IAC-AH- -V1

Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number:
[EA/01956/2021] UI-2021-001160
[EA/03618/2021] UI-2021-001161

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On the 26 August 2022	**On the 11 October 2022**

Before

UPPER TRIBUNAL JUDGE KAMARA

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

ORAL ORLANDO FRECKLETON
HERMA ANASSA FRECKLETON
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:
For the Appellant: Mr P Deller, Senior Home Office Presenting Officer
For the Respondent: Mr V Thoree, counsel instructed by NN Solicitors

DECISION AND REASONS

Introduction

1. This is an appeal against the decision of First-tier Tribunal Judge Louveaux, promulgated on 9 July 2021. Permission to appeal was granted by Upper Tribunal Judge Blum on 2 February 2022.

Anonymity

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

Background

3. The respondents are a married couple who are the primary carers of a British citizen(N), who is their minor son. On 25 April 2017, the respondents made a human rights application, following which they were granted discretionary leave to remain, until 31 May 2020. On 17 April 2020, the respondents applied for a Derivative Residence card on a Zambrano basis, under the EU Settlement Scheme. That application was refused. According to the decision letters dated 27 January 2021, the Secretary of State considered that the respondents had a realistic prospect of success if an application for further leave to remain under Appendix FM was made and as such, they did not meet the eligibility requirements for settled status as set out in either EU11 or EU14 of Appendix EU

The decision of the First-tier Tribunal

4. The Secretary of State was not represented at the hearing before the First-tier Tribunal. At the outset, the judge indicated that he would allow the appeals on the basis that the respondents met the requirements of Regulation 16 of the Immigration (European Economic Area) Regulations 2016, as he considered that the issue in the case had been settled in *Akinsanya* [2021] EWHC 1535 (Admin).

The grounds of appeal

5. The grounds of appeal argued that the judge fundamentally misconstrued the Zambrano right. Furthermore, the judge had followed *Akinsanya* which related to an EUSS applicant with current leave and addressed the question of compulsion to leave, in relation to which the Secretary of State's appeal was being heard in December 2021. In the first ground, it was said that the conclusions of the judge were not an accurate assessment of the factual position, in that the respondents did not have to leave and may not have to do so at all if they sought leave.

6. Permission to appeal was granted on the following basis:

> *In the Court of Appeal judgment in Akinsanya v SSHD [2022] EWCA Civ 37, handed down on 25 January 2022, Underhill LJ rejected the reasoning of Mostyn J's Administrative Court decision handed down on 9 June 2021 in respect of the Zambrano jurisprudence (but rejecting the SSHD's 2nd ground relating to the construction of*

> *Regulation 16 of the Immigration (European Economic Area) Regulations 2016). However, [56] and [57] of his Lordship's judgment suggests that, if a person has no leave to remain (such as the respondents in the instant case), the Zambrano circumstances will still apply. The position is sufficiently unclear as regards those who could make applications under Appendix FM but have not done so, such that the First-tier Tribunal's decision may be arguable wrong.*

7. The respondents did not file a Rule 24 response. On the eve of the hearing, the Secretary of State filed a detailed position statement by email, in which she maintained that the decision of the First-tier Tribunal contained a material error of law.

The hearing

8. The submissions of the representatives can be summarised as follows. Mr Deller confirmed that the Secretary of State was pursuing her appeal because the respondents had leave to remain in the UK when they applied under the EUSS and still did, owing to the operation of Section 3C of the 1971 Act. He explained that a concession given in a similar case, known to all present, was probably wrongly given.

9. Mr Thoree sought to defend the decision of the First-tier Tribunal, stating that it was correct at the time and that it should not make a difference that matters had moved on. Many other cases had resulted in a grant of ILR on identical facts. The judge concluded that Regulation 16 was satisfied and that was all that was required. On *Akinsanya*, Mr Thoree stated that the only exclusion related to indefinite leave to remain and therefore an in-time application should not prevent a successful variation from limited leave to remain to settlement under the EUSS.

10. In reply, Mr Deller stated that there had been much confusion as to the outcome of *Akinsanya*, however the Court of Appeal had agreed that an application under the EUSS was a right of last resort, and this justified the Secretary of State's position. The scheme Rules were lawful.

11. At the end of the hearing, I indicated that I was satisfied that there was a material error of law in the decision of the First-tier Tribunal and that the decision was set aside. After seeking the views of the representatives, I agreed to remit the matter to the First-tier Tribunal for a de novo hearing

Decision on error of law

12. The decision letters state that it was not accepted that the respondents met the requirements of regulation 16(5) of the Immigration (European Economic Area) Regulation 2016 because:

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

13. The judge rightly recognised that the issue was whether the respondents were entitled to apply under the EUSS for permanent residence as a Zambrano carer. His error was in finding at [25] that they "*have no right to remain in the UK. Until such a right to remain is applied for and granted, they are required to leave the UK*." This was not the case.

14. At the time the applications were made under the EUSS, the respondents had extant discretionary leave to remain. As no decision had been made on the EUSS applications prior to that leave expiring, it was extended pending a decision on the EUSS application, as well as the bringing of these appeals. In addition, on the specified date of 31 December 2020, the application under the EUSS was still undecided. The 1971 Act was amended, with the addition of sections 3C (2) (ca), (cb) and (d) to include appeals pending under the Immigration (Citizens' Rights Appeals) (EU Exit) Regulations 2020 as well as when an administrative review could be sought or is pending.

15. Given the judge's erroneous understanding of the respondents' immigration history, his conclusion based on that misunderstanding, that there was a derivative right to reside under regulation 16 cannot stand. Owing to that misunderstanding, there was inadequate consideration by the judge as to whether the respondents' child would be compelled to leave the Union, the fact that the respondents have limited leave to remain being just one aspect of the test of compulsion.

16. Like the respondents in this case, the claimant in *Akinsanya* had leave to remain under Appendix FM when the application under the EUSS was made. The claimant in *Akinsanya* was again refused under the EUSS after the Secretary of State reviewed the decision and has been granted permission to judicially review that decision. In addition, an application has been made for permission to appeal the decision in *Velaj* [2022] EWCA Civ 767, which also has some relevance here. In these circumstances, I acceded to Mr Thoree's request to remit the appeal to the First-tier Tribunal.

Decision

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

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

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

No anonymity direction is made.

Signed: T Kamara Date: 5 September 2022

Upper Tribunal Judge Kamara