IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2024-000454
First-tier Tribunal No: EU/50761/2023

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 15 April 2024

Before

UPPER TRIBUNAL JUDGE KOPIECZEK

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

SHANDRA NKUMBE
(ANONYMITY ORDER NOT MADE)

Respondent

Representation:
For the Appellant: Mr T. Melvin, Senior Home Office Presenting Officer Counsel
For the Respondent: Ms F. Shaw, counsel instructed by Divinefield Solicitors

Heard at Field House on 3 April 2024

DECISION AND REASONS

Background

1. Although the appellant in these proceedings is the Secretary of State, it is convenient to continue to refer to the parties as they were before the First-tier Tribunal ("FtT").

2. The appellant is a citizen of Cameroon born in 1985. She appealed to the FtT against the respondent's decision dated 17 January 2023 refusing her application, made on 30 June 2021, for leave under Appendix EU of the Immigration Rules ("the Rules") as 'a person with a Zambrano right to reside'. First-tier Tribunal Judge Blackwell allowed the appeal.

3. Permission to appeal Judge Blackwell's decision having been granted to the Secretary of State, the appeal came before me to consider whether

Judge Blackwell erred in law in allowing the appeal and, if so, what should follow. In view of the way that the appeal proceeded before me, this decision can be given relatively succinctly.

4. The appellant first arrived in the UK as a student on 28 December 2010. An application for further leave to remain as a student was refused on 31 October 2012. A human rights application made in 2014 was also refused and certified as clearly unfounded.

5. The appellant married a Swedish citizen on 10 July 2018. She was granted an EEA residence card on 23 August 2019, valid until 23 August 2023. The couple divorced and a decree absolute was granted on 12 February 2021, the decree nisi having been granted on 31 December 2020. According to the respondent's skeleton argument before me, the residence card was revoked on 14 April 2021.

6. The couple have two children together, a son born on 26 September 2017 and a daughter born on 22 June 2020. Their son holds EU settled status in the UK and their daughter is a British citizen by virtue of her father's settled status in the UK at the time of her birth.

7. The application made on 30 June 2021, for leave under Appendix EU of the Immigration Rules ("the Rules") as "a person with a Zambrano right to reside" was made on the basis that the appellant is the primary carer of her British citizen son. The respondent was not, however, satisfied that the appellant met the requirements of Appendix EU11 or EU14. Furthermore, it was considered that if an application under Appendix FM was made it would likely be successful and the appellant's son would not, therefore, be compelled to leave the UK.

8. After referring to authority and setting out the relevant paragraphs of Appendix EU, Judge Blackwell found that the appellant has not heard from her former spouse since their separation and plays no part in the upbringing of the children. Attempts to contact him have been fruitless. He also found that the appellant is the sole carer of the two children.

9. He found that the appellant presently has no immigration status other than a *Zambrano* right. He concluded that if the appellant was to make an application for leave to remain under Appendix FM she would succeed under paragraph EX.1(a) as she has a genuine and subsisting relationship with a British citizen under the age of 18 and it would not be reasonable to expect the child to leave the UK and go to Cameroon.

10. Judge Blackwell made findings about the appellant's earnings and expenses and concluded that she would not have sufficient funds to pay the fee for an application under Appendix FM or for the NHS surcharge. Therefore, whilst she may satisfy the Rules, she would not be able to make a successful application because she would not have the funds.

11. Thus, he concluded, without leave being granted under Appendix EU, the appellant and her British citizen son would be forced to leave the UK. He therfore allowed the appeal.

12. The respondent's grounds of appeal, in the initial grounds upon which permission was refused, and the renewed grounds, argue that Judge Blackwell failed to apply the guidance in *Sonkor (Zambrano and non-EUSS leave)*[2023] UKUT 00276 (IAC), in particular in para 2 of the headnote that:

> "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."

13. The grounds assert that it was accepted by Judge Blackwell at para 13 that the appellant "had leave granted" under the Immigration (European Economic Area) Regulations 2016 ("the EEA Regulations") as the family member of an EEA national. Thus, at the "relevant date" the appellant had leave under the EEA Regulations and did not have a *Zambrano* right to reside. It is said in the grounds that the judge did not make any material findings with respect to *Sonkor*.

14. The renewed grounds refer to Appendix 1 of Appendix EU and the definition of a person who has a derivative or *Zambrano* right to reside and the requirement that "…where a person relies on meeting this definition, the continuous qualifying period in which they rely on doing so must have been continuing at 2300 GMT on 31 December 2020".

15. The grounds contend that the appellant cannot satisfy the requirements of Appendix EU, either at the specified date or date of application, as she is unable to show that she had any *Zambrano* rights prior to 31 December 2020. As suggested in the decision letter, holding or being granted status in another capacity meant that the application was bound to fail under Appendix EU.

16. The renewed grounds also argue that Judge Blackwell erred in failing to apply *Velaj v Secretary of State for the Home Department* [2022] EWCA Civ 767 on the question of whether the appellant's daughter would be compelled to leave the UK in the context of the appellant's ability to make an Article 8 application for leave to remain under Appendix FM.

Submissions

17. Mr Melvin relied on the grounds of appeal and his skeleton argument. He emphasised that the appellant had no *Zambrano* right to reside prior to 31 December 2020 and submitted that she simply could not qualify for leave on that basis now.

18. Ms Shaw initially relied on the skeleton argument that was before the FtT. However, in response to me Ms Shaw accepted that Judge Blackwell's

decision does contain material errors as argued by the respondent. She did, nevertheless, take issue with an aspect of the respondent's skeleton argument, namely at para 12 in terms of the suggestion that she had a residence card at the relevant date. In fact, the residence card had been revoked by the time she made the instant application.

19. Ms Shaw also canvassed the idea that the hearing might usefully be adjourned on the basis that there was a suggestion following *Akinsanya & Anor v Secretary of State for the Home Department* [2024] EWHC 469 that the Secretary of State's *Zambrano* guidance might be revised.

Conclusions

20. I declined to adjourn the hearing on the basis of the suggestion that the Secretary of State's *Zambrano* guidance might at some stage be revised. It seemed to me that this was too speculative a basis upon which to adjourn the hearing, particularly given that it is not clear how any revised guidance could make any difference to this appellant's appeal in the light of the requirements of the Rules.

21. It is evident that the appellant cannot meet the definition of a person with a *Zambrano* right to reside. At the specified date of 31 December 2020 she had a residence card, and she was not a person with any *Zambrano* rights prior to that date, as required by Appendix EU.

22. On behalf of the appellant I was not taken to any provision of the Rules which suggests that the respondent's argument is misconceived on this issue. On the contrary, it was accepted on behalf of the appellant that Judge Blackwell's decision was flawed for error of law.

23. In relation to the respondent's contention that the appellant had "leave" under the EEA Regulations at the material date, which the respondent contends is a further reason for concluding that the appellant cannot succeed in her appeal, I raised with parties the question of whether residence under the EEA Regulations constituted "leave". Neither party was in a position to make any submissions on the point, although Mr Melvin argued that the appellant did not meet the other relevant requirements in any event.

24. It may be that the answer to the point lies in the fact that Annex 1 prevents an " exempt person" from having a *Zambrano* right. For present purposes it is sufficient to state that the appellant having had a right to reside under the EEA Regulations, was at the material time an exempt person. However, since I did not hear argument on the issue I do not express a concluded view on the matter. In any event, the appellant could not otherwise succeed in her application for the reasons already explained.

25. Similarly, it is not necessary to decide the ground of appeal which relies on *Velaj*.

26. I am satisfied that Judge Blackwell erred in law in allowing the appeal and his decision must be set aside.

27. In the light of the above, the only realistic option is to re-make the decision and dismiss the appeal.

Decision

28. The decision of the First-tier Tribunal involved the making of an error on a point of law. Its decision is set aside and the decision is re-made, dismissing the appellant's appeal.

A.M. Kopieczek

Judge of the Upper Tribunal
Immigration and Asylum Chamber

5/04/2024