Upper Tribunal
(Immigration and Asylum Chamber)
Extempore decision **Appeal Number: EA/04080/2020**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On the 19 November 2021	**On the 25 November 2021**

Before

UPPER TRIBUNAL JUDGE SHERIDAN

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

SOUAD OUBAHA
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation
For the Appellant: Mr Tufan, Senior Home Office Presenting Officer
For the Respondent: Mr Gajjar, Counsel instructed by Law Lane Solicitors

DECISION AND REASONS

1. This is an appeal by the Secretary of State. However, I will refer to the parties as they were designated in the First-tier Tribunal.

2. The appellant is a citizen of Morocco. On 15 September 2019 she applied for an EEA family permit in order to accompany her two British national children (born in 2011 and 2013) to the UK. On 27 July 2020 the application was refused on the basis that the appellant had not provided sufficient evidence to establish that she was the primary carer of the children. In addition, the application was refused on the ground that she had not applied for entry clearance under Appendix FM of the Immigration Rules and a derivative right

of residence is a right of last resort which only applies if a person has no other route to enter the UK.

3. The appellant appealed to the First-tier Tribunal where her appeal came before Judge of the First-tier Tribunal Hembrough ("the judge"). In a decision promulgated on 3 June 2021 the judge allowed the appeal.

Decision of the First-tier Tribunal

4. Before the judge, the respondent accepted that the appellant was the primary carer of British national children. The only issue in contention was whether the appellant was not entitled to an EEA family permit in circumstances where she had not previously applied for entry clearance under Appendix FM because a derivative right of residence is a "right of last resort".

5. The judge stated in paragraph 10 that he asked the respondent's representative whether she could direct him to any authority to support the contention that a derivative right to reside is a right of last resort. He recorded that she responded in the negative.

6. In paragraph 13 the judge found that the appellant met the requirements of regulations 11(5)(e) and 16(5) of the Immigration (EEA) Regulations 2016 ("the 2016 Regulations"). It does not appear that this was disputed.

7. In paragraph 14 the judge stated that there was nothing in the 2016 Regulations (and the respondent's representative was unable to identify any authority) to support the proposition that an application for a derivative right to reside can only be made as a last resort.

8. In paragraph 15 the judge stated that the respondent's proposition that the derivative right in regulation 16(5) is a right of last resort is not consistent with the UK's obligations under article 8 ECHR and Section 55 of the Borders, Citizenship and Immigration Act 2009 ("the 2009 Act)".

Grounds of Appeal

9. The respondent's grounds of appeal argue that the judge erred by having regard to article 8 ECHR and section 55 of the 2009 Act which are immaterial to whether there is a right to reside under regulation 16(5).

10. The grounds also argue that the hearing should be adjourned pending the Court of Appeal's consideration of *Akinsanya, R (On the Application Of) v Secretary of State for the Home Department* [2021] EWHC 1535 (Admin).

Adjournment

11. Mr Tufan noted that permission to appeal against the High Court decision in *Akinsanya* was granted on 8 July 2021 and the hearing is listed to take place in December 2021. He argued that the Court of Appeal is likely to address the issue in dispute and therefore it is in the interests of justice to await the outcome of that appeal before deciding this case.

12. Mr Gajjar resisted the respondent's application to adjourn, arguing that (a) *Akinsanya* will not necessarily address the issues in contention; (b) the grant of permission does not mean *Akinsanya* is not good law; and (c) delaying the matter is prejudicial to two young British children.

13. I refused to grant an adjournment, as I agree with Mr Gajjar's arguments. Firstly, the factual matrix in this case is similar, but not identical, to that in *Akinsanya.* The appellant in *Akinsanya* was in the UK with extant limited leave to remain under Appendix FM. In contrast, the appellant in this case is outside the UK and does not have any leave. It may be, therefore, that the Court of Appeal in *Akinsanya* does not resolve the issue in this case. Secondly, waiting for the Court of Appeal judgment in *Akinsanya* may result in a substantial delay which is potentially prejudicial to two British citizen children. Having regard to all of the circumstances, I consider it consistent with the overriding objective as expressed in rule 2 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (in particular rule (2(2)(e)) to proceed.

Analysis

14. Regulation 16(5) of the 2016 Regulations provides:

> 16.— Derivative right to reside
>
> (1) A person has a derivative right to reside during any period in which the person—
>
> (a) is not an exempt person; and
>
> (b) satisfies each of the criteria in one or more of paragraphs (2) to (6).
>
> …
>
> (5) The criteria in this paragraph are that—
>
> (a) the person is the primary carer of a British citizen ("BC");
>
> (b) BC is residing in the United Kingdom; and
>
> (c) BC would be unable to reside in the United Kingdom or in another EEA State if the person left the United Kingdom for an indefinite period

15. Regulation 11(5)(e) provides that a person must be admitted to the UK if she is accompanying a British citizen to, or joining a British citizen in, the United Kingdom and she would be entitled to

reside in the United Kingdom under regulation 16(5) were she and the British citizen both in the United Kingdom.

16. Regulation 16(5) implements into domestic legislation a principle of European law, derived from the CJEU case *Ruiz Zambrano v Office national de l'emploi* (Case C-34/09) [2012] QB 265, which is frequently referred to as the "Zambrano principle". The Zambrano principle was succinctly summarised by the Supreme Court in *Patel v Secretary of State for the Home Department* [2019] UKSC 59 as follows:

> "In Zambrano, the Court of Justice of the European Union ("the CJEU") held that a third-country (ie non-member state) national parent ("TCN" parent), of a Union citizen child resident in Union territory, was entitled to a right of residence to avoid the child being deprived of the genuine enjoyment of the substance of their Union citizenship rights on removal of the TCN parent. The principle extends to dependents who are not children, and has been applied even where the Union citizen has not exercised their right of free movement. The right of residence is a "derivative right", that is, one derived from the dependent Union citizen. A key to this derivative right is the deprivation of the benefits of the Union citizenship as a result of the Union citizen being compelled, by the TCN's departure, to leave Union territory."

17. Mr Tufan submitted that the judge fell into error by relying on article 8 ECHR and section 55 of the 2009 Act when these provisions are irrelevant to whether the conditions of regulation 16(5) (ie the Zambrano principle) are met. I agree with Mr Tufan that article 8 and section 55 are immaterial and therefore that, to the extent he relied upon them, the judge erred in law.

18. However, I am satisfied that any such error was immaterial because it is plain that the judge allowed the appeal not because of article 8 (or section 55) but because (a) the appellant satisfied the conditions of regulations 11(5)(e) and 16(5) of the 2016 Regulations; and (b) no argument was advanced, or authority cited, to support the proposition that a right of residence under 16(5) is only available if a person first applies under Appendix FM of the Immigration Rules.

19. It does not appear to have been in dispute before the First-tier Tribunal that the conditions of regulation 16(5) were met. Plainly, they were, as the respondent accepted that the appellant is the primary carer of British national children who are unable to reside in the UK without her.

20. The judge gave cogent (albeit brief) reasons explaining why he rejected the respondent's submission that the appellant was excluded from the benefit of regulation 16(5), even though the conditions of that regulation were met, because she had not applied to enter the UK under Appendix FM. These were that regulation

16(5) imposes no such requirement and the respondent was unable to identify any authority to support the proposition.

21. Before me, Mr Tufan was unable to cite any authority undermining the judge's position. The only authority before me addressing this issue is the High Court judgment in *Akinsanya,* which firmly supports the appellant's position. *Akinsanya* concerned a person who had limited leave to remain under Appendix FM but nonetheless applied under the EU Settlement Scheme for indefinite leave to remain under Appendix EU on the basis of the *Zambrano* principle. The respondent argued that because she had leave to remain (and therefore did not face compulsion to leave the territory of the UK or EU) the *Zambrano* principle was not applicable. This argument was rejected by Moystn J, who, inter alia, noted that the appellants in *Zambrano* itself did not face compulsion to leave the EU (as they had a limited residence permit). Moystn J found that neither CJEU nor UK jurisprudence supports the view that limited leave to remain under national law is a "Zambrano extinguishing factor". In paragraph 41 he described the suggestion that a grant of limited leave extinguishes the Zambrano principle as "a fallacy" and in paragraph 51 he stated:

> "My conclusion is that nothing decided in the CJEU or domestically since the decision in Zambrano supports the theory that the existence of a concurrent limited leave to remain of itself automatically extinguishes a claim for Zambrano residence. On the contrary, it is clear to me from the facts of Zambrano itself that the CJEU tacitly acknowledged that a limited national leave to remain, and a wider Zambrano right to remain, in many cases can and will coexist."

22. Plainly, if Moystn J is correct that having limited leave to remain does not extinguish a claim for a derivative right to reside under the *Zambrano* principle it follows that having a prospect of being granted leave does not extinguish a claim for a *Zambrano* derivative right of residence.

23. I have carefully reviewed *Akinsanya* and agree entirely with the reasoning given by Moystn J about the scope of the *Zambrano* principle. For the reasons given by Moystn J, the fact that the appellant could apply for leave to enter under the Immigration Rules is irrelevant to the question of whether she is entitled to a derivate right to reside under regulation 16(5).

24. The judge therefore did not err in finding that the appellant did not need to apply for entry under Appendix FM in order to be eligible for a derivate right to reside under regulations 11(5)(e) and 16(5). As the appellant plainly met the conditions of regulations 11(5)(e) and 16(5), the judge did not err in allowing the appeal.

NOTICE OF DECISION

The decision of the First-tier Tribunal did not involve the making of an error of law and stands.

Signed
D. Sheridan
Upper Tribunal Judge Sheridan Dated: 25 November 2021