that the appeal be re-determined in this Tribunal. We have given directions below to permit the Appellant to update his evidence (as we understand it, [P] is exhibiting some behavioural issues which may be relevant in relation to the Appellant's role).

CONCLUSION

23. The Appellant's grounds (particularly the first and third) identify errors of law in the Decision. We therefore set that aside. We do not preserve any findings. We have given directions below for a re-making hearing in this Tribunal.

DECISION

The Decision of First-tier Tribunal Judge N M Paul promulgated on 21 December 2021 involves the making of an error on a point of law. We therefore set aside the Decision.

DIRECTIONS

1. **By 4pm on Wednesday 14 December 2022, the Appellant is to file with the Tribunal and serve on the Respondent (at email) any further evidence on which he wishes to rely at the hearing.**
2. **The appeal is to be listed for a re-making hearing before any Upper Tribunal Judge (on a face-to-face basis) after Monday 19 December 2022 with a time estimate of ½ day. If an interpreter is required, the Appellant shall notify the Tribunal forthwith.**

Signed: L K Smith

Upper Tribunal Judge Smith Dated: 17 November 2022