IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-000864

First-tier Tribunal No: EA/11359/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:

20th September 2023

Before

DEPUTY UPPER TRIBUNAL JUDGE SAFFER

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

And

ABDULAI AZARA
(no anonymity order made)

Respondent

Representation:
For the Appellant: Mr Diwynicz a Senior Home Office Presenting Officer
For the Respondent: none

Heard at Phoenix House (Bradford) on 18 September 2023

DECISION AND REASONS

1. Ms Azara was born on 5 July 1980 and is a citizen of Ghana. She appealed against the decision of the Secretary of State (SSHD) dated 3 November 2022, refusing her application for settled or pre-settled status under the EU Settlement Scheme as set out in Appendix EU.

2. The application was refused as she did not meet the definition of a person with a Zambrano right to reside as she could not rely on any period in which she had held non-Appendix EU-leave. Her appeal was allowed by Judge Skehan who considered the papers in 13 February 2023. The SSHD appeals against that.

Permission to appeal

3. Permission was granted by First-tier Tribunal Judge Komorowski on 16 March 2023 who stated:

"3…the judge arguably wrongly equated a person who currently had leave under the Immigration Act 1971, section 3, whose leave was liable to be curtailed due to the immigrant's change in circumstances, with someone currently without any leave (judge's reasons, para. 12). Arguably, there is no intermediate status under the Immigration Rules, Appendix EU or otherwise of having "no legitimate continuing right to reside" (ibid) (underlining added); there being no such thing as an illegitimate right to reside."

The First-tier Tribunal decision

4. Judge Skehan made the following findings:

"7. The appellant's application was made on the basis that she is entitled to leave under the EUSS as '*a person with a Zambrano right to reside'*. That is a phrase defined in Annex 1 to Appendix EU. It was not disputed in the reasons for refusal letter that the appellant is the primary carer of her British citizen son. The appellant is separated from her husband due to an abusive relationship and her assertion that he plays no part in their son's upbringing is not challenged. I conclude therefore that if the appellant had to leave the UK, her son would have to leave with her. It is not challenged that the appellant has 5 years' continuous residence in the UK. The only factual issue in dispute appears to be the question of the appellant's alternative entitlement to leave to remain.

8. The appellant has been granted periods of leave under the Immigration Rules:.
(i) On 6 January 2014 valid until 27 August 2016;
(ii) 8 November 2016 valid until 26 May 2019; and
(iii) 20 September 2019 valid until 24 March 2022.

9. The Court of Appeal has now issued its decision in Akinsanya v SSHD [2022] EWCA Civ 37. The Court of Appeal held that Zambrano rights did not arise as long as domestic law accorded to Zambrano carers the right to reside. At paragraph 55, Underhill LJ said,

'Zambrano rights are for that reason exceptional. They are not typical Treaty rights, since they arise only indirectly and contingently in order to prevent a situation were EU citizen dependants are compelled to leave the EU. That being so, it makes sense to treat them as arising only in circumstances where the carer has no domestic (or other EU) right to reside (or to work, or to receive necessary social assistance).'

10. Under Appendix EU, a person with any leave is excluded from the Zambrano route. At paragraph 66 of Akinsanya it was said,

'the language of regulation 16(7)(c)(iv) is simply too clear to allow it to be construed as covering persons with limited leave to remain. The explicit reference to persons with indefinite leave to remain necessarily precludes its application to persons with limited leave.'

11. The appellant's argument appears to be that her last period of leave granted under the immigration rules should be treated as invalid or void from when her husband left and therefore she had no valid leave to remain at the time that she made her application and at the time of the decision. Further from the available information, the effect of this decision will have a substantial and obvious detrimental impact on the best interest of the appellant's son who had various disabilities and is in school and settled in the UK. I have considered S55 of the Borders, Citizenship And Immigration Act 2009 and the child's best interest has been a primary consideration in assessing this application.

12. The Court of Appeal decision in Akinsanya makes clear that where an appellant with a domestic right to reside is excluded from having a Zambrano right to reside. In this case, there is an argument that on the breakdown of her relationship, this appellant had an obligation to notify the respondent and in the absence of that notification, had no legitimate continuing domestic right to reside. This is a scenario where Zambrano rights do arise. The appellant is a person with a Zambrano right to

reside as defined in Annex 1 to Appendix EU. This is the only issue raised in the refusal letter.
13. I find that the appellant meets the requirements of Appendix EU for a grant of leave to remain as a person with a Zambrano right to reside."

The Appellants' grounds seeking permission to appeal

5. The grounds asserted that:

"1. The Judge of the First-tier Tribunal has made a material error of law in the Determination in fundamentally misapplying primary legislation so as to hold that a provision of Appendix EU was met when it manifestly was not.
2. An application of 6 July for status under Appendix EU as a Person who had held a Zambrano right to reside had been refused because Ms Azara had at the specified date (31 December 2020) held leave to remain granted on a basis other than under Appendix EU. This is incontrovertible, see paragraph 8 of the determination.
3. Judge Skehan has, however, erred in having inappropriate regard to the litigation in Akinsanya as to the existence of a Zambrano right to reside, which could not avail a challenge based on the decision being not in accordance with a rule under which the application plainly fell for refusal.
4. Judge Skehan appears also to accept a submission that it was relevant that Ms Azara no longer met the requirements of the rule under which her leave had been granted, as the relationship on which it was based had ended. That is to misconstrue the status of leave to remain under the 1971 Act. Unlike situations where status is contingent on continuing eligibility (for example enjoying a continuing right of residence under the EEA Regulations or being exempt from immigration control under section 8 of the 1971 Act), leave to remain is given for a period (which can be subject to conditions and/ or a time limit) and only comes to end via expiry, curtailment or revocation. The only relevant fact was that leave had been granted and had not been curtailed, revoked or otherwise invalidated. It was leave which prevented eligibility as a Person With a Zambrano Right to Reside as defined by the rules. That was enough."

Rule 24 notice

6. Ms Azara wrote;

"I am writing to express my support for the decision made by the First-tier Tribunal judge to allow my application for Zambrano rights. I firmly believe that my case is clearly distinguishable from Akinsaya and has strong merits similar to those that led to the establishment of the Zambrano principle. It is regrettable that the Secretary of State failed to recognize this important distinction, further extending my pain and suffering.
GROUNDS FOR (stet) RESISSTENNCE
Ground 1: Lack of immediate status in the immigration law
The lack of clarity in the law regarding the legal status of non-EU parents of EU citizen children who experience a change of circumstances, such as a relationship breakdown, underscores the importance of recognizing Zambrano rights. Similar to the situation with Zambrano, there is currently a void in the law regarding the immediate status of non-EU parents in situations where their domestic right to reside is impacted by a change in circumstances. This lack of clarity in the immigration rules should be seen as a compelling reason to grant me Zambrano rights. The term "illegitimate status" would have been appropriate to describe my situation, but it is not recognized in either EU or UK law, further emphasizing the importance of recognizing Zambrano's rights in situations where a non-EU parent is the primary carer of an EU citizen child.
Ground 2: Why my case is different from Akinsanya

My situation differs from Akinsanya's in that my domestic right to reside was impacted from the day my relationship broke down, leaving me in legal limbo with no clear immigration status or rights. This change of circumstances should be recognized as the reason why I am entitled to Zambrano rights, as it is a clear example of the need for the protection of non-EU parents in situations where their right to reside is affected.

The Secretary of State's handling of my case

Irrespective of the outcome of this appeal, it is evident that there are clear distinctions between my case and Akinsanya, which the Secretary of State failed to recognize in my initial application as outlined in the reasons given to allow this appeal. Failing to exercise due care in this regard violates their responsibilities and may result in chain reactions similar to those that caused the Windrush deportations.

Additionally, in their appeal, the Secretary of State's use of the term "enjoying" when referring to a continuing right of residence under the EEA Regulations is inappropriate. There is nothing enjoyable to vulnerable individuals who have to live in fear and uncertainty to protect their well-being and that of their children. As a single mother of a child with disabilities, I have personally experienced manipulation and abuse due to my lack of status. The only reason I am still alive today is to preserve my son's best interest and his right to life. Therefore, I urge the Secretary of State:-

a) Not to trivialise our experiences and struggles with inappropriate language.

b) To refrain from being trigger-happy and instead take into account unique circumstances of each case.

This will prevent other families in my situation from experiencing the same suffering my child and I keep enduring throughout this process.

CONCLUSION

I respectfully request the panel to consider my case and recognise my entitlement to Zambrano's rights. Granting these rights will give me the peace of mind needed to move forward with my life and allow me to provide my son with the care and support he deserves. It will also ensure that he has a fair chance in life. I thank the panel for their attention to this matter and for considering my request."

Oral submissions

7. Mr Diwyncz submitted that it was a simple legal point. As Ms Azara had section 3C leave, she could not have Zambrano leave.

8. Ms Azara said that she understood what the SSHD was saying. She was in an abusive marriage that failed. Her son has ADHD and autism. She only has 1 son. Who would she leave him with? Her ex-partner threated to report her to the SSHD.

Discussion

9. Ms Azara's relationship broke down on 15 August 2020. The fact that her she had an obligation to notify the SSHD does not mean she did not have leave to remain by making it invalid or void. The SSHD has a discretion not to interfere with the leave she had been granted. Without repeating [66] of Akinsanya, she accordingly was not covered by the Zambrano exception. The Judge was wrong in finding she had a Zambrano right to reside. There is no void in the law. But even if there is, it is a matter for Parliament to fill that void, not the Tribunal.

10. Mr Diwynicz submitted that I should retain the appeal in the Upper Tribunal as there were no facts to find. Ms Azara had no view. I have decided to remake the decision as there are no facts to find.

Notice of Decision

11. The Judge made a material error of law. I set aside the decision of Judge Skehan.

12. I dismiss the appeal.

Laurence Saffer

Deputy Judge of the Upper Tribunal
Immigration and Asylum Chamber

18 September 2023

NOTIFICATION OF APPEAL RIGHTS

1. A person seeking permission to appeal against this decision must make a written application to the Upper Tribunal. Any such application must be **received** by the Upper Tribunal within the **appropriate period** after this decision was **sent** to the person making the application. The appropriate period varies, as follows, according to the location of the individual and the way in which the Upper Tribunal's decision was sent:

2. Where the person who appealed to the First-tier Tribunal is **in the United Kingdom** at the time that the application for permission to appeal is made, and is not in detention under the Immigration Acts, the appropriate period is **12 working days (10 working days, if the notice of decision is sent electronically).**

3. Where the person making the application is in detention under the Immigration Acts**, the appropriate period is 7 working days (5 working days, if the notice of decision is sent electronically)**.

4. Where the person who appealed to the First-tier Tribunal is **outside the United Kingdom** at the time that the application for permission to appeal is made, the appropriate period is **38 days (10 working days, if the notice of decision is sent electronically).**

5. A "working day" means any day except a Saturday or a Sunday, Christmas Day, Good Friday or a bank holiday.

6. The date when the decision is "sent' is that appearing on the covering letter or covering email.