Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: UI-2021-000182
[EA/05574/2020]

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 24 August 2022	**On 27 September 2022**

Before

UPPER TRIBUNAL JUDGE KOPIECZEK

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

TAIBA AFTAR
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:
For the appellant: Mr E Tufan, Senior Home Office Presenting Officer
For the respondent: Mr J. Gajjar, Counsel (Direct Access)

DECISION AND REASONS

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

2. The appellant is a citizen of Pakistan born in 1987. On 31 March 2020 she made an application for a derivative residence card as the primary carer of a British citizen child. That application was refused on 13 October 2020 pursuant to regulation 16(5) of the Immigration (European Economic Area) Regulations 2016 ("the EEA Regulations").

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3. The appellant appealed to the FtT against that decision and her appeal was allowed after a hearing on 20 May 2021 before First-tier Tribunal Judges Short and Povey. The Secretary of State appeals to the Upper Tribunal ("UT") against the decision of the FtT.

The parties' written and oral arguments

4. The respondent's grounds of appeal contend that the FtT erred in its understanding and purpose of the *Zambrano* right. Reference is made to the decision of Mostyn J in *R (on the application of) Akinsanya v Secretary of State for the Home Department* [2021] EWHC 1535 (Admin) in terms of the 'compulsion to leave the UK' test in circumstances where the claimant in that case had limited leave to remain. The FtT had erred in concluding that the 'compulsion' test was made out.

5. Similarly, the grounds contend that the relevant part of the EEA Regulations is more generous than it should be and should be read accordingly.

6. The grounds refer to the fact that the Secretary of State had appealed to the Court of Appeal in *Akinsanya*.

7. A rather tardy, but nevertheless helpful, response (by email dated 23 August) to the UT's case management directions resulted in the following from the respondent, so far as material:

> "This is a "legacy" appeal brought under the preserved 2016 Regulations against the refusal of a document confirming a derivative right under regulation 16(5) as the primary carer of British citizen children who would be compelled, it is said, to leave the EEA (realistically the UK) if the appellant was unable to remain. Refusal had been on the basis that Ms After had not shown that the children in reality faced such a threat as she had the option to apply for leave on an alternative basis. This issue, and the associated one of where such limited leave was held, has been much litigated and its effects on the cases of applicants with outstanding appeals and applications has become more unclear after further Court of Appeal authority on the nature of the Zambrano right.
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> **Our position is now** that it needs to be established, with due regard to the principles in Velaj, whether in all of the circumstances Ms Aftar was demonstrably in real danger of having to leave and her children would have no option but to leave with her. This would include all factors including the presence of the father and the realistic option of successful application for leave under Appendix FM, given the age of the children. This is a natural development of our challenge to the allowed Ft-T appeal in that it addresses the nature of the 16(5) right itself rather than a mechanical need for the alternative application as an absolute procedural requirement."

8. In oral submissions Mr Tufan argued, in summary, that because the appellant would be able to apply for leave to remain under the Article 8 Rules, she does not have a *Zambrano* right to reside. Even though she says that she does not have the funds to make an application under

Appendix FM, she could apply for a fee waiver. In those circumstances, there would be no compulsion on her child to leave the UK.

9. Mr Gajjar argued, in summary, that there was no error of law on the part of the FtT. The facts were resolved in favour of the appellant. The fact that the appellant may be able to apply for leave to remain under the Article 8 Rules, would not defeat the application for a residence card on *Zambrano* grounds.

10. In any event, it was submitted that she would not be able to succeed in an application for leave to remain under the Rules. She would not meet the minimum income threshold in an application as a partner and she would not qualify for leave to remain as a parent because of the existence of her partner, the child's parent.

11. Mr Gajjar relied on *Akinsanya v Secretary of State for the Home Department* [2022] EWCA Civ 37, in particular at paragraphs 34 and 35, and *Velaj v Secretary of State for the Home Department* [2022] EWCA Civ 767 at paragraphs 65-69.

Assessment and Conclusions

12. The EEA Regulations, so far as material at the date of the appellant's application and the decision under appeal, provide as follows:

16.-Derivative right to reside

(1) A person has a derivative right to reside during any period in which the person –

(a) is not an exempt person; and

(b) satisfies each of the criteria in one or more of paragraphs (2) to (6).

...

(5) The criteria in this paragraph are that –

(a) the person is the primary carer of a British Citizen ("BC")

(b) BC is residing in the United Kingdom; and

(c) BC would be unable to reside in the United Kingdom or in another EEA State if the person left the United Kingdom for an indefinite period.

13. Regulation 16(7) defines an "exempt person" for the purposes of Regulation 16(1)(a). The categories of exempt persons includes persons with Indefinite Leave to Remain ("ILR").

14. The FtT set out the agreed facts. These were that the appellant is the primary carer for her two infant children, a daughter then aged two years and a son aged two months. Both of her children are EEA nationals, being the children of her partner, himself an EEA national.

15. It was also agreed that that it was not reasonable for the appellant to travel to Pakistan and leave her children in the care of her partner in the UK and it is not reasonable to expect her partner to travel to Pakistan with the appellant and her two young children.

16. The FtT made findings of fact which are unchallenged in the proceedings before me. These are that her children are dependent on the appellant given their young age and particularly in relation to the appellant's son who has health issues. She set out those health issues at [33] of her decision, explaining that he suffers from a blocked kidney and has food allergies. At the time of the FtT's decision he was still being breast fed and required prescription milk.

17. The FtT also recorded at [35] the appellant's account, which appears to have been accepted, that it was not likely that the appellant's partner would follow the appellant and her two children to Pakistan. His family do not accept her or the children. He had been in the UK for 15 years.

18. At [62] the FtT concluded that "The degree of dependency on their mother is sufficient to establish that both of these young children would be compelled to leave the UK with her were she to return to Pakistan".

19. At [63] the FtT found that the fact that the appellant has a "potential alternative legal right to establish her right to remain in the UK is a theoretical right" and it is practical rights that had to be considered, not theoretical rights.

20. The argument before the FtT was essentially the same as that before me, namely that the appellant could make an application for leave to remain under the immigration rules and that application was likely to be successful given that she is the primary carer for her two children.

21. The respondent's challenge to the decision of Mostyn J in *Akinsanya* was only partially successful and the appeal to the Court of Appeal failed substantively.

22. The Court of Appeal in *Akinsanya* said this:

> "54. At first sight there is some force in Mr Cox's position that a right arising under the EU Treaty must exist independently of any domestic rights which purport to reproduce it or which are to substantially the same effect. However, that does not in my judgment correspond to the analysis of the nature of *Zambrano* rights adopted by the CJEU. 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.
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> 55. That analysis is perfectly sustainable at the theoretical level. As the Court recognises (see para. 72 of the judgment in *Iida*) the

> right of third country nationals to reside in a member state is normally a matter for that state. *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 where 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).
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> 56. I do not believe that that approach is inconsistent with *Sanneh*. In that case, unlike this, the claimant had no right to reside under domestic law, and the issue was whether her *Zambrano* right to reside arose prior to the point of imminent removal. It was to that issue that the observations of Elias LJ on which Mr Cox relies were addressed. His conclusion was, in effect, that the *Zambrano* circumstances arose as soon as the claimant had no leave to remain and was thus (as a matter of domestic law) under a duty to leave and liable to removal – see in particular para. 169. The Court was not considering a case where the claimant enjoyed leave to remain as a matter of domestic law. In such a case, on the CJEU's analysis, the *Zambrano* circumstances do not obtain, and Elias LJ's observations have no purchase."

23. However, in considering the second ground of appeal advanced by the Secretary of State in that case, the Court of Appeal at [59]-[67] rejected the argument that an "exempt person" in regulation 16(7)(c) of the EEA Regulations includes a person with limited leave to remain (and thereby cannot qualify under the EEA Regulations for a derivative residence card). The Court decided that aspect of the 'exemption' only applied to persons with indefinite leave to remain, whatever may have been the intention in the drafting of the EEA Regulations in that respect.

24. At [66] the Court said this:

> "66. In the end, however, the short answer to Mr Blundell's submission is that, whatever the contextual considerations, 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. As Mostyn J says at para. 72 of his judgment, the Secretary of State is seeking to imply words into the provision which completely change its scope and meaning."

25. *Velaj* (in the Court of Appeal) was concerned with the question of whether a person deciding the requirements of regulation 16(5)(c) (British citizen unable to reside in the UK or another EEA State if the primary carer left the UK for an indefinite period) must consider whether the British citizen dependant would be unable to reside in the UK on the *assumption* that the primary carer will leave (irrespective of whether that assumption is correct), or whether it must be considered what the impact of on the British citizen would be if *in fact* the primary carer *would* leave the UK for an indefinite period.

26. The Court explained the decision in *Akinsanya* in terms of what it decided and in terms of what it did not decide. At [65] Andrews LJ said this:

> "In *Akinsanya* this court was not required to consider, and did not consider, the requirements of Regulation 16(5) and how 16(5)(c) might be satisfied in practice by a primary carer who had limited leave to remain. The only issue it had to determine was whether Regulation 16(7) acted as a threshold barrier precluding someone like Ms Akinsanya from asserting that she had a derivative right of residence under Regulation 16(5) (or its predecessor) which had survived the subsequent grant to her of limited leave to remain."

27. It follows from what was decided in *Akinsanya* that even if it could be said that the appellant in the appeal before me would be successful in an application for leave to remain under the Article 8 immigration rules, that would not mean that she would not still be entitled to a derivative right of residence because she would otherwise, on the facts as found by the FtT, have met all the requirements for a derivative residence card under regulation 16(5). Leave to remain would not defeat the claim to a derivative residence card by reason of the appellant being an "exempt person" under regulation 16(1); she was not an exempt person.

28. It is important to point out, as explained at [61] of *Velaj*, that the claimant in *Akinsanya* had already satisfied the criteria for a derivative right to reside before she was granted limited leave to remain.

29. Accordingly, regardless of any analysis of whether this appellant would or would not succeed in any Article 8 application under the Rules, including a consideration of paragraph EX1, her ability to make such an application does not mean, by that reason alone, she is not thereby entitled to a derivative right of residence. On the facts as found by the FtT the appellant had already satisfied the criteria for a derivative right.

30. It is otherwise useful to bear in mind the following concluding paragraphs from *Velaj:*

> "68. … the immigration status of a person with limited leave to remain is precarious; leave is likely to be subject to conditions and it is liable to be withdrawn or truncated. It is possible to conceive of situations in which the conditions attached to a limited leave to remain are such as to make it impossible in practice for the primary carer to remain in the UK and look after the child.
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> 69. I can also envisage a *Zambrano* carer whose limited leave to remain is due to expire making an application under Regulation 16(5)(c) and succeeding on the basis that they would have to leave the UK as soon as their limited leave expired and the child would have to go with them. In such a case if the decision-maker asks "what will happen to the child in the event that the primary carer leaves the UK for an indefinite period?" they will not be positing a completely unrealistic scenario. In any event, the practical difficulties of someone with limited leave to remain being able to satisfy the requirements of Regulation 16(5)(c) would not be a justification for construing those requirements in a manner which was clearly unintended."

31. In conclusion, I am not satisfied that there is any material error of law in the decision of the FtT. The substance of its decision that the appellant has acquired a derivative right of residence stands.

32. It would appear that given that the EEA Regulations were revoked on 31 December 2020 the appellant would not be issued with a residence card under the EEA Regulations notwithstanding her success in this appeal. As indicated in the 23 August email from the respondent, the conclusions in the appeal would be taken into account in any EUSS (EU Settlement Scheme) application.

Decision

33. The decision of the First-tier Tribunal did not involve the making of an error on a point of law. The Secretary of State's appeal is, accordingly, dismissed.

Signed

A.M. Kopieczek

Upper Tribunal Judge Kopieczek 26/08/2022