IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case Nos: UI-2023-005102
UI-2023-005103
First-tier Tribunal Nos:
EA/12302/2022
EA/12303/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 24 July 2024

Before

UPPER TRIBUNAL JUDGE PERKINS
DEPUTY UPPER TRIBUNAL JUDGE MAHMOOD

Between

LAURETTA OBIANUJU STILVE
and
PASSION OLAMMA UGWA
(no anonymity order made)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellants: Mr E Imo, Legal Representative from Chancery CS Solicitors
For the Respondent: Mr S Walker, Senior Home Office Presenting Officer

Heard at Field House on 19 January 2024

DECISION AND REASONS

1. The first appellant is the mother of the second appellant. The second appellant was born in June 2005 and so is now an adult but at the time of making the application she was the dependent child of the first appellant. Her case depends on her being a dependant on the first appellant and does not require any express separate consideration. Anything that we say about the first appellant applies in substance to the second appellant.

2. We see no need for, and do not make, an anonymity order in this case.

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3. The appellants say that they have acquired a "Zambrano right" to reside in the United Kingdom. As will be well understood by people familiar with this area of law, a "Zambrano right" is a right to reside in the United Kingdom that is enjoyed by someone who otherwise has no right to be in the United Kingdom but whose presence is needed to prevent an EU national having to leave the protection of the Union.

4. Many of the important facts are not in dispute. There is clear evidence that the first appellant is the carer of a British citizen child and that the second appellant, at all material times, was the dependant of the first appellant. We see no reason to say any more than that about the facts supporting the claim for recognition of a right to reside. However we do record that the judge said at paragraph 47, when dismissing the appeals:

> "I must add that I reach this decision with reluctance because it is undisputed that the First Appellant is a carer for a British child and the Second Appellant is her dependent. It is obviously in that child's best interests for the Appellants to be granted leave to remain. That is a primary concern for me, as it must be under section 55 of Borders, Citizenship and Immigration Act 2009….".

5. In summary outline the Secretary of State decided that the appellants were disqualified from recognition as people with Zambrano rights because the appellants had been granted leave to remain and Zambrano rights are only relevant in the case of a person with no other basis for remaining in the United Kingdom.

6. The appellants appealed to the First-tier Tribunal but were unsuccessful. The First-tier Tribunal ruled that it did not have jurisdiction to entertain the appeal and then purported to dismiss them.

7. Permission was granted by the First-tier Tribunal but only on limited grounds. An application was made to the Upper Tribunal for permission on all grounds but, for reasons that are not clear, this was never determined.

8. The First-tier Tribunal Judge actually dismissed the appeals because the judge was persuaded, or rather persuaded himself because he took a point no one else had raised, that the Tribunal did not have jurisdiction to hear the appeals. The First-tier Tribunal's conclusion that it did not have jurisdiction to entertain the appeal was a result that neither party sought and we find it sufficient to say that we disagree. The respondent gave details of the appeal rights when she made the decision and we find that the respondent was correct (bundle page 201). The permissible ground is that "the decision is not in accordance with the E U Settlement Scheme rules".

9. Nevertheless the judge explained that it was the appellants' case that under the Immigration Rules in force on 6 June 2019 the EUSS applications should have been treated as variations of the Appendix FM applications and therefore the Appendix FM applications should not have been determined. At paragraph 39 of the Decision and Reasons the judge said something that we find particularly important. The judge said:

> "… this approach appeared not in fact to be controversial because the Respondent accepted during the judicial review that she should never have decided the Appendix FM applications because of the variation. However the reason why matters".

10. The judge then said at paragraph 41:

> "However, when the variation application was made on 6 July 2019, the statutory provisions were not in force regarding the residence scheme immigration rules. I consequently have difficulty seeing how the failure to treat the original application of 27 October 2018 as no longer falling to be decided, until it was in fact decided on 27 September 2019, when they were granted, as having anything to do with the residence scheme immigration rules that did not yet exist".

11. We do not understand the Judge's concern. It is almost trite immigration law that applications are determined in accordance with the rules relevant when then application is decided.

12. The judge found that he had no basis for concluding that the purported grant of leave was void and that of itself was sufficient reason to say the appellants did have leave and therefore could not satisfy the EUSS Rules but the judge was also emphatic that the Rule application had not been varied into an EUSS application (see paragraph 44 of the Decision and Reasons).

13. Before us Mr Walker conceded that the First-tier Tribunal erred in law and that is sufficient for us to rule that the First-tier Tribunal did err in law and to set aside its decision, which we do.

14. We made plain in the hearing room that all options were open and we reserved our decision._Given the degree of agreement on the facts and that the law is potentially complex we resolved to determine the appeal in the Upper Tribunal. We see no need for further submission. It is, of course, for the appellants to prove their case on the balance of probabilities.

15. Paragraph 4 of the judge's Decision and Reasons is important. The judge said:

> "At the start of the hearing the advocates told me that they had agreed that there was one issue in the appeal, and it was decisive of it: whether the Appellant had been granted leave under a category under [*the second "under" must be a mistake*] other than Appendix EU of the Immigration Rules. This is because, at all material times the immigration rules provided that a grant of such leave would preclude a grant of leave under the EUSS for the First Appellant. This would follow through to defeat the Second Appellant's claim as her dependant".

16. Clearly, the issue before us is the same. This synopsis was not challenged by the respondent before us and we intend to follow the concession made by the Presenting Officer before the First-tier Tribunal which, although there is no need for us to say this, seem entirely sensible on the available evidence that we have considered only in very summary form because of the concessions that have been made. Nevertheless, the summary above needs some clarification. It is plain beyond argument that the respondent *purported* to grant the appellants leave pursuant to their "appendix FM" applications. In order for the appellants to succeed we need to be satisfied that the purported grant of leave had no legal effect. The appellants clearly start off with the disadvantage that there was a grant of leave in their favour following an appendix FM application that they chose to make.

17. We should, and do, take note of all the material before the First-tier Tribunal, including the submissions sent to the First-tier Tribunal very soon after the hearing there.

18. We now set out to determine the appeal against the Secretary of State's decision for ourselves.

19. Some dates are important.

20. The first appellant was given a residence card as an EEA national's partner valid from February 2011 until February 2016 and the second appellant was given a similar residence card based on her dependency._They applied for permanent residence but were unsuccessful and their appeal rights were exhausted in August 2018.

21. In November 2018 they applied under Appendix FM for leave based on private and family life.

22. According to the appellants' chronology (page 56), on 6 June 2019 they varied their applications to a **Zambrano** application under Appendix EU. We cannot confirm that date but certainly on 5 August 2019 (page 204 in bundle) the appellants applied under "the EU Settlement Scheme as a person with a Zambrano right to reside". We find that 5 August 2019 is more likely to be correct because that appears on the application form. The application form was entitled "EUSS (DR): Apply to the EU Settlement Scheme as a person with a Zambrano right to reside" and we do see how it can be thought of as anything else.

23. As is explained above, the appellants' made a "**Zambrano** application" under Appendix EUSS in August 2019. On 15 December 2020 the EUSS application was refused because leave had been granted under Appendix FM. That decision was upheld on administrative review on 1 February 2021 and this led to judicial review proceedings. On 22 June 2022 the judicial review proceedings were withdrawn by consent with the respondent agreeing to withdraw the decision of 15 December 2020 and to issue a fresh decision within three months. As is apparent from above, the decision of 15 December 2020 was the decision to refuse the EUSS applications. On 11 July 2022, upheld on review on 19 April 2023, the respondent issued a fresh decision again refusing the applications under Appendix EUSS because the appellants had been given leave and the appellants appealed (page 195).

24. It is not in dispute but the respondent's decision dated 11 July 2022 makes plain that it was the application for recognition of the **Zambrano** right to reside under the EU Settlement Scheme that was refused. Contrary to the first appellant's case, the respondent said that she did not have a continuous qualifying period of residence in the United Kingdom as a "person with a **Zambrano** right to reside" because she was given leave to remain on 27 September 2019 until 26 March 2022 under Appendix FM of the Immigration Rules. It is the respondent's case that, by reason of being given leave under the Rules pursuant to the appellants' application, the appellants lost any status they may have had as a person with a **Zambrano** right to reside and, at least on the facts of this case, that right could not be revived.

25. It is fundamental to the appellants' case that it is the "**Zambrano** application" that should have been decided by the respondent but on 27 September 2019 (that is clearly after the Zambrano application was made and considerably before the decision on 11 July 2022) the respondent purported to allow the Appendix FM application and granted the appellants leave until 26 March 2022. It is the period of leave given by this grant that the Secretary of State says is the period of leave that disqualifies the appellants from succeeding in their **Zambrano** applications. It must be understood that, at least according to the appellants, this leave was granted wholly inappropriately and unlawfully because it was following an application that had been made originally under Appendix FM but which had been varied. Quite simply the Secretary of State should not have considered the

application before her as an application under Appendix FM; It started out that way but by the time it had been considered by the Secretary of State it had become something else.

26. The appellants' skeleton argument then set out in some detail the various submissions concerning the relevant date and the relevant Rules. We see no need to consider them further at this stage. The issues were narrowed considerably by the time the First-tier Tribunal made the decision that is the subject of the appeal before us.

27. We remind ourselves of the relevant chronology. The application to vary the application under Appendix FM to an application under **Zambrano** principles under Appendix EUSS was made on 5 August 2019 (6 June 2019?). At that time the appellant did not have and had not been granted any leave. As a result of an earlier application, she had been recognised as a person entitled to be in the United Kingdom under the EU provisions but that is not the same. She had acquired a right and so did not need permission. However a grant of leave was made on 27 September 2019. We have to decide the relevance, if any, of that purported grant.

28. We were referred to the decision in R **(on the application of Bajracharya) v SSHD (para.34 – variation – validity) [2019] UKUT 00417 (IAC)**. This is a decision of Mrs Justice Thornton sitting as a Judge of the Upper Tribunal. She reached the conclusion set out in the judicial headnote that having considered paragraph 34 of the Immigration Rules:

> "If a second application is submitted when the first application is outstanding, the second application will be treated as a variation of the first application".

29. This is judicial authority for the entirely unremarkable proposition that a person who exercises a right to vary an application before the outstanding original application has been determined has a right to have the second application considered, not the first one but this is not as helpful as the appellants need it to be. The scope of rule 34 is qualified by rule 34BB which begins "Except where one or more applications have been made under Appendix EU", the rules do not permit two applications for leave to remain (Rule 34BB of HC 395) but the appellants have not made two applications for leave to remain. They have applied for leave to remain (under appendix FM) and for recognition of a right to remain under appendix EU. We do not accept that making an "appendix EU application" after and appendix FM application had been made but not decided is unlawful or, of itself, has any impact on the earlier "FM application". Certainly nothing has come to our attention to suggest that the "EU application form" asked about any other outstanding applications. It follows that there is no reason why lodging the EU application would, of itself, nullify the appendix FM application.

30. In her witness statement the applicant says that she "made varied applications under the EU Settlement Scheme". We accept that in her mind that is what she wanted. If she would have been content with leave following consideration of an appendix FM application she would not have asked for something else but we have seen no direct pre-decision evidence in which the appellants said that they wanted their "FM" applications to be varied into "EU" applications. The skeleton argument for the hearing in the First-tier Tribunal asserts that "RB78-79 sets out precisely what happened". This shows a solicitor's representations (page 272) explaining that the application under article 8 was "varied to that of a Zambrano under the EU Scheme in June 2019" and asserts that the application could not be

made on line but only by paper and that the appellant dealt directly with the Respondent. Importantly, the letter referred to conversations about the earlier (FM) application not being decided when the new application was submitted. This is obviously consistent with an intention to vary (perhaps more accurately, withdraw and make a fresh) application but the letter is dated 7 January 2021 (page 270) and refers to the administrative review decision of 15 December 2020. The point is that this is dated after the need for the FM application to have been withdrawn or varied into something else had become apparent. We do not for a moment doubt its good faith but it is illuminated by the wisdom of hindsight.

31. However do not share the First-tier Tribunal's dismissive reference to the judicial review proceedings. We have seen a "PAP letter" dated 22 April 2021 (page 109) where the Secretary of State says:

> "**Ground 1: The Appendix FM application should not have been considered**
>
> It is accepted that the Applicants' EU Settlement Scheme applications varied their Appendix FM application and that their Appendix FM application should not have been given substantive consideration."

32. The language was unequivocal. It was relied upon in the skeleton argument before the First-tier Tribunal and, as far as are aware, the respondent has never tried to disavow it.

33. We must therefore accept that the "FM application" was varied, like the respondent says, and we find that it should not have been determined and, we find, the respondent ought not to have granted leave pursuant to it. This is echoed by the Secretary of State's approach in the judicial review proceedings.

34. However there was a purported grant of leave and have to ask what significance, if any, it carries?

35. We do not accept that leave granted pursuant to an application under appendix FM should be regarded as valid leave when there was no appendix FM application. The Secretary of State, we know, has wide powers to grant leave but this purported leave was not given outside the rules, either on application or on the Secretary of State's own motion, but as a consequence of an application that had been made but which had been varied. It would be very odd if the Secretary of State's mistake in purporting to grant leave pursuant to an application that did not exist deprived the appellants of a right that they would otherwise have enjoyed.

36. The purported grant of leave can only be explained by saying that it arose from an application by the appellant and, by the time it was decided, the application had been varied. It is, in our experience, unusual for a claimant to base her case on the respondent purporting to grant her leave that she did not want but that is precisely what has happened here and, we find, it has no legal effect. It is the consequence of a clear mistake.

37. It follows that the appellants were not in fact given leave and so are not outside the scope of the EUSS.

38. The appeal was against the refusal of an EUSS application. Given the findings that are accepted here, we allow the appeals.

Notice of Decision

39. In each case the First-tier Tribunal erred in law. We set aside its decision and in each case we substitute a decision to allow the appeal against the Secretary of State's decision.

Jonathan Perkins

Judge of the Upper Tribunal
Immigration and Asylum Chamber

24 July 2024