UT Neutral Citation Number: [2024] UKUT 00235 (IAC)

Maisiri (EUSS; *Zambrano*; 'Realistic Prospect' policy)

IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Heard at Field House

THE IMMIGRATION ACTS

Heard on 22 January 2024
Promulgated on 21 June 2024

Before

UPPER TRIBUNAL JUDGE HANSON
and
UPPER TRIBUNAL JUDGE BLUNDELL

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

GABRIEL TICHAONA MAISIRI

Respondent

Representation:
For the Appellant: Peter Deller, Senior Presenting Officer
For the Respondent: Alex Papasotiriou, instructed by Legal Rights Partnership

It is not incumbent on a decision maker who is considering the application or appeal of a person who is said to have a Zambrano right to reside to assess whether that person stands a realistic prospect of securing leave to remain under another provision of the Immigration Rules, including Appendix FM. The Secretary of State's guidance entitled EU Settlement Scheme: person with a Zambrano right to reside has been wrong in suggesting otherwise from 14 December 2022 to date.

DECISION AND REASONS

1. We regret the delay in issuing this decision, which was caused in large part by the decision in R (Akinsanya & Aning-Adjei) v SSHD [2024] EWHC 469 (Admin) and the need to seek the submissions of the parties on the judgment of Eyre J after it was handed down on 11 March 2023.

2. The Secretary of State appeals with the permission of First-tier Tribunal Judge Chowdhury against the decision of First-tier Tribunal Judge Ripley. By her decision of 5 September 2023, Judge Ripley allowed Mr Maisiri's appeal against the Secretary of State's refusal to grant him leave to remain under Appendix EU of the Immigration Rules.

3. In order to avoid confusion, we will refer to the parties as they were before the First-tier Tribunal: Mr Maisiri as 'the appellant' and the Secretary of State as 'the respondent'. We will refer to the First-tier Tribunal as 'the FtT' and to Judge Ripley as 'the judge'.

Background

4. The appellant is a Zimbabwean national who was born on 1 December 1984. He arrived in the United Kingdom as a visitor in 2004. He then overstayed his leave to enter. He claimed asylum in 2009 but that claim was refused and his appeal against that decision was dismissed later that year.

5. On 25 June 2021, the appellant applied for leave to remain. The application was for leave under the EU Settlement Scheme as a person with a Zambrano right to reside. The fifty-page application form which he completed with the assistance of his representatives included the following information. The appellant stated that he believed that he was eligible for pre-settled status. He stated that he had completed a continuous qualifying period of less than five years as a person with a Zambrano right to reside, or a combined qualifying period of less than 5 years with other types of residence. He stated that he was applying as a joint primary carer who shared responsibility for a British citizen child or dependent British citizen adult with one other person. He named the British citizen as his daughter, who was born in London on 9 October 2016. He named the other joint primary carer as Ms Joseph, who is his partner and his daughter's mother. Ms Joseph is settled in the United Kingdom.

6. The covering letter which accompanied the appellant's application form stated that Ms Joseph and the appellant were unmarried partners. It stated that they shared equal responsibility for looking after their daughter. It was said that the appellant's daughter would not be able to remain in the UK in the event that he was required to leave, largely because Ms Joseph had a registered disability in the form of rheumatoid arthritis which caused significant pain. She also had mental health problems. The appellant's wife and daughter were therefore 'entirely dependent' on the appellant for their care. She would be forced to leave the UK with him in the event of his removal.

7. The covering letter also included a section in the following terms (the emphasis is in the original):

> "On 9 June 2021 the High Court in R (Akinsanya) v Secretary of State for the Home Department [2021] EWHC 1535 (Admin) ruled that the Home Office had misunderstood EU law and that Zambrano carers rights to reside were not affected by a grant of limited leave to remain, **or by the possibility of getting limited leave to remain.**
>
> Your guidance also states that Zambrano carers cannot have EUSS leave to remain if they can get other leave to remain. In R (Akinsanya) v Secretary of State for the Home Department, Mr Justice Mostyn quashed that unlawful guidance.
>
> Accordingly, our client satisfies the requirements under Regulation 1 6 of the EEA and therefore the requirements under Appendix EU. Our client is the primary carer of a British Citizen national, who resides in the UK and his British Citizen daughter would be unable to remain in the UK if he left the UK for an indefinite period."

8. The application was refused by the Secretary of State on 18 January 2023. The respondent did not accept that the appellant had been a person with a Zambrano right to reside in the UK before the specified date (31 December 2020). That was because the appellant's daughter would not in practice have been compelled to leave the UK if the appellant left the UK for an indefinite period. In turn, that was because the Secretary of State considered it likely that the appellant would have qualified for leave under Appendix FM of the Immigration Rules if he had applied for the same. The respondent considered that the appellant had "a realistic prospect of being granted Appendix FM leave as a parent of a British citizen". The respondent cited the decision of the Court of Appeal in Velaj v SSHD [2022] EWCA Civ 767; [2023] QB 271 as being supportive of his decision.

The Appeal to the First-tier Tribunal

9. The appellant appealed to the First-tier Tribunal. He was represented then, as now, by Mr Papasotiriou.

10. Mr Papasotiriou filed a long Appeal Skeleton Argument in which he contended that the respondent's decision was not in accordance with the Residence Scheme Immigration Rules. The respondent was said to have misunderstood Velaj v SSHD; the appellant did not have extant leave to remain and the FtT was not required to undertake a "proleptic assessment of what other form(s) of leave the person could likely obtain, or would have a realistic prospect of obtaining." The reality of the case, he submitted, was that the appellant's partner was in no position to care for their daughter on her own and the refusal of the application would mean that their daughter was compelled to leave the UK with him. Any other approach was contrary to established domestic and Court of Justice ("CJEU") authority.

11. The respondent filed a rather shorter Review on 30 May 2023. He accepted that the appellant had been his daughter's primary carer since 2019. But he maintained the overarching position in the refusal letter, asserting that the appellant "would have likely qualified for leave under Appendix FM as the parent of a British citizen if he had applied prior to the specified date'". The respondent was therefore "satisfied that the primary carer and British citizen would not have been required to leave the UK." The appellant was not a person with any right to reside under the principle in Zambrano.

12. The appeal came before the judge, sitting at Hatton Cross, on 18 August 2023. The appellant was represented by Mr Papasotiriou. The respondent was unrepresented. Given that there were no issues of fact in dispute, the judge heard a submission from Mr Papasotiriou before reserving her decision.

13. In her reserved decision, the judge made reference to the relevant provisions of the Immigration Rules and to the authorities cited by Mr Papasotiriou, including Akinsanya v SSHD [2022] EWCA Civ 37; [2022] QB 482, Velaj v SSHD and Iida v Stadt Ulm (Case C-40/11); [2013] 1 CMLR 47. Having summarised those arguments, the judge stated at [24] that she accepted what had been said by Mr Papasotiriou. The dispositive reasoning in the decision is found in its three final paragraphs:

> "[24] The respondent did not attend the appeal hearing and I accept the arguments put forward by the appellant. I accept that a Zambrano right should be considered as a protection for a British child of last resort, as referred in paragraph 57 of Velaj which summarises Lady Justice Andrews' understanding of the conclusion in Akinsanya. That paragraph states that a Zambrano right does not arise where a third country national otherwise enjoys a right under domestic law. This appellant does not enjoy a right. It is suggested by the respondent that he could apply for one. I am not satisfied that that is a pedantic distinction. There is a lack of European authority to support the respondent's guidance and the proposition the respondent relies on. Such an approach realistically leaves the appellant, who currently remains unlawfully in the UK, vulnerable to removal.
>
> [25] I also accept the appellant's argument that the drafting of the definition in Appendix EU does not, though [sic] any straightforward or purposeful reading, support the meaning that the respondent is seeking to attribute to it in her guidance. I find that that understanding is supported by her decision to include specific exclusions for those with limited and indefinite leave but no such exclusion for an individual who could make an Article 8 application.
>
> [26] I find that the decision appealed against was not in accordance with the provisions of Appendix EU. I am satisfied that the appellant meets the definition of a person with a Zambrano right to reside and satisfies the eligibility requirements for limited leave pursuant to paragraph EU 14."

The Appeal to the Upper Tribunal

14. The Secretary of State sought permission to appeal to the Upper Tribunal. The concise grounds were settled by Mr Deller. It was submitted that the judge had misdirected herself in law. She had misunderstood the relevance of the ability to make a successful application under Appendix FM; this was not a formal, procedural requirement but part of the detailed factual matrix to which the test in the Rules was to be applied. The Secretary of State's guidance was irrelevant; the critical point was that the appellant was less likely to face removal if he had strong ties to the UK.

15. Judge Chowdhury considered those grounds to be arguable and granted permission to appeal to the Upper Tribunal.

16. Mr Papasotiriou filed a response to the grounds under rule 24. We also have a skeleton argument from Mr Deller, to which he confirmed that the respondent's policy teams had made a significant contribution.

17. Mr Deller submitted that the analysis required by the relevant Immigration Rule was a holistic and fact-sensitive one. In any such case, the Tribunal was required to consider whether, if the Appendix EU application was refused, the primary carer would be required to leave the UK indefinitely and, if so, whether the British citizen would be unable, in practice, to remain in the UK, the EEA or Switzerland. In that respect, the test in the Immigration Rules mirrored the approach in the domestic and European Zambrano authorities.

18. Mr Deller acknowledged that there was no express reference in the Immigration Rules to the possibility of an applicant under Appendix EU applying for and securing leave to remain on another basis. He accepted that "quite a lot needs to be inferred" but he submitted that the scheme, and the necessary part played by the respondent's "realistic prospect" policy[1], was clear when the Rules were read as a whole and in the context of what had gone before.

19. We asked Mr Deller which version of the Immigration Rules applied to the appellant's case. He submitted initially that the relevant version was that which was in force at the date of the appellant's application (25 June 2021). Having reflected on the absence of relevant transitional provisions in HC719, however, Mr Deller could see no reason why the amended definition of "a person with a Zambrano right to reside" which was substituted on 9 November 2022 should not have applied at the date of the respondent's decision, or that of the FtT.

20. Mr Deller submitted that the obvious and rational meaning of the question posed by paragraph (a)(iii) of that definition was as contended in the skeleton argument; it was necessary to consider whether the British citizen would be required to leave, which in turn necessitated consideration of whether their primary carer would be required to leave. That necessitated consideration of whether the carer could make an application under the other Immigration Rules, and Appendix FM in particular. It was necessary to recall that a Zambrano right was merely a residual or derivative right, brought about to protect the rights of a Union Citizen under the TFEU. It was impermissible for a person to engineer a situation in which they benefitted from that right by deciding not to make an application under Appendix FM. As was clear from the Secretary of State's skeleton argument, it was not his position that the existence of such an alternative route was determinative; it was a part of a holistic and fact-sensitive enquiry.

21. Mr Papasotiriou submitted, citing Mahad v ECO [2009] UKSC 16; [2010] 1 WLR 48, that the Tribunal should consider the natural and ordinary meaning of the Immigration Rules. In his submission, the relevant provisions did not correspond with the submissions of the Secretary of State, and it was not possible to read the "realistic prospect" test into the Rules. It was accepted by the appellant in light of [47]-[48] of Velaj v SSHD that the test was not a purely hypothetical one but the European

[1] That convenient label is from [53] of the respondent's skeleton

authorities (Zambrano v Office national de l'emploi (Case C-34/09) [2011] 2 CMLR 46, Dereci v Bundesministerium für Inneres (Case C-256/11); [2012] 1 CMLR 45 and Iida v Stadt Ulm) militated against the respondent's approach. In the case of an appellant in the paradigm situation, there was more than a "purely hypothetical prospect" (Iida v Stadt Ulm refers, at [77]) of the British citizen's rights under the TFEU being obstructed by the removal of their carer. The circumstances in Velaj v SSHD were wholly distinguishable, in that the other carer was able to look after the British citizen and had no intention of leaving the UK.

22. Mr Papasotiriou accepted that the authorities (Dereci and Sanneh v SSWP [2015] EWCA Civ 49; [2015] 3 WLR 1867 in particular) showed that extant leave to remain was usually sufficient to defeat a claim to a Zambrano right but the Secretary of State invited the Tribunal to go a step further. Taking that step would lead to absurd results, he submitted, and it was to be recalled that a 'proleptic' analysis had been deprecated in other contexts. It was preferable, he submitted, to focus on the known circumstances, rather than engaging in speculation as to what might happen. In the instant case, there was no clear route available to the appellant under the Immigration Rules. He was not eligible to apply as a parent as a result of E-LTRPT 2.3 of Appendix FM and he would therefore be compelled to rely on his relationship with his wife, either in an application under the Ten Year Route or on Article 8 ECHR grounds under Gen 3.2 of Appendix FM. He might also have to make an application for a fee waiver. Any assessment under section EX1 would not be straightforward. The Secretary of State's "realistic prospect" approach was unnecessary and overly speculative. The proper course was to treat the possibility of a carer making an Appendix FM application as an irrelevancy and to consider their entitlement under Appendix EU on the basis of the known facts.

23. Mr Deller replied briefly, submitting that the appellant's vulnerability to removal could not be sufficient. It remained necessary to consider whether he had a potentially effective claim under Appendix FM.

24. We permitted Mr Papasotiriou to add a further point at the end of Mr Deller's submissions. He reminded us that the relevant route had been closed altogether by HC 1496. That had been effected by providing that applications were to have been made by the 'required date', which was 9 August 2023. In the event that the appellant could not successfully assert a claim under Appendix EU in this appeal, therefore, he would be unable to assert it in the future.

25. We reserved our decision at the end of the submissions.

26. On 11 March 2024, by which stage this decision was substantially complete, we noted that Eyre J had handed down judgment in R (Akinsanya & Aning-Adjei) v SSHD. The first issue which the court considered in that case, as summarised by Eyre J at [16], was whether the Secretary of State

> "was correct in formulating App EU and the Guidance on the basis that under EU law a Zambrano right to reside did not extend to those who had a real prospect of obtaining

leave to remain under a different route (even if those persons had not actually obtained such leave)?"

27. Given Eyre J's detailed consideration of that question, and the fact that it was the central question before us, we issued directions requiring the parties to make written submissions on the judgment. Mr Papasotiriou's submissions for the appellant were filed and served on 28 March. Mr Deller's submissions for the respondent were filed and served (after a short extension of time) on 8 April 2024.

28. The parties' positions on the judgment were, in outline only at this stage, as follows.

29. The Secretary of State's primary position was that our decision should be stayed to await the outcome of any appeal he might make against Eyre J's decision. In the alternative, Mr Deller submitted that a decision of the High Court is not binding on the Upper Tribunal; that the relevant section of Eyre J's judgment was obiter; and that the relevant section of the judgment was wrong and that there were powerful reasons not to follow it.

30. For the appellant, Mr Papasotiriou submitted that Eyre J's resolution of the "realistic prospect" question was part of the ratio of his decision or, in the alternative, that it was highly persuasive and should be followed. Mr Papasotiriou submitted that Eyre J rejected the Secretary of State's critical submission that Velaj v SSHD supported the "realistic prospect" question and that we should reach the same conclusion.

31. We are grateful to the advocates for their written submissions. We made enquiries of the Administrative Court after receiving those submissions. We learned that Eyre J had refused applications by the claimants and the defendant for permission to appeal to the Court of Appeal. We received a copy of his final order, which was sealed on 24 April 2024.

32. We do not know whether the claimants or the Secretary of State have made applications for permission to appeal directly to the Court of Appeal. We do not consider it necessary or desirable to stay this appeal in order to await the outcome of any application(s) which might be made. To do so would only serve to delay these proceedings still further and, in any event, we consider the correct outcome of this appeal to be clear.

33. We record that neither party invited us to reconvene the hearing to hear oral submissions. We have nevertheless considered whether to do so, and have decided that further oral submissions are not necessary in light of the comprehensive written submissions made.

The Immigration (EEA) Regulations 2006 and 2016

34. From 16 July 2012, provision was made at regulation 15A of the Immigration (European Economic Area) Regulations 2006 for a person to assert a derivative right of residence within the United Kingdom's domestic legal framework. The Explanatory Memorandum to the Immigration (EEA)(Amendment) Regulations 2012 (SI

2012/1547) stated that the amended Regulations gave effect to recent judgments of the CJEU, although Zambrano was not one of the judgments listed. Further amendment was made to the 2006 Regulations later in 2012, however, and the Explanatory Memorandum to the Immigration (EEA)(Amendment)(No 2) Regulations 2012 made clear that the relevant amendments were designed to give effect to the decision in Zambrano.

35. From 1 February 2017, the Immigration (EEA) Regulations 2016 made corresponding provision at regulation 16. Those Regulations ceased to have effect, save for certain transitional purposes, on 31 December 2020. The final version of regulation 16 was in force from 28 March 2019 to 30 December 2020. For present purposes, it suffices to note that a person in the appellant's position was required to show that he was not an "exempt person"; that he was the primary carer of a British citizen who was residing in the UK; and that the British citizen

> "… 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."

The Immigration Rules

36. The EU Settlement Scheme opened on 30 March 2019, on which date Appendix EU was inserted into (or added onto) the Immigration Rules. Appendix EU made provision from that date for a person with a Zambrano right to reside to apply for Indefinite Leave to Remain (under paragraph EU 11) or limited leave to remain (under paragraph EU 14). The definition of a person with a Zambrano right to reside was to be found in Annex 1 and was as follows:

> "a person:
>
> (a) with, by the specified date, a right to reside in the UK by virtue of regulation 16(1) of the EEA Regulations, by satisfying the criteria in:
>
> (i) paragraph (5) of that regulation; or
>
> (ii) paragraph (6)(c) 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); and
>
> (b) without leave to enter or remain in the UK granted under another part of these Rules."

37. That definition was subsequently amended but the cross-reference to regulation 16 of the 2016 Regulations remained until a wholesale replacement of the definition was effected by paragraph APP EU11 of HC719. Certain parts of that instrument preserved the application of the pre-existing Immigration Rules for pending applications but APP EU11 took effect on 9 November 2022.

38. By application of the principle in Odelola v SSHD [2009] UKHL 25; [2009] 1 WLR 1230, therefore, it was that new definition which applied when the Secretary of State came to make a decision on the appellant's application on 18 January 2023. The new

definition of a person with a Zambrano right to reside was in the following terms (with emphasis supplied):

> "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'"

39. Our focus in this decision is on the underlined requirement in that definition: paragraph (a)(iii). Since its introduction on 9 November 2022, that paragraph has remained unchanged.

40. It is also necessary before leaving the Immigration Rules to note the point made by Mr Papasotiriou at the very end of the hearing. As a result of amendments effected by HC 1496, the Zambrano route closed to new applicants from 9 August 2023, that being the 'required date' by which such applications were to be submitted.

Published Policy

41. It will be necessary at a later stage in this decision to say something about the development of the respondent's published policy. For the time being, it suffices to note that the relevant policy is entitled *EU Settlement Scheme: person with a Zambrano right to reside*. The current version is version 8.0, which was published on 15 August 2023.

42. Version 6.0 of the guidance was published on 14 December 2022. It was that version of the guidance which introduced, for the first time, the "realistic prospect" assessment with which we are concerned. The relevant parts of the guidance have not changed since that date, and are as follows.

43. Section 3 on page 23 of the current guidance is entitled "Eligibility – Zambrano primary carer". It requires a caseworker to adopt the following three stage test:

> "Where the applicant relies on being a Zambrano primary carer and meets the initial eligibility requirements in section 2 of this guidance, you must then consider the following 3 additional stages.
>
> These are:
>
> • stage 1: British citizen resides in the UK: assessing whether the person for whom the applicant claims to be the primary carer is a British citizen who resides in the UK
>
> • stage 2: primary carer: assessing whether the applicant is the primary carer of the British citizen
>
> • stage 3: British citizen unable to reside in the UK, the EEA or Switzerland:

assessing whether, in practice, the British citizen would be unable to reside in the UK, the EEA or Switzerland if the applicant was in fact required to leave the UK for an indefinite period

The applicant must meet these 3 stages for the whole continuous qualifying period in the UK, which began before the specified date, in which they rely on having been a 'person with a Zambrano right to reside' in order to be eligible for leave under the scheme as such a person."

44. The guidance on the third stage of that process appears at page 28 of the current guidance. It states:

> "The third additional stage is to assess whether, in practice, the British citizen would be unable to reside in the UK, the EEA (the 27 EU Member States, other than the UK when it was a member, together with Iceland, Liechtenstein and Norway) or Switzerland if the applicant were in fact required to leave the UK for an indefinite period.
>
> As held by the Court of Appeal in Velaj v SSHD [2022] EWCA Civ 767, this assessment requires a fact-based enquiry looking at whether, in practice, the British citizen would be unable to remain in the UK, an EEA Member State or Switzerland, if the applicant were in fact required to leave the UK for an indefinite period."

45. On the same page, under the sub-heading "Could the British citizen live in the UK?", there is further reference to the Court of Appeal's judgment in Velaj v SSHD. This section requires decision makers to consider "whether the applicant would be required to leave the UK for an indefinite period if their EU Settlement Scheme application as a 'person with a Zambrano right to reside' is refused". It continues:

> "This includes an assessment of whether the applicant either has or could obtain lawful immigration status. If, as a result of the refusal of their EU Settlement Scheme application, the applicant would not in fact leave the UK for an indefinite period, then the applicant will not meet this criterion."

46. Further guidance on the nature of that assessment is at page 31 (we have emboldened the sub-headings which appear in purple in the original document):

> **"The applicant has never applied under Appendix FM or Article 8 ECHR**
>
> If the applicant has never made an application under Appendix FM or a claim that their removal from the UK would breach their right to respect for private or family life as protected by Article 8 ECHR, you must consider whether, on the balance of probabilities, an applicant is likely to qualify for Appendix FM leave such that the applicant has failed to show that they would in fact leave the UK for an indefinite period: see Considering the prospects of making a successful Appendix FM, private life or long residence application.
>
> **Considering the prospects of making a successful Appendix FM, private life or long residence application**
>
> This is not an exercise to assess whether the applicant qualifies for leave to remain under Appendix FM or based on their private life or long residence, as this can only be done

by the relevant caseworker following the making of a valid application under that route, but to consider whether there is a realistic prospect that they would do so (or would have done so), such that they cannot satisfy you that they would (or would have) in fact left the UK for an indefinite period.

If the applicant cannot satisfy you of this on the balance of probabilities, then the British citizen would be able to continue to live in the UK. As a result, the applicant will not meet the requirements to be a 'person with a Zambrano right to reside'.

If the applicant submits any information or evidence about whether or not they meet the relevant requirements, this must be taken into account when you make the decision.

You must not argue that an applicant could have obtained leave under a route before that route existed. Therefore, please note:

• Appendix FM came into force on 9 July 2012. Before that, parent and partner routes were in Part 8 of the Immigration Rules

• Appendix Private Life came into force on 20 June 2022 for applications made on or after that date, replacing paragraphs 276ADE to 276DH in Part 7 of the Immigration Rules

You must base your assessment on the applicant's individual circumstances and consider any relevant information or evidence provided. Some guidance is set out below on some of the scenarios you may see:

• the applicant claims to be the parent (including adoptive parent) or legal guardian of a British citizen child

• the applicant claims to be the primary carer of their British citizen spouse or civil partner • the applicant claims to be the primary carer of a British citizen direct relative who is not their spouse, civil partner, or minor child

• the applicant claims long residence in the UK"

Analysis

47. This is not a case about applicants who already have leave to remain which was granted outside the residence scheme Immigration Rules and who contend that they are eligible for leave to remain as a Zambrano carer. The Upper Tribunal has already given guidance on individuals in that category in Sonkor (Zambrano and non-EUSS leave) Ghana [2023] UKUT 276 (IAC), and nothing we say in this decision is intended to cast doubt on that decision.

48. This case concerns, instead, applicants for leave to remain under paragraph EU11 or EU14 who do not have leave to remain but who, on the Secretary of State's case, have a "realistic prospect" of securing leave under other provisions of the Rules, primarily Appendix FM.

49. We note that Mr Deller does not contend simply that a realistic prospect of securing leave to remain on an alternative basis is determinative of a Zambrano carer's

application, in the same way that the possession of extant leave to remain would be. His case, as summarised at [45] of his skeleton argument, is put in this way:

> "The SSHD does not contend that *Velaj* is authority that the *Zambrano* circumstances do not obtain where there is a realistic prospect of the primary carer acquiring LTE/R under the wider Immigration Rules. Rather, he contends that it is clear, following *Velaj*, and in line with the above case law, that the assessment under sub-paragraph (a)(iii) requires a fact-based enquiry looking at whether, if the Appendix EU application is refused:
>
> a. the primary carer, in fact (i.e. more likely than not), will be required to leave the UK for an indefinite period; and, if so
>
> b. the British citizen would be unable, in practice, to remain in the UK, the EEA or Switzerland."

50. That submission closely mirrors the terms of the guidance which we have reproduced above, and this case is therefore concerned not only with the correctness of Mr Deller's submissions, but also with the correctness of the guidance upon which it is based.

51. We decided following the hearing in January that the Secretary of State's submissions, and the guidance which we have cited immediately above, were wrong as a matter of law. We came to that conclusion for three reasons, which were as follows.

52. Firstly, that the natural and ordinary meaning of the words used in the Immigration Rules did not suggest that the prospect of securing leave in another (non-Zambrano) category was a relevant consideration. Secondly, that the Secretary of State's approach was not supported by authority. And, thirdly, that the "realistic prospect" test was likely to be unfair and unworkable in practice, whether for caseworkers or judges on appeal. We will explain those reasons in greater detail before turning to Eyre J's decision in Akinsanya & Aning-Adjei and considering the correctness of our own initial conclusions in light of that decision and the submissions which were made about it.

The Secretary of State's First Difficulty – The Construction of the Immigration Rules

53. There is no dispute about the proper approach to the construction of the Immigration Rules. It is necessary to consider the language of the rule, construed against the relevant background. That involves consideration of the rules as a whole and the function they serve in the administration of immigration policy: Odelola v SSHD [2009] UKHL 25; [2009] 1 WLR 1230. The Rules are not to be construed with all the strictness applicable to the construction of a statute but "sensibly according to the natural and ordinary meaning of the words used, recognising that they are statements of the Secretary of State's administrative policy": Mahad & Ors v SSHD [2009] UKSC 16; [2010] 1 WLR 48.

54. Adopting that approach, we were unable when we first heard this case to understand how the "realistic prospect test" in the Secretary of State's published policy was said to be found in the Immigration Rules. It was said by Mr Deller to be part of the enquiry required by paragraph (a)(iii) of the definition of a person with a *Zambrano* right to

reside. But that paragraph requires a decision maker to consider the consequences for the relevant British citizen if the applicant 'in fact left the UK for an indefinite period'. It does not require the decision-maker to consider what would or might happen in the event that the applicant made an application under other provisions of the Immigration Rules. The focus is on the present reality of the case, and not on alternative hypotheses of what might happen in the event that an alternative route was explored.

55. We considered that it would have been a simple matter for the Secretary of State to draft the Rules so as to contain the realistic prospect test. When we put that to Mr Deller, he was inclined to agree, although he maintained that there was no need to do so because the test was implicit in the words used in paragraph (a)(iii). We are unable to accept that submission. As drafted, it is simply impossible to read into that paragraph an intention that a decision maker should take such contingencies into account.

The Secretary of State's Second Difficulty – No Support in the Authorities

56. The intention in formulating the Immigration Rules was apparently to reflect settled authority on the eligibility of Zambrano carers; no more, and no less. Try as we might, however, we do not find any real support for the realistic prospect test in the authorities. It is not necessary to consider the authorities in the detail set out in the Secretary of State's skeleton argument. We considered the absence of any reference to those authorities in Mr Deller's oral submissions to be notable, and indicative of the absence of any real assistance being available in the jurisprudence.

57. It was not suggested in any of the CJEU authorities which were cited to us that the Article 20 TFEU rights of the EU national might not be compromised because their primary carer might in the future be able to regularise their status under domestic law. No such submission was made in Zambrano, Dereci, Chavez-Vilchez [2018] QB 103 or Iida and it has not, to our knowledge, been considered by the CJEU in any case.

58. In substance, the realistic prospect test is based not on the raft of European and domestic authority cited in the respondent's skeleton but on the decision of the Court of Appeal in Velaj v SSHD. If that is not clear from the policy guidance which we have already cited, it is clear beyond peradventure when one considers the *EU Settlement Scheme: derivative right to reside (Chen and Ibrahim/Teixeira cases)* guidance, version 6, which was published on 12 April 2023. That contains the same text as we have reproduced at our [45] above, underneath the sub-heading 'The Velaj Assessment'.

59. Velaj v SSHD was a case which arose under the Immigration (EEA) Regulations 2016. As Andrews LJ noted at [1], it specifically concerned regulation 16(5)(c), the material part of which we have reproduced at [35] above. As Andrews LJ explained at [15], the issue which fell for decision was

> "whether a person deciding whether the requirements of Regulation 16(5)(c) are fulfilled must consider whether the British Citizen dependant would be unable to reside in the UK on the *assumption* that the primary carer (or both primary carers, as the case may be)

will leave the UK for an indefinite period (irrespective of whether the assumption is correct); or whether the decision-maker must consider what the impact on the British Citizen would be if *in fact* the primary carer (or both primary carers) *would* leave the UK for an indefinite period."

60. Andrews LJ surveyed the domestic and European authorities in detail before concluding that the language of the regulation did not compel the decision maker to make a purely hypothetical and counterfactual assumption: [47]. She therefore proceeded on the basis that the second of the approaches set out at [15] was the correct one. Andrews LJ explained that Chavez-Vilchez and Patel & Shah v SSHD [2019] UKSC 59; [2020] 1 WLR 228 showed that what was required was a fact specific enquiry, which called for a nuanced analysis of what was likely to happen in reality. Nothing in Akinsanya, CA, precluded the court adopting that construction of regulation 16(5)(c), for reasons which Andrews LJ explained at [53]-[70]. The reality in that case was that the British citizen children would, on the evidence, be remaining in the UK with their British citizen mother, there was no possibility that the children would be compelled to leave the UK with the appellant: [34].

61. On proper analysis, we do not consider that anything in Velaj v SSHD supports the realistic prospect policy adopted by the Secretary of State. The Secretary of State made no submission that Mr Velaj should have made an application for leave to remain under Appendix FM, or that his failure to do so was somehow relevant to the determination of his claim under regulation 16. The critical factor in that case was the statement by Mrs Velaj that she had no intention of leaving the UK with the children, and that was the factual basis upon which the appeal was decided in the Upper Tribunal and the Court of Appeal. Andrews LJ warned against taking a purely hypothetical approach to such cases, but that is what the Secretary of State has required his caseworkers to do in the subsequent policies, by considering the likely success or failure of applications which are yet to be made on the basis of evidence which is yet to be made available.

62. Following the hearing, therefore, we found ourselves in strong agreement with Mr Papasotiriou that nothing in Velaj v SSHD or the other authorities provided any support for the realistic prospect test.

The Secretary of State's Third Difficulty – Realistic Prospect Test Unfair and Unworkable

63. The effect of the guidance which we have reproduced at [41]-[46] above is to place a burden on a Zambrano applicant to demonstrate on the balance of probabilities that they would be unlikely to secure leave to remain under Appendix FM. Given that there is no such requirement in the Immigration Rules, or in the already overlong application form, we consider the imposition of such a burden to be conspicuously unfair. People such as the appellant have – since the amendment of the guidance – been refused leave under Appendix EU on a basis which they could not have discerned from the Immigration Rules or the form which they completed. Many such people would have been unrepresented.

64. It is also to be recalled that a person who is refused leave under Appendix EU because they are thought to have a realistic prospect of securing leave under Appendix FM cannot, as of August last year, simply make a further application; as noted above, the route is now closed to new applicants.

65. We struggle to understand the scope of the "realistic prospect" analysis which the guidance requires caseworkers to undertake. Both in the guidance and the submissions made before us, it seems that the expectation is that the caseworker should enquire into the merits of any application which might at some point be made by the applicant. Mr Deller accepted, therefore, that something more would be required than simply a decision that a person has a partner or a child in the UK, and might therefore be eligible for leave to remain on that basis.

66. We pressed Mr Deller at the hearing to assist us with the depth of the enquiry required of the caseworker, using the facts of this case as an appropriate example. Mr Deller thought that the caseworker should consider whether, on the facts, the appellant could make a claim under Appendix FM of the Immigration Rules. He accepted, as we understood him, that the caseworker should also consider whether that claim might be brought as a parent or a partner. We asked whether the enquiry should proceed beyond that stage. Mr Deller thought that it should, and submitted at one point that the caseworker should consider whether there was a realistic prospect of the appellant demonstrating on the balance of probabilities that he was entitled to leave to remain under Appendix FM. That mirrors the terms of the guidance, which suggests that it is for the applicant to satisfy the caseworker on the balance of probabilities that they would be unlikely to meet the other requirements of the Immigration Rules.

67. Despite the terms of the guidance (which states that "[t]his is not an exercise to assess whether the applicant qualifies for leave to remain under Appendix FM"), it is difficult to see how a caseworker can assess whether a person is likely to qualify under Appendix FM without undertaking a proper assessment under those Rules. There might be any number of reasons why a person with a British partner and/or a British child would be unlikely to secure leave to remain under Appendix FM, but those reasons are only likely to be identified by a caseworker properly applying their mind to the detailed provisions of Appendix FM. If a person is to be denied leave to remain as a Zambrano carer because they are thought to have a realistic prospect of securing leave under Appendix FM, it is imperative that the denial of the former entitlement is based on a proper consideration of the latter. The pre-screening approach which the guidance requires is no such thing, and is likely to lead to errors. Given the closure of the route from August 2023, the consequences of such errors may be significant; a person who would have been entitled to leave to remain as a Zambrano carer might lose that entitlement because a caseworker wrongly assessed there to be a realistic prospect of leave under Appendix FM.

68. We need not turn to hypothetical cases for an example of such an error. The Secretary of State concluded in this case that the appellant stood a realistic chance of "being granted Appendix FM leave as a parent of a British citizen". We explored that

suggestion with Mr Deller at the hearing, and it appears to be straightforwardly wrong, for the reasons given by Mr Papasotiriou.

69. The eligibility requirements for limited leave to remain as a parent include paragraph E-LTRPT 2.3. The appellant cannot satisfy E-LTRPT 2.3(a) because he does not have sole parental responsibility for his daughter; he and his wife live with their daughter as a family unit. The alternative, paragraph E-LTRPT 2.3(b), requires the applicant to satisfy three requirements. He is able, we think, to satisfy the first (as his partner is settled in the UK), but he cannot satisfy the second or third because his partner is his daughter's mother and because he is "eligible to apply for leave to remain as a partner'" (as to which, see SSHD v Khattak [2021] EWCA Civ 1873; [2022] Imm AR 576). Mr Deller accepted this analysis when it was put to him.

70. The caseworker in this case was wrong, therefore, to conclude that the applicant had any chance of securing leave to remain as a parent under Appendix FM. Whether or not he could meet the other requirements, he falls foul of the black and white requirements of the paragraph we have considered above. What of the applicant's eligibility for leave to remain as a partner, therefore? There is no suggestion that he would fall foul of the Suitability requirements. His partner is settled. They appear to be in a durable relationship and their relationship appears to be genuine and subsisting. The appellant is clearly in the UK in breach of the immigration laws, however, and he therefore falls foul of the Immigration Status Requirement at E-LTRP 2.2 of Appendix FM. He could only secure leave as a partner, therefore, if he is able to meet the requirements of the 'Ten Year Route' in D-LTRP 1.2 of that appendix. He must either establish, therefore, that there are insurmountable obstacles to the continuation of his family life in Zimbabwe (paragraph EX1 refers) or that a refusal would give rise to unjustifiably harsh consequences which would breach Article 8 ECHR (paragraph GEN 3.2(2) refers).

71. Mr Deller was reticent about offering a submission on the appellant's likely ability to persuade the Secretary of State of either of those matters and it is rather difficult to see how one could take a provisional view on either prospect. If the Secretary of State is correct in his approach, and the realistic prospect test is indeed part of the de facto compulsion test, judges considering appeals against decisions such as this would be faced with the most peculiar situation of Presenting Officers arguing that appellants would be likely to meet the requirements of the Immigration Rules, whilst those representing appellants would be required, in order to defend against the submission, to argue that their clients would be unable to meet the requirements of the Immigration Rules. The only proper way to evaluate that submission would be to consider the requirements of the Immigration Rules and the evidence adduced (or not adduced) by the parties, and to reach a reasoned decision on all of the requirements. A mere 'pre-screening' of the kind suggested in the guidance would be likely to lead to errors such as that which occurred in the Secretary of State's decision in this case, with the serious consequences which we have already explained. Whether at initial decision-making stage or on appeal, therefore, we concluded that the approach suggested in the guidance was not only unfair (because it requires an applicant to prove that which was not known to be in issue) but also unworkable.

72. For these three reasons, we concluded after the hearing that the 'realistic prospect' test in the Secretary of State's guidance did not represent the law. Then came Eyre J's decision in Akinsanya & Aning-Adjei v SSHD.

Eyre J's decision in Akinsanya & Aning-Adjei

73. The circumstances of the first claimant before Eyre J are set out at [56]-[60] of his judgment. She was a Nigerian national who held leave to remain under Appendix FM but applied during the currency of that leave for ILR under Appendix EU as a Zambrano carer. The refusal of the application was ultimately quashed by the Court of Appeal. The Secretary of State reconsidered the application and refused it again on 22 July 2022, relying on the fact that she held leave to remain under Appendix FM.

74. The circumstances of the second claimant are set out at [61]-[63]. She was a Ghanaian citizen who held leave to remain under Appendix FM. She applied during the currency of that leave for ILR under Appendix EU. The application was refused by reference to the fact that the applicant enjoyed leave to remain. The application was reconsidered following the Court of Appeal's decision in Akinsanya. ILR was again refused, this time on the basis that she had not completed five years as a Zambrano carer because the possession of Appendix FM leave disentitled her to that status.

75. It was submitted by both claimants that Eyre J should consider the realistic prospect test, whereas the Secretary of State submitted that any such consideration would be academic, since both claimants actually had leave to remain: [13] and [66]. Eyre J resolved that dispute in favour of the claimants, for reasons he gave at [66]. It was, he said, necessary to resolve whether the respondent had misunderstood the law in formulating the Immigration Rules and the Guidance in order to determine whether any such misunderstanding had any effect on the positions of the claimants.

76. Having resolved that question in favour of the claims, Eyre J considered the realistic prospect test, which had been introduced after the Court of Appeal's decision in Velaj v SSHD, in the sixth version of the guidance. For reasons he gave at [67]-[110], he concluded that the effect of the authorities was clear; "the Zambrano right is only excluded where the carer has been granted leave to remain". The realistic prospect test had not been considered in the authorities and the submission that a realistic prospect of obtaining leave excluded the Zambrano right was based on a misunderstanding of the law applicable before the departure of the United Kingdom from the European Union: [109]-[110].

77. For reasons he gave in the next two paragraphs of his judgment, however, Eyre J concluded that the respondent's misunderstanding had only affected version 6 of the policy, and had not affected the terms of the definition in Appendix EU of a person with a Zambrano right to reside. His reasoning was as follows:

> "[111] In issuing version 6 of the Guidance the Defendant was proceeding on the basis of a mistaken belief that a person who did not have leave to remain but had a realistic prospect of obtaining such leave could not be a Zambrano carer for the purposes of EU law. That misunderstanding was combined with and flowed from a flawed

understanding of the effect of the decision in Velaj. That misunderstanding affected the terms of version 6 of the Guidance and the way in which paragraph (a)(iii) of the Annex 1 definition was applied.

[112] The misunderstanding did not, however, affect the terms of the definition in App EU of a person with a Zambrano right to reside. Those terms were entirely consistent with the position under EU law and as matters had been before the Withdrawal Agreement came into effect. In particular paragraph (a)(iv) of the definition was entirely consistent with EU law in excluding from those with a Zambrano right those who already had leave to remain under a different provision. Similarly, the terms of paragraph (a)(iii) of the definition were entirely consistent with the Zambrano jurisprudence."

78. Eyre J went on to consider the impact of those conclusions on the cases of the claimants. He rejected the claimant's contention that he should quash the decisions in their cases because he concluded that the misunderstanding had not had any impact, since both claimants had leave under Appendix FM and "neither claimant was a Zambrano carer on a correct understanding of EU law.": [117]. It was a "misunderstanding as to a matter of law which arose after the terms of App EU were drawn up; which was not reflected in the version of the Guidance which was current at the time of the decisions affecting the claimants; and which had no relevance to the circumstances of those decisions…"

79. We need not refer to the way in which Eyre J resolved the remaining arguments, since those conclusions have no bearing on the matters in issue before us. We will record, however, that the court's final order included the following term:

> "(3) In relation to the Realistic Prospect Issue: (a) The Court's judgment sets out the Court's conclusion that in issuing version 6 of his Guidance to caseworkers, "EU Settlement Scheme: person with a Zambrano right to reside", the Defendant erred in concluding that a person who did not have leave to remain but had a realistic prospect of obtaining alternative leave could not be a Zambrano carer for the purposes of EU law."

The Written Submissions on Eyre J's Judgment

80. Mr Papasotiriou understandably contends that Eyre J's judgment is supportive of his original submissions.

81. For the respondent, Mr Deller makes several submissions. We agree with one of those submissions, which is that the Upper Tribunal is not bound by a decision of the High Court.

82. Mr Deller cites what was said by Eyre J at [71] of R (Roehrig) v SSHD [2023] EWHC 31 (Admin); [2023] 1 WLR 2032 in that connection. Eyre J was there considering whether to depart from a decision made by McCloskey J in this chamber of the Upper Tribunal. He noted that the Upper Tribunal and the High Court were exercising a coordinate jurisdiction and that he was not bound to follow McCloskey J's decision but that he should do so as a matter of judicial comity unless he was convinced that it was wrong.

83. We note also what was said by the Upper Tribunal (Tax and Chancery Chamber) in Gilchrist v HMRC [2014] UKUT 169 (TCC); [2015] 1 Ch 183. There, the question was whether the Upper Tribunal was bound by a decision of the High Court. The Upper Tribunal (David Richards J and Julian Ghosh QC concluded that it was not, and it declined to follow the decision of the High Court in Pierce v Wood [2009] EWHC 3225 because it was satisfied that it was wrong.

84. We disagree with Mr Deller's remaining submissions, for the following reasons.

85. We do not accept that Eyre J's conclusions on the realistic prospect issue were obiter. He explained at some length why it was necessary to decide that issue in order to resolve the submissions made by the claimants. Eyre J clearly did not consider his conclusions on that issue to be obiter, and we note that his order reflects the conclusion that version 6 of the guidance proceeded on a misunderstanding of the law.

86. Nor do we accept that Eyre J's decision is wrong for any of the reasons given by Mr Deller. There is no artificiality in Eyre J's approach, and he explained clearly why the realistic prospect test was not part of the assessment of whether the relevant British citizen would be compelled to leave the UK. That conclusion followed a detailed review of the domestic and European authorities and an equally detailed assessment of the way in which the domestic law and policy had progressed.

87. The Secretary of State submits that Eyre J failed to engage with the crucial issue, of whether the British citizen can really be subjected to the required compulsion to leave the EU when their carer has an alternative route to lawful residence. We disagree; it is plain that Eyre J understood the nature of the test, since he set out what was said about the 'nature or intensity of that compulsion' by Lady Arden in Patel & Shah v SSHD. At [88], he made it clear that the Supreme Court was in that case addressing "compulsion of the British citizen not compulsion of the carer". He went on to conclude that Velaj v SSHD did not "bear the weight which the Secretary of State sought to place on it". We respectfully agree.

88. As we concluded after the hearing, without the benefit of Eyre J's analysis, nothing in Velaj v SSHD or any of the earlier authorities supports the 'realistic prospect' approach in the guidance. Properly understood, nothing in the authorities supports the view that a Zambrano right which has otherwise already come into existence (see Sanneh v Secretary of State for Work and Pensions [2015] EWCA Civ 49; [2016] QB 453) can be denied by reference to the mere possibility (or likelihood) of the carer securing leave to remain. The circumstances in Velaj v SSHD were wholly distinguishable, because there could be no suggestion that the British citizen would be compelled to leave the UK. Here, the most that can be said by the Secretary of State is that there is some possibility that leave might, on application, be granted to the appellant, although the basis upon which he reached that conclusion was based on a misunderstanding of Appendix FM.

89. We cannot discern in the Secretary of State's submissions any persuasive reasons not to follow Eyre J's judgment on the realistic prospect issue. We had reached the same conclusion, albeit for slightly different reasons, and his judgment serves to reinforce

our view that the realistic prospect test is no part of the factual analysis required by Appendix EU.

90. We note one further matter, which is clear from the material which was before Eyre J but was not clear from the material before us in January. At [27] of his judgment, Eyre J noted that the Secretary of State had been presented with three options regarding the framing of the Zambrano provisions in the Settlement Scheme in light of the Court of Appeal's decision in Akinsanya. Those three options were as follows:

> "Option 1: Allow any applicant who met the Zambrano requirements of the EEA Regulations, as interpreted by the Court of Appeal, at the end of the transition period to qualify for EUSS status.
>
> Option 2: Do not allow an applicant with, at the end of the transition period, limited leave under another route or a realistic prospect of obtaining it to qualify for EUSS status as a Zambrano primary carer.
>
> Option 3: Continue to exclude from EUSS eligibility under the Zambrano category those with, at the end of the transition period, limited leave under another route, but include those with, at that point, a realistic prospect of obtaining such leave."

91. Eyre J noted at [28] that option three was the recommended course. He went on, at [45], to note that it was indeed option three which had been implemented in the amended version of Appendix EU, "albeit with emphasis placed on the need for a fact-based enquiry in the determination of whether the relevant British citizen would in fact have to leave the United Kingdom, the European Economic Area, or Switzerland".

92. We consider that evidence to reinforce the first of the conclusions we reached following the hearing (as set out at [53] to [55] above). The Immigration Rules were intentionally framed so as to include those with a realistic prospect of obtaining leave under another route, and it was only in the subsequent guidance, which was issued as a result of the Secretary of State's gloss on Velaj v SSHD, that the realistic prospect test was said to be a part of the analysis. The construction of the Rules which the Secretary of State now advances, therefore, is contrary to his intention at the time the Rules were framed.

93. We conclude, in summary, that it is not incumbent on a decision maker who is considering the application of a person who is said to have a Zambrano right to reside to assess whether that person stands a realistic prospect of securing leave to remain under another provision of the Immigration Rules, including Appendix FM. The Secretary of State's guidance entitled *EU Settlement Scheme: person with a Zambrano right to reside* has been wrong in suggesting otherwise from 14 December 2022 to date. That approach was not intended when the relevant provisions of Appendix EU of the Immigration Rules were framed, and is not supported by the natural and ordinary meaning of the Rules, or by the domestic and European authorities which pre and post date the promulgation of those Rules. The application of the realistic prospect approach in the guidance is likely in any event to give rise to real difficulty in practice, whether initially or on appeal.

94. If we are wrong in these conclusions, we make one final observation, which stems from the closure of the Zambrano route to new applicants as of last year. If a judge of the First-tier Tribunal is asked to dismiss the appeal of a Zambrano carer because there is a realistic prospect of them securing leave under Appendix FM, it strikes us that there is every reason not to dismiss the appeal on the basis of that possibility. To do so would be to risk a situation in which the appellant makes a paid application for leave under Appendix FM which is ultimately unsuccessful. That person could not resort to another application as a Zambrano carer because the route has closed.

95. The better course, in our judgment, would be to ensure that the pending appeal against the adverse decision under Appendix EU would be decided on the basis of the actual facts, as and when they are known. If what we have said in the preceding paragraphs does not represent the law, therefore, we consider that a judge who is faced with a submission such as that which was made in this case might wish to consider staying the appeal under rule 4(3)(j) in order to enable the appellant to make and have decided an application under Appendix FM, thereby preserving their access to leave as a Zambrano carer. To do otherwise would, in our judgment, risk the denial of an entitlement under the Immigration Rules by reference to a contingency.

96. Although we have decided this appeal with the benefit of much more argument, and with the additional benefit of Eyre J's judgment, we have in substance reached the same conclusion as Judge Ripley. We therefore dismiss the respondent's appeal against her decision.

Notice of Decision

The Secretary of State's appeal is dismissed. The decision of the FtT to allow the appeal shall stand.

Mark Blundell

Judge of the Upper Tribunal
Immigration and Asylum Chamber

14 June 2024