IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2024-000091
First-tier Tribunal No: EU/50443/2023

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 04 April 2024

Before

DEPUTY UPPER TRIBUNAL JUDGE LEWIS

Between

Tesfay Hailemariam GEBREYESUS
(NO ANONYMITY ORDER MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms B Asanovic of Counsel instructed by Southwark Law Centre
For the Respondent: Mr T Lindsay, Senior Home Office Presenting Officer

Heard at Field House on 19 February 2024

DECISION AND REASONS

Introduction

1. This is an appeal against a decision of First-tier Tribunal Judge Raymond signed on 6 November 2023 dismissing an appeal against a decision dated 11 January 2023 to refuse leave under the European Union Settlement Scheme ('EUSS') as a person with a 'Zambrano' right to reside.

2. The Appellant is a citizen of Eritrea born on 17 May 1986.

3. The Appellant's application under the EUSS was based on his claim to be a carer of his and his partner's minor child, 'A' (date of birth 1 December 2017). The Appellant's partner is Ms Marta Abraham. She is also a national of Eritrea, but has been recognised as a refugee in the UK and was granted indefinite leave to remain in February 2017. Ms Abraham has two

children (dates of birth 16 April 2003 and 4 November 2005) whose father is said to be in Eritrea.

4. At the date of the Appellant's application Ms Abraham was expecting a further child with the Appellant; the First-tier Tribunal was informed that this child was born on 28 November 2021. It is to be noted that this was after 31 December 2020 – a relevant date for the purposes of the EUSS. Given the ages of Ms Abraham's other children, and the timing of the birth of her fourth child, the application, and in turn the appeal, could only rely on the Appellant's claimed care of A.

5. The Appellant's application was refused for reasons set out in a decision letter dated 11 January 2023. The Respondent relied on two matters in refusing the application:

> (i) "*Although you have never applied for leave under Appendix FM, from the information and evidence provided or otherwise available, it is considered that, on the balance of probabilities, you are likely to have qualified for Appendix FM leave if you had applied for this before 11pm on 31 December 2020 because the evidence you have submitted confirms you play an active role in the life of your British sponsor son [A].*"
>
> (ii) "*It is also noted your sponsor's mother Martha Abraham has settled status and therefore if you were required to leave the UK your sponsor [A] could remain in the UK with their mother.*"

6. The Appellant appealed to the IAC.

Proceedings before the FTT, and the Decision of the FTT

7. For reasons that are unclear, and in respect of which Ms Asanovic was unable to assist, the Appellant's Skeleton Argument before the First-tier Tribunal, dated 16 August 2023, in rehearsing the basis of the Respondent's decision omitted the matter set out at paragraph 5(ii) above: see Skeleton at paragraph 7. Thereafter the Skeleton Argument stated: "*The only issue is whether [the Appellant] fails to meet the requirement of App EU, during a period when there was a hypothetical possibility that if they had applied for leave to remain they would have been granted it?*" (paragraph 9).

8. It may be seen that the Skeleton Argument mischaracterised the refusal as being based only on the issue identified at paragraph 5(i) above, to the disregard of the issue identified at paragraph 5(ii).

9. The Appellant's bundle before the First-tier Tribunal did not contain any further evidence to that which was filed in support of the application. Instead, it comprised the Skeleton Argument and case law. In substance there was no attempt to address through further evidence the issue of A's

ability to remain in the UK in the care of his mother in the event of the Appellant's departure.

10. For reasons that are similarly unclear, but perhaps wrongfooted by the contents of the Appellant's Skeleton Argument, the Respondent's Review at paragraph 4 identified the 'Schedule of Issues' as comprising only the single issue identified in the Skeleton Argument. Indeed paragraph 5 of the Review states "*The schedule of issues above is taken from the ASA, page 2, paragraph 9*". The second issue is not otherwise expressly identified or addressed. Nonetheless, in the usual way, the Respondent's Review restated reliance upon the 'reasons for refusal' letter (paragraphs 1 and 6).

11. There is no evidence of any express concession in respect of the second issue identified in the Respondent's decision.

12. In reflection of the identification of a single issue that essentially turned on an interpretation of law, and further to not filing any further evidence on appeal, neither the Appellant nor any supporting witnesses were called, and the appeal hearing proceed by way of submissions only (paragraph 9).

13. The appeal was dismissed for reasons set out in the 'Decision and Reasons' of First-tier Tribunal Judge Raymond.

14. Paragraph 5 of the Decision of the First-tier Tribunal rehearses evidence that might be considered relevant to the extent to which Ms Abraham would be able to care for A in the event of the Appellant leaving he UK – and thereby the issue of whether A would be required to leave the UK. In particular it is expressly identified that the Appellant's Skeleton Argument includes reference to Ms Abraham's claimed inability to care for all of her children without the Appellant's assistance by reason of "*debilitating rheumatoid arthritis*" - in respect of which the Judge comments "*No medical evidence has been submitted in support of this*".

15. At paragraph 6 the Judge notes:

> "*The refusal, relies upon the decisions in Akinsaya [2021] EWHC 1535 (Admin), as interpreted in Velaj v Secretary of State for the Home Department [2022] EWCA Civ 767, which decide that where the applicant can expect to be granted leave to remain, it cannot be argued that the relevant child would be bound to leave the UK to remain in their care.*"

16. The Judge then quotes extensively from the 'reasons for refusal' letter. The quotation closes with: "*It is also noted your sponsor's mother Martha Abraham has settled status and therefore if you were required to leave the UK your sponsor [A] could remain in the UK with their mother*".

17. However, at paragraph 7, mirroring the language of the Appellant's Skeleton Argument, the Judge identified "*The agreed issue [to be] whether the appellant fails to meet the requirements of Appendix EU, during a period when there was a hypothetical possibility that he had applied for leave to remain, he would have been granted it?*".

18. The Judge set out his 'Findings' in a single paragraph (paragraph 11):

> "*I find that there is no evidence for the appellant as primary carer for the relevant children, as there is no medical evidence to show that Ms Abraham is unable to look after the children, although it is possible that the matter is one of shared responsibilities, which would suffice under Appendix EU definition of primary carer. However, I find that whilst the restriction read into a Zambrano application by the Home Office may seem contentious, it has been established by the Court of Appeal in Velaj v SSHD [2022] EWCA Civ 76, that the assessment of whether or not a British citizen (the two children in the present case fathered by the appellant) would be compelled to leave the UK must be based on what would happen in practice. The assessment is not to be based on a hypothetical, assumed or counter-factual premise. Given the present refusal effectively concedes that the before the specified date the appellant would have succeeded in an Appendix FM application as follows – "…on the balance of probabilities, you are likely to have qualified for Appendix FM leave if you had applied for this before 11pm on 31 December 2020 because the evidence you have submitted confirms you play an active role in the life of your British sponsor son Aman Tesfay." The appeal fails because it cannot be seen that the two more obviously relevant children, [A] a British citizen, and his sister [M] who can be presumed to be entitled to the same British citizenship as her sibling, would be bound to follow the appellant out of the UK. Firstly, as was pointed out by Mr Alam for the respondent in submissions, because they have a Carer in their mother who, as a refugee from Eritrea, cannot be expected to be returned to that country. Secondly, because as is effectively conceded in the refusal the family relationship is such that a successful application under Appendix FM had been more than merely hypothetical scenario before the specified date.*"

19. It may be seen – "*as was pointed out by Mr Alam for the respondent in submissions, because they have a Carer in their mother*" - that the Respondent's Presenting Officer advanced submissions in accordance with the contents of the reasons for refusal letter – i.e. beyond the scope of the single issue identified in the Appellant's Skeleton Argument

20. In substance the First-tier Tribunal agreed with the Respondent's position, both in respect of the likelihood of the Appellant having been able to secure some form of leave under Appendix FM, and also because A

would not be required to leave the UK by reason of having a carer in his mother.

Appeal to the UT

21. The Appellant sought permission to appeal to the Upper Tribunal.

22. The Grounds of Appeal acknowledge that the First-tier Tribunal dismissed the appeal for two reasons – one in relation to the Appellant's partner's ability to care for "*the children*", and the other in respect of the Appellant's theoretical ability to have succeeded on an application for leave under the Immigration Rules. (Grounds at paragraph 3.)

23. Ground 1 pleads that it was procedurally unfair to determine that it had not been demonstrated that Ms Abraham was unable to care for her children without the assistance of the Appellant. In this context it was asserted that there was "*no factual dispute*" on this issue between the parties. It was also submitted that the Judge was wrong in stating that there was no evidence of the Appellant's partner's inability to look after children. (Grounds at paragraph 5).

24. Grounds 2 and 3 challenge the reliance on the Appellant's potential to have acquired leave under Appendix FM.

25. Permission to appeal was granted by the First-tier Tribunal on 12 January 2024.

Consideration of the 'error of law' challenge

26. In my judgement Ground 1 is misconceived in two respects:

> (i) It is not correct to state, as per paragraph 5 of the Grounds, that "*the Respondent raised no factual dispute on the issue of [the Appellant's] partner's inability to care for the children alone... in the decision...*".
>
> (ii) The Judge did not state, as per paragraph 7 of the Grounds, "*that there was no evidence that [Ms Abraham] was unable to look after the children alone*": rather, the Judge stated that there was no medical evidence of the claimed medical conditions that were claimed to limit her ability in this regard.

27. Nonetheless, in my judgement, there is something unsatisfactory about the way with which this issue was dealt before the First-tier Tribunal.

28. I make it clear that I have considerable sympathy with the Judge in this regard. It seems to me adequately clear that insofar as this issue became confused - and in particular whether it was an issue at all – such confusion primarily arose by reason of the mis- drafting of the Appellant's Skeleton

Argument. This is compounded by the failure of the Respondent's Review to identify clearly in terms that there was more than one issue in the refusal.

29. I note that in quoting from the 'reasons for refusal' letter the Judge in substance identified that there were in fact two issues in the refusal. And in turn, it is apparent that the Judge made findings on both such issues. All other things being equal, this might have been sufficient to permit me to preserve the First-tier Tribunal's Decision in this regard – which would have been adversely determinative of the appeal before the First-tier Tribunal and before me, irrespective of any issue on the 'potential to secure Appendix FM leave' point. In so far as the Appellant had failed to file any further evidence to address this issue, and there had been an election not to call the Appellant and Ms Abraham to support their positions by oral evidence, this should be seen as a consequence of the Appellant's advisers' misunderstanding of the basis of the decision – and not a fault resting with the Tribunal.

30. However, it seems to me that there is confusion on the face of the First-tier Tribunal's decision on this issue insofar as paragraph 7 suggests that there is a single agreed issue in the appeal. Accordingly, there is a dissonance within the decision in terms of the identification of a single issue, but determination of two issues.

31. Whilst, as I have already observed, this dissonance arises primarily by reason of the mischaracterisation of the Respondent's case in the Appellant's Skeleton Argument, such dissonance should properly have been identified by the First-tier Tribunal Judge at the commencement of the hearing. Clarification might then have resulted in the Appellant and/or Ms Abraham electing to give evidence, or even possibly seeking an adjournment to file evidence in respect of the issue of Ms Abraham's ability to care for her children (and in particular A) given the representatives misunderstanding of the scope of the Respondent's decision and concomitant limited preparation of the appeal.

32. Perhaps with an excess of caution, I am just minded to conclude that this amounts to an error of law.

33. In the circumstances it is not necessary for me to determine whether the Judge's approach to the fact-finding in this regard amounts to an error of law. I would have been less inclined to find in the Appellant's favour on this point: the Judge did not err in stating that there was no medical evidence; further, whilst it is not a prerequisite that an appellant produce supporting documentary evidence to corroborate an asserted fact and may rely on personal testimony alone, the Appellant and his partner were not called to give oral evidence to counter the position of the Respondent; it is difficult to see that mere reliance upon disputed written testimony without any supporting corroborative evidence that might be expected to

be reasonably available, and without an election to offer oral evidence in support of the written testimony and be exposed to cross-examination, would be sufficient to discharge the burden of proof.

34. In considering the challenge in respect of the single issue identified in the Appellant's Skeleton Argument before the First-tier Tribunal, in the premises it is necessary to make a distinction between the Zambrano right itself, and provisions under Appendix EU that exclude persons who might otherwise have a Zambrano right to reside if they have been granted leave to remain in the UK on some other basis under the Immigration Rules. A 'Zambrano applicant' under the EUSS who had leave to remain at the relevant date is, pursuant to the definition at Annex 1 of Appendix EU of the Immigration Rules, excluded from being 'a person with a Zambrano right to reside'.

35. Necessarily the Appellant could not be excluded from the definition of a person with a Zambrano right to reside simply by reason of a potential to have secured some form of leave under Appendix FM.

36. However, the case law in respect of the Zambrano right to reside when discussing the potential impact on the relevant British citizen child, also discusses the necessity to consider whether the postulated event of the applicant leaving the UK is realistic and not just theoretical: **Velaj [2022] EWCA Civ 767** at paragraph 48. Accordingly, the fact specific enquiry of whether the British child would become unable to reside in the UK "*presupposes that on the facts of the specific case [it] is a realistic hypothesis*" that the applicant will be forced to leave the UK (**Velaj** at paragraphs 49-51).

37. In such circumstances it seems to me that notwithstanding the express exclusionary provision in the definition in Annex 1 in respect of persons with leave, the enquiry as to whether a person is a Zambrano carer at all is not precluded from considering the potentiality of obtaining leave to remain because that is an aspect of considering whether it is a realistic hypothesis that the applicant will be forced to leave the UK. To this extent, the Appellant's reliance both before the First-tier Tribunal and the Upper Tribunal on the absence of an express exclusionary provision under Appendix EU for somebody who had a hypothetical possibility of obtaining leave, does not avail him.

38. In a similar way, upon reflection, the passage relied upon by the Appellant at paragraph 39 of **Akinsanya [2021] EWHC 1535 (Admin)** in respect of the Zambrano right 'waiting in the wings' does not negate the approach explained in **Velaj**. This is because the approach explained in **Velaj** goes to the question of whether there is a Zambrano right at all, and not whether an individual enjoying such a right is then to be excluded from the benefits of such a right by reason of the potentiality of obtaining leave under Appendix FM.

39. In all such circumstances, in my judgement it is part of the legitimate inquiry of considering whether a Zambrano right exists – even before considering issues of exclusion - to consider the potentiality of obtaining leave. If such a right exists then, under the scheme of Appendix EU, exclusion may arise in the event that somebody has actual leave. (Of course, by way of a shortcut, if a person does have leave it would not be necessary to conduct any further enquiry for the purposes of Appendix EU because such leave would be adversely determinative of an application based on a Zambrano right because such a person is excluded under the Annex 1 definition.)

40. To this extent I reject paragraphs 12-14 of Ground 2 and the entirety of Ground 3.

41. This leaves paragraph 11 of Ground 2 which in substance argues that the Judge's finding of fact that "*the family relationship is such that a successful application under Appendix FM had been more than merely hypothetical scenario*" was in error of law.

42. I pause to note that it was not similarly argued in the Appellant's Skeleton Argument before the First-tier Tribunal that the Respondent had been in error in stating "*it is considered that, on the balance of probabilities, you are likely to have qualified for Appendix FM leave if you had applied for this before 11pm on 31 December 2020 because the evidence you have submitted confirms you play an active role in the life of your British sponsor son*". Instead, the Appellant's case was put in the Skeleton Argument only on the basis that such a circumstance did not, as a matter of law, exclude the Appellant from enjoying a Zambrano right to reside – with particular reference to the argument explored above in relation to the fact that he did not ever have leave irrespective of any potential to have acquired such leave. Nor is it apparent that such a submission was articulated before the First-tier Tribunal: e.g. see paragraph 9 of the Decision. To this extent it would appear that the Appellant is seeking to rely on an argument before the Upper Tribunal that did not feature as part of his case before the First-tier Tribunal.

43. Be that as it may, I am not persuaded that the Grounds as drafted and further articulated before me disclose any error of law in this regard so much as a disagreement with the Judge's evaluation and finding of fact. The Grounds essentially argue that the Respondent's position, and in turn the Judge's position, was no more than a hypothesis. This is accurate to the extent that it was theoretical rather than actual. But the case law envisages a process of evaluating potentiality rather than actuality; it expressly refers to a hypothesis – albeit a realistic hypothesis. It is not an error of law that the Judge's evaluation was hypothetical. There is nothing in the pleading, or otherwise, to suggest that the Judge's evaluation, which he expressly stated to be based on the Respondent's own indication as to what a decision-maker within the Respondent's employee would likely

have done, was not a realistic hypothesis. The characterisation of the Respondent's position as amounting to a 'concession' does not in any way undermine the Judge's evaluation this regard.

44. In all such circumstances I reject Grounds 2 and 3.

45. Although I have found error in respect of Ground 1, it cannot avail the Appellant on its own. If the Appellant cannot succeed on Grounds 2 and 3, it matters not that he might have been able to establish a Zambrano right in any event. To this extent the error in respect of Ground 1 is not material to the overall outcome of the appeal.

46. Accordingly: Grand 1 on its own does not justify setting aside the decision of the First-tier Tribunal; there is no other basis to set aside the Decision; the Decision of the First-tier Tribunal stands.

Notice of Decision

47. The decision of the First-tier Tribunal contained n material error of law and stands.

48. The Appellant's appeal remains dismissed.

Ian Lewis

Deputy Judge of the Upper Tribunal
(Immigration and Asylum Chamber)

2 April 2024