IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-005424

First-tier Tribunal No:
EA/10426/2022

THE IMMIGRATION ACTS

Decision & Directions Issued:
On 7th November 2024

Before

UPPER TRIBUNAL JUDGE SMITH

Between

MS TOYIN AYODELE IMOMOH
[NO ANONYMITY DIRECTION MADE]

Appellant

And

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: The Appellant did not attend and was not represented
For the Respondent: Mr P Deller, Senior Home Office Presenting Officer

Heard at Field House on Wednesday 6 November 2024

DECISION AND REASONS

BACKGROUND

1. By a decision promulgated on 5 February 2024, the Tribunal (myself sitting with Deputy Upper Tribunal Judge Lewis) found an error of law in the decision of First-tier Tribunal Judge Wilsher itself promulgated on 20 October 2023 allowing the Appellant's appeal against the Respondent's decision dated 9 October 2022 refusing her application under the EU Settlement Scheme ("EUSS") as a "Zambrano carer" of a British citizen child. The basis for the Respondent's refusal is that the Appellant has limited leave to

remain in the UK under domestic Immigration Rules which precludes her from succeeding under the EUSS Rules (Appendix EU). The error of law decision is appended hereto for ease of reference.

2. Following the error of law decision which set aside Judge Wilsher's decision, the appeal was stayed pending the Tribunal's decision in Ayoola v Secretary of State for the Home Department (case ref UI-2022-003001) (now reported as Ayoola (previously considered matters) Nigeria [2024] UKUT 143 (IAC) – "Ayoola"). It had been anticipated that the Tribunal in that case would give guidance which might have some bearing on this appeal. As it was, due to a change in the nature of the case in Ayoola, the guidance is not relevant to this appeal.

3. Following the promulgation of the decision in Ayoola, and in accordance with the directions given in the error of law decision, this appeal was listed for a case management review which took place on 22 August 2024. The Appellant did not attend and was not represented. However, I explained in the decision, for the Appellant's benefit, that the guidance in Ayoola was not likely to be relevant to her appeal. I also drew attention to a further case in which judgment had been given by the High Court (Eyre J) which represents the latest guidance on the issue which arises in this appeal. That case is reported as R (on the application of) Akinsanya and another v Secretary of State for the Home Department [2024] EWHC 469 (Admin) ("Akinsanya 2").

4. I gave directions for the filing by both parties of written submissions setting out their position on this appeal having regard to the case-law developments as above. The Appellant was directed to file those submissions within 28 days of the directions being issued and the Respondent was directed to file submissions in response within 28 days from service of the Appellant's submissions or within 56 days if no submissions were made by the Appellant. Those directions were issued to the Appellant via her solicitors and to the Respondent on 28 August 2024.

5. On 30 September 2024, the Tribunal was notified by Sarker Solicitors that the Appellant had withdrawn her instructions from them. They were therefore removed from the record as acting. They informed the Tribunal of the Appellant's current address and contact details, and the Appellant was therefore duly notified of the hearing before me on 6 November.

6. The Appellant did not attend the hearing. The Tribunal clerk was however able to contact her by telephone. She confirmed that she was aware of the hearing but did not have any further evidence to offer and was therefore content that the hearing should proceed in her absence. She did not seek an adjournment of the hearing. For the reasons given below, the Appellant's appeal stands no prospect

of success, and I was therefore satisfied that the Appellant would not be prejudiced by a failure to attend the hearing and that it was in the interests of justice to proceed in her absence.

7. Mr Deller apologised that the Respondent had not filed or served any written submissions in accordance with my directions which she was directed to do, irrespective of whether the Appellant filed and served any submissions. He indicated that this was due to an administrative oversight. I permitted Mr Deller to make brief oral submissions to check my understanding of the facts and legal position.

8. Having heard those submissions, I indicated that I would be dismissing the appeal with reasons to follow. I now turn to set out my reasons.

DISCUSSION

9. The facts of the Appellant's case are set out at [4] to [6] of the error of law decision and I do not therefore repeat them. In short summary, the Appellant had, at 31 December 2020, and continues to have leave to remain granted to her under Appendix FM to the Immigration Rules ("Article 8 leave"). The Article 8 leave continues presently until December 2024. The Appellant therefore continues to have a right to remain in the UK notwithstanding the outcome of this appeal and will have the opportunity due to the timing of this decision to apply to renew her leave to remain.

10. The legal position following the Court of Appeal's judgment in Akinsanya v Secretary of State for the Home Department [2022] EWCA Civ 37 ("Akinsanya") is also set out in extenso in the error of law decision ([8] to [11]). Again, I do not repeat what is there said. However, in short summary, the Respondent's appeal in Akinsanya was dismissed by the Court of Appeal but the Court confirmed that the Respondent's understanding of EU law in relation to "Zambrano" carers was correct. EU law did not require a "Zambrano" right to be given to such carers if they had a domestic law right to remain in the UK. That right did not have to be a permanent right, in other words, indefinite leave to remain. Limited leave to remain would suffice.

11. In response to a direction given to the Respondent by Mostyn J in Akinsanya, she considered her position under EUSS and published guidance on 13 June 2022 confirming that she intended the position under Appendix EU to be that a person in the position of the Appellant would not be entitled to a "Zambrano" right to reside under those rules if that person held limited leave to remain.

12. The Appellant was therefore precluded from succeeding under Appendix EU. She could not meet the definition of a "person with a Zambrano right to reside" under Annex 1 to Appendix EU because

she had leave to remain in the UK which was not leave granted under Appendix EU.

13. As confirmed at [68] of the judgment in Akinsanya 2, the effect of the Court of Appeal's judgment in Akinsanya (which was binding on Eyre J and is binding on me) is that the presence of either limited leave to remain or indefinite leave to remain operates to prevent a "Zambrano" right arising (repeated at [92] and following of the judgment).

14. As Eyre J pointed out at [124] of the judgment "it is of central importance to remember that before the Withdrawal Agreement came into effect the Claimants did not have a *Zambrano* right to reside". The claimants in Akinsanya 2 were in precisely the same position as the Appellant.

15. Eyre J then went on to differentiate between the position of "those who had rights under EU law as *Chen* carers and *Ibrahim* and *Teixeira* carers" (in other words the carers of EU citizens) and persons who are "Zambrano" carers (whose rights derive from the status of the person cared for). That distinction explains the point confirmed at [20] of the judgment that "[t]he Withdrawal Agreement had addressed the rights of *Chen* and *Ibrahim* and *Teixeira* carers but did not provide for *Zambrano* carers (unsurprisingly given that such persons were the carers of British citizens who ceased to be EU citizens when the United Kingdom left the European Union)".

16. The Appellant can only succeed in this appeal if she can show that the Respondent's decision under appeal is contrary to Appendix EU or contrary to the Withdrawal Agreement. As I have already explained, she cannot meet Appendix EU because she is unable to satisfy the definition of a "person with a Zambrano right to reside". Neither can she show that the Respondent's decision is contrary to the Withdrawal Agreement because, quite simply, "Zambrano" carers are not provided for by the Withdrawal Agreement because the person being cared for (the Appellant's child) as a British citizen is no longer also an EU citizen and therefore has no right under EU law from which the Appellant can herself derive a right.

17. For the foregoing reasons, the Appellant's appeal must fail. However, I repeat the point made above. The Appellant continues to have a right to remain in the UK under Appendix FM to the Immigration Rules. That does not expire until December 2024. She therefore has the opportunity to renew her Article 8 leave. As I understand the facts of this case, if renewed, that will be the Appellant's third grant of leave under Appendix FM. She is on a ten-year route to settlement such that, following this renewal and one further renewal (in other words after two further periods of thirty months) she will be entitled to apply for settlement.

NOTICE OF DECISION

The Appellant's appeal is dismissed.

L K Smith
Upper Tribunal Judge Smith
Judge of the Upper Tribunal
Immigration and Asylum Chamber

7 November 2024

APPENDIX: ERROR OF LAW DECISION

IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-005424

First-tier Tribunal No:
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THE IMMIGRATION ACTS

Decision & Directions Issued:

.....5 February 2024.....

Before

UPPER TRIBUNAL JUDGE SMITH
DEPUTY UPPER TRIBUNAL JUDGE LEWIS

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

And

MS TOYIN AYODELE IMOMOH
[NO ANONYMITY DIRECTION MADE]

Respondent

Representation:
For the Appellant: Mr E Tufan, Senior Home Office Presenting Officer
For the Respondent: Mr A Badar, Counsel instructed by Sarker Solicitors

Heard at Field House on Friday 26 January 2024

DECISION AND DIRECTIONS

1. This is an appeal by the Secretary of State. For ease of reference, we refer to the parties as they were in the First-tier Tribunal. The Respondent appeals against the decision of First-tier Tribunal Judge Wilsher promulgated on 20 October 2023 ("the Decision") allowing the Appellant's appeal against the Respondent's decision dated 9 October 2022 refusing her application under the EU Settlement Scheme ("EUSS") as a "Zambrano carer" of a British citizen child. The basis for

the Respondent's refusal is that the Appellant has limited leave to remain in the UK under domestic Immigration Rules which precludes her from succeeding under the EUSS Rules (Appendix EU).

2. The appeal was determined by Judge Wilsher on the papers. We accept therefore that he is unlikely to have received significant assistance from either party.

3. We also accept that this Tribunal's guidance in a case to which Mr Badar's attention was drawn (Sonkor (Zambrano and non-EUSS leave) [2023] UKUT 00276 (IAC) – "Sonkor") whilst promulgated prior to the Decision, may not have been reported by that date. Nevertheless, the guidance in Sonkor, whilst not binding on us, is persuasive. We come to the content of that guidance below.

4. The facts of the Appellant's case can be shortly stated. The Appellant is a Nigerian national. She came to the UK as a visitor in September 2012 and appears to have overstayed. She had a child with a British citizen in what she said was a casual relationship. She applied for a residence card as the Zambrano carer of that child in September 2018. That application was refused.

5. However, the Appellant subsequently made an application for leave to remain under Appendix FM to the Rules ("Appendix FM") which application was successful and she was granted leave from 2019 to 2022. Her leave under Appendix FM was subsequently extended to December 2024.

6. The Appellant applied for status under the EUSS on 30 June 2021 which was refused by the decision under appeal. Therefore, at the date of the Respondent's decision under appeal, the hearing before Judge Wilsher and the Decision the Appellant had limited leave to remain. As we understood Mr Badar to accept, that precludes the Appellant from succeeding under Appendix EU.

7. Judge Wilsher purported to determine the Appellant's case on the basis of the Court of Appeal's judgment in Akinsanya v Secretary of State for the Home Department [2022] EWCA Civ 37 ("Akinsanya") saying as follows:

> "3. The reasons for refusal asserts a legal argument that has been rejected by the Court of Appeal in upholding the decision in **Akinsanya [2022] EWCA Civ 37.** Based upon an interpretation of the domestic law, the Court of Appeal found that reliance on the category of a Zambrano carer was only excluded where a person held indefinite leave. Given the facts are not disputed, the appellant therefore does qualify as a Zambrano carer and the appeal must be allowed on under [sic] the Rules in Appendix EU as properly interpreted."

8. That paragraph misunderstands what was said in Akinsanya and ignores developments since that judgment. At first instance, Mostyn J

held that under EU law, the right to remain as a Zambrano carer could only be extinguished by indefinite leave to remain (ILR). That was contrary to Appendix EU which provided that there was no right to status under the EUSS if an individual had limited leave to remain (contrary to the position under the Immigration (European Economic Area) Regulations 2016 – "the EEA Regulations" which provided that a residence card could only be refused if an individual had ILR).

9. However, the Court of Appeal concluded that Mostyn J's analysis of the position under EU law was incorrect ([58]). The Court held that the EU jurisprudence did not provide for a right as a Zambrano carer so long as such a person had the right to reside under domestic law. As the Court of Appeal said at [54] of the judgment:

> "It is clear from *Iida* and *NA* that the Court does not regard *Zambrano* rights as arising as long as domestic law accords to *Zambrano* carers the necessary right to reside (or to work or to receive social assistance). To put it another way, where those rights are accorded what I have called 'the *Zambrano* circumstances' do not obtain."

The Court therefore concluded that the Respondent was correct in his analysis about the effect of EU law ([57]).

10. The reason why the Court did not go on to overturn Mostyn J's judgment is to be found in the remainder of [57] of the judgment as follows:

> "57. I thus prefer Mr Blundell's submissions. I should say, however, that that does not as such answer the question whether the Secretary of State misdirected herself in framing the definition in the EUSS. It depends what she was intending to achieve. Notwithstanding the analysis above, the fact remains that if at any time a *Zambrano* carer loses their right to reside as a matter of domestic law, the *Zambrano* right will arise (assuming, that is, that the effect of the carer leaving will be that the EU citizen child also has to do so): *Zambrano* is always waiting in the wings, and so long as the *Zambrano* circumstances obtain the carer can never be put in a position where their residence is unlawful. If the Secretary of State's purpose in wanting to 'understand the *Zambrano* jurisprudence' was indeed to restrict rights under the EUSS to people whose right to reside at the relevant dates directly depended on *Zambrano*, then her approach was consistent with the EU case-law. But if her intention was to extend those rights to all those carers whose removal would result in an EU citizen dependant having to leave the UK, then the exclusion of carers who currently had leave to remain on some other basis would evidently be inconsistent with that purpose. What the Secretary of State's purpose was is not something that this Court can answer. But fortunately it is not necessary for us to do so because of my conclusion on ground 2, with which I understand Bean and Andrews LJJ to agree."

11. The Court went on to consider whether, in framing the definition under Appendix EU of a Zambrano carer, the Secretary of State had misunderstood regulation 16 of the EEA Regulations and had therefore

erred in the different formulation under the EUSS and whether the Secretary of State had intended by that regulation to give more generous rights to Zambrano carers than EU law required. The Court was therefore considering a definition which, at that time, was linked to regulation 16 of the EEA Regulations. Interpretation of that regulation was for that reason clearly relevant. However, the Court went on to draw attention to the declaration made by Mostyn J which led to the Secretary of State agreeing to reconsider the wording of the definition in Appendix EU.

12. By guidance published on 13 June 2022, entitled "EU Settlement Scheme: Zambrano primary carers", the Respondent made his position clear. He "has decided that [he] no longer wishes that definition in Appendix EU to reflect the scope of the 2016 Regulations (which have now been revoked) but wishes it to reflect the scope of those who, by the end of the transition period, had an EU law right to reside in the UK as a Zambrano primary carer, in line with the originally stated policy intention".

13. As we pointed out to Mr Badar, the only grounds which the Appellant could raise in her appeal were that the decision under appeal was contrary to the Rules (that is to say Appendix EU) and/or the withdrawal agreement between the EU and the UK following the UK's exit from the EU ("the Withdrawal Agreement").

14. When considering the Rules, the Judge had to have regard to Appendix EU as that stood at the date of the hearing before him. The Rules were the same in this regard as those at the date of decision under appeal.

15. We do not need to set out the Respondent's grounds challenging the Decision. Those make reference to the various definitions under Appendix EU. The import of those rules is now set out in the guidance in Sonkor as follows:

> "1. The EU Settlement Scheme ("EUSS") makes limited provision for certain Ruiz Zambrano v Office National de l'Emploi [2011] Imm AR 521 carers to be entitled to leave to remain, as a matter of domestic law.
>
> 2. A Zambrano applicant under the EUSS who holds non-EUSS limited or indefinite leave to remain at the relevant date is incapable of being a 'person with a Zambrano right to reside', pursuant to the definition of that term in Annex 1 to Appendix EU of the Immigration Rules.
>
> 3. Nothing in R (Akinsanya) v Secretary of State for the Home Department [2022] 2 WLR 681, [2022] EWCA Civ 37 calls for a different approach."

16. As that guidance makes clear, the Appellant, who had and still has limited leave to remain is unable to satisfy the definition of a Zambrano carer under Appendix EU. Mr Badar made the point that Appendix EU

has been reformulated in this regard so that the numbering of the definition in the Respondent's grounds is no longer correct. We do not however understand that there have been any changes in substance.

17. Permission to appeal was granted by First-tier Tribunal Judge L K Gibbs on 13 November 2023 as follows:

> "..2. The grounds of appeal assert that the judge has misinterpreted **Akinsanya v Secretary of State for the Home Department [2022] EWCA Civ 37**. Given that the appellant holds leave to remain I am satisfied that the judge has arguably made an error of law. The grant of permission is not restricted."

18. We can put the error no better ourselves. Judge Wilsher has misunderstood the Court of Appeal's judgment in Akinsanya and has failed to consider the definition of a Zambrano carer under the relevant Rules. The error in that regard is made out.

NEXT STEPS

19. Having discussed with Mr Badar the effect of Akinsanya and the error which we found to be made out in the Decision, we invited his submissions on the way forward. On the basis of Sonkor, we invited him to consider whether it was appropriate to continue the appeal as the guidance would suggest that the Appellant would fail subject to any arguments he might wish to make about the correctness of that guidance or matters not considered by the Tribunal in that case.

20. Mr Badar made some submissions about case-law regarding compulsion and that a British citizen (as also an EU citizen) would be required to leave if the carer had only limited leave. Those submissions appeared to us to ignore the very clear comments of the Court of Appeal about the EU jurisprudence in this area. Further, the judgments to which he alluded pre-date the UK's departure from the EU and arise in the context of the EEA Regulations.

21. Mr Badar mentioned in vague terms a case which he said that the Tribunal had recently heard where he had understood the Respondent's representative (Mr Deller) to accept that there might need to be a change in the wording of Appendix EU. He could not give us the name of that case nor details of when it was heard or might be decided. We have not been able to trace any significant case dealing with Zambrano on which a decision is awaited and certainly none which might suggest that Sonkor was wrongly decided.

22. Mr Badar did however point out that the grounds before the First-tier Tribunal also included a challenge on the basis that the Respondent's decision was not in accordance with the Withdrawal Agreement. We have some doubts about the strength of this ground having regard to what is said at [7] of the decision in Sonkor. Nonetheless, we accept

that the Tribunal did not hear argument on that point in Sonkor and the point is not part of the guidance for which the case is reported.

23. We also indicated to Mr Badar however that the same constitution of the Tribunal as heard Sonkor (myself and UTJ Stephen Smith) are due to hear another case which is likely to touch on Zambrano and which may resolve the issue of whether Zambrano carers are covered by the Withdrawal Agreement and if so how. That is being heard in early March 2024. The case is Ayoola v Secretary of State for the Home Department (case ref UI-2022-003001; EA/08750/2021).

24. We therefore agreed with Mr Badar that we would give directions for this case to be stayed pending the outcome of Ayoola and for submissions to be made thereafter. This would also enable Mr Badar to give advice to the Appellant about the guidance in Sonkor which seemingly he had not seen until the day of the hearing before us.

CONCLUSION

25. The Judge has made an error of law in the determination of this appeal. We therefore set aside the Decision. The appeal is retained for re-making in this Tribunal with the directions set out below.

NOTICE OF DECISION

The Decision of First-tier Tribunal Judge Wilsher promulgated on 20 October 2023 involves the making of an error of law. We set aside the Decision. We make the following directions for the rehearing of this appeal.

DIRECTIONS

1. **The re-making hearing of this appeal is to be stayed pending the determination of the appeal in Ayoola v Secretary of State for the Home Department (case reference UI-2022-003001; EA/08750/2021).**

2. **This appeal will be relisted for a CMR before UTJ L Smith on the first available date after 14 days from the date when the decision in Ayoola is promulgated in order that further directions can be given in this appeal.**

L K Smith
Upper Tribunal Judge Smith
Judge of the Upper Tribunal
Immigration and Asylum Chamber

29 January 2024