UT Neutral citation number: [2023] UKUT 00276 (IAC)

Sonkor (Zambrano and non-EUSS leave)

Upper Tribunal
(Immigration and Asylum Chamber)

Heard at **Field House**

THE IMMIGRATION ACTS

Heard on 21 March 2023
Promulgated on 20 April 2023

Before

UPPER TRIBUNAL JUDGE SMITH
UPPER TRIBUNAL JUDGE STEPHEN SMITH

Between

The Secretary of State for the Home Department

Appellant

and

Ms Sylvia Sonkor
(NO ANONYMITY ORDER MADE)

Respondent

Representation:
For the Appellant: Mr P. Deller, Senior Home Office Presenting Officer
For the Respondent: Mr C. Appiah, Counsel (Direct Access)

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.*

DECISION AND REASONS

1. By a decision promulgated on 22 December 2021, First-tier Tribunal Judge Mills ("the judge") allowed an appeal brought by Sylvia Sonkor, a citizen of Ghana born in 1976, against a decision of the Secretary of State dated 2 February 2021 to refuse her application for leave to remain under the EU Settlement Scheme ("the EUSS"). The judge heard the appeal under the Immigration (Citizens' Rights Appeals) (EU Exit) Regulations 2020 ("the 2020 Regulations").

2. By a decision promulgated on 7 December 2022, Upper Tribunal Judge Smith (sitting alone) found that the judge's decision involved the making of an error of law, set it aside and gave directions for the decision to be remade in the Upper Tribunal: see Judge Smith's error of law decision, and the accompanying reasoned adjournment directions, in the **Annex**.

3. The matter came before us on 21 March 2023 for the decision to be remade, acting under section 12(2)(b)(ii) of the Tribunals, Courts and Enforcement Act 2007. The hearing proceeded on the basis of submissions alone. Each party relied on their skeleton argument.

4. Although these proceedings began as an appeal brought by the Secretary of State, for present purposes we refer to the appellant before the First-tier Tribunal as "the appellant".

Factual and procedural background

5. The full factual background is set out in the **Annex** to this decision. The appellant is a single mother and primary carer of her two British children born in 2004 and 2006. The elder child is now 18, although little turns on that development, since he was a minor when these proceedings started, and, in any event, the appellant's daughter is still a minor. In 2015 and 2018, the Secretary of State granted the appellant limited leave to remain under Appendix FM of the Immigration Rules on human rights grounds, on account of her role as the primary carer for her two British children. On 19 August 2020, before the expiry of her leave under Appendix FM, the appellant applied for leave to remain under the EUSS, on the basis that she was a person with a 'Zambrano' right to reside. For a discussion of the 'Zambrano' right to reside, see *R (Akinsanya) v Secretary of State for the Home Department* [2022] EWCA Civ 37, paras 8 to 15.

6. The Secretary of State refused the application on the basis that there was a "realistic prospect" of the appellant being able to obtain further leave to remain under Appendix FM. That being so, the appellant had not demonstrated that she would have "no other means to remain lawfully in the UK" as the primary carer of her children. She therefore failed to meet the criteria in regulation 16(5) of the Immigration (European Economic Area) Regulations 2016 ("the 2016 Regulations"), to which the relevant provisions of Appendix EU of the Immigration Rules cross-referred at the time (there have been amendments since, but none is relevant).

Issue to be resolved: whether the decision is in accordance with Appendix EU

7. *Zambrano* carers are not within the scope of the EU Withdrawal Agreement. The appellant does not, therefore, enjoy the ability to advance a ground of appeal under regulation 8(2) of the 2020 Regulations, concerning the compatibility of the decision with the Withdrawal Agreement. The relevant ground of appeal is that found in regulation 8(3)(b) of the 2020 Regulations: that the decision in question is not in accordance with "residence scheme immigration rules", namely Appendix EU of the Immigration Rules. The case therefore turns on whether the decision of the Secretary of State was in accordance with Appendix EU.

8. Paragraph EU11 of Appendix EU, in the form it stood at the date of the application, was as follows:

> "(a) The applicant:
>
> (i) is a relevant EEA citizen; or
>
> (ii) is (or, as the case may be, for the relevant period was) a family member of a relevant EEA citizen; or
>
> (iii) is (or, as the case may be, for the relevant period was) a family member who has retained the right of residence by virtue of a relationship with a relevant EEA citizen; or
>
> (iv) is a person with a derivative right to reside; or
>
> **(v) is a person with a Zambrano right to reside**; or
>
> (vi) is a person who had a derivative or Zambrano right to reside; and
>
> (b) The applicant has completed a continuous qualifying period of five years in any (or any combination) of those categories; and
>
> (c) Since then no supervening event has occurred…"

9. "Person with a Zambrano right to reside" is a defined term in Annex 1 to Appendix EU. It means:

> "a person who has satisfied the Secretary of State, including (where applicable) by the required evidence of family relationship, that, by the specified date, they are (and for the relevant period have been), or (as the case may be) for the relevant period in which they rely on having been a person with a Zambrano right to reside (before they then became a person who had a derivative or Zambrano right to reside) they were:
>
> (a) resident for a continuous qualifying period in the UK with a derivative right to reside by virtue of regulation 16(1) of the EEA Regulations, by satisfying the criteria in:
>
> (i) paragraph (5) of that regulation; or
>
> (ii) paragraph (6) of that regulation where that person's primary carer is, or (as the case may be) was, entitled to a derivative right to reside in the UK under paragraph (5), regardless (where the person was previously granted limited leave to enter or remain under this Appendix as a person with a Zambrano right to reside and was under the age of 18 years at the date of application for that leave) of whether, in respect of the criterion in regulation 16(6)(a) of the EEA Regulations, they are, or (as the case may be) were, under the age of 18 years; and
>
> (b) **without leave to enter or remain in the UK granted under another part of these Rules**." (Emphasis added).

10. At the material times, regulation 16(5) of the 2016 Regulations provided:

> "(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."

The appellant is not a "person with a Zambrano right to reside"

11. While the Secretary of State's operative reasons for refusing the appellant's application under the EUSS focussed on what she considered to be the appellant's prospective ability to secure leave under Appendix FM, it was common ground that the appellant would have to meet additional criteria contained in Appendix EU in any event. In our judgment, the primary question is whether the appellant meets paragraph (b) of the definition of a "person with a Zambrano right to reside" in Annex 1 to Appendix EU (applicant must be without leave to enter or remain granted under another part of the Immigration Rules).

12. Mr Appiah sought to rely on the Court of Appeal's judgment in *Akinsanya* as authority for the proposition that the Secretary of State had misunderstood the import of the 2016 Regulations and their relationship with the EUSS on matters relating to *Zambrano* when framing the rules, and when taking the decision under challenge in these proceedings. He submitted that Mr Deller had merely invited us to adopt the same erroneous understanding of the EUSS as the Secretary of State had in *Akinsanya*. See para. 8 of his skeleton argument:

> "It is respectfully submitted that it is difficult to see how the approach to the present appeal cannot follow the conclusions of Court of Appeal which found that the Respondent erred in law in [her] approach and that (contrary to Home Office policy) a primary carer of a UK citizen child may have a *Zambrano* right to reside even where they are entitled to limited leave to remain on another basis."

13. The difficulty with that submission is that *Akinsanya* concerned the disparity between the Secretary of State's understanding of the 2016 Regulations and the effect of Appendix EU, insofar as each concerned *Zambrano* carers holding some form of existing, non-EUSS leave to remain. Whereas regulation 16(7) of the 2016 Regulations prevented a person with *indefinite leave to remain* from enjoying a right to reside as a *Zambrano* carer (thereby entitling putative *Zambrano* carers with *limited* leave to remain to be granted a right to reside on *Zambrano* grounds under those Regulations), paragraph (b) of the Annex 1 definition of a *Zambrano* carer carved out holders of limited, as well as indefinite, leave to remain from the scope of the EUSS *Zambrano* provisions. What *Akinsanya* did *not* do was find the paragraph (b) requirement in the Annex 1 definition of a "person with a Zambrano right to reside…" to be unlawful. The Court did not quash the rule and declined to be drawn into a discussion as to whether the Secretary of State had misdirected herself in framing the EUSS. That depended on what the Secretary of State was intending to achieve, the Court held. There were any number of reasons why the Secretary of State may have wanted to adopt a different approach: see para. 57.

14. We have emboldened the words in the definition of a "Zambrano right to reside" at para. 9 since they lie at the heart of our operative analysis. The appellant held leave granted under Appendix FM at the time of her EUSS application. She continues to hold leave in that capacity, pursuant to section 3C of the 1971 Act. In his written and oral submissions before us, Mr Deller relied on the barrier to

the appellant succeeding established by paragraph (b) in the Annex 1 definition. We agree that paragraph (b) is dispositive of these proceedings against the appellant. Since the appellant held leave under Appendix FM at the time of her application (and, extended by section 3C, at the date of the appeal before us), she is unable to be a person who meets the definition of "Zambrano right to reside". She cannot satisfy the requirement that she does **not** hold leave to enter or remain granted under another part of the rules. By holding another form of leave, the appellant disqualified herself from being able to succeed as a Zambrano carer under Appendix EU. That is dispositive of all issues in this appeal.

15. Nothing in *Akinsanya* calls for a different approach; the Court of Appeal held that the 'Zambrano circumstances' were not engaged in relation to a person who holds existing leave to remain: see para. 48, and the preceding discussion.

16. Mr Appiah sought to rely on *Velaj v Secretary of State for the Home Department* [2022] EWCA Civ 767. Mr Velaj faced deportation to Kosovo for serious criminal offences. The Upper Tribunal found, as a matter of fact, that Mr Velaj's wife and their British daughters would not relocate to Kosovo upon Mr Velaj's deportation, thereby preventing him from satisfying the criterion contained in regulation 16(5)(c) of the 2016 Regulations. The issue in *Velaj* before the Court of Appeal was whether a person deciding whether the requirements of regulation 16(5)(c) were fulfilled had to *assume* that the primary carer of a British citizen dependent would leave the UK for an indefinite period, or whether the decision-maker must consider what the impact on the British citizen would be if *in fact* the primary carer (or both primary carers) *would* leave the UK for an indefinite period: see para. 13.

17. Mr Appiah relied expressly on paras 68 and 69 of *Velaj*. At para. 69, Andrews LJ held:

> "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..."

18. The difficulty with Mr Appiah's submission is that *Velaj* concerned an application under the 2016 Regulations, rather than the EUSS. That Andrews LJ envisaged a *Zambrano* carer with imminently expiring limited leave to remain being able to succeed under regulation 16(5)(c) of the 2016 Regulations does not undermine our conclusion that this appellant is unable to meet the definition of a "person with a Zambrano right to reside" in Appendix EU. Appendix EU specifically excludes applicants, such as this appellant, who hold limited or indefinite leave to remain at the time of their application to the Secretary of State. The fact that the 2016 Regulations did not is nothing to the point. As Mr Deller points out at para. 12 of his skeleton argument, these proceedings are not a judicial review challenge to the lawfulness of para. (b) of the Annex 1 definition.

Appeal dismissed

19. Drawing this analysis together, we conclude in these terms. At the time of her EUSS application, the appellant held limited leave to remain under Appendix FM. That precluded her from meeting para. (b) of the definition of "a person with a

Zambrano right to reside" in Appendix EU. It is not necessary for us to consider the other reasons relied upon by the Secretary of State for refusing the application. The appeal must be dismissed in any event.

20. Nothing in this decision should be read as undermining the Secretary of State's repeated insistence throughout her decision dated 2 February 2021 that the appellant has a realistic prospect of a future application succeeding under Appendix FM.

Postscript

21. In his skeleton argument, Mr Deller drew our attention to two minor clarifications arising from the summary of Ms Akinsanya's circumstances in para. 19 of the error of law decision. First, Ms Akinsanya's ineligibility for certain benefits as a Zambrano carer under the 2016 Regulations was not as a result of the imposition of a "no recourse to public funds" condition. Rather, it was because all Zambrano carers under the 2016 Regulations were prohibited from having recourse to most public funds by virtue of primary legislation. Secondly, Ms Akinsanya did not hold leave to remain under Appendix FM at the date the EUSS came into force, but at the date of her EUSS application, as we note above at para. 14. We accept those clarifications. Nothing turns on them for the purposes of our analysis.

Notice of Decision

The decision of Judge Mills contained an error of law and is set aside.
We remake the decision, dismissing the appeal.
We do not make a fee award.

Stephen H Smith
Judge of the Upper Tribunal
Immigration and Asylum Chamber
24 March 2023

ANNEX

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: UI-2022-001129; EA/02357/2021

THE IMMIGRATION ACTS

Decided on the papers on 15 November 2022 Determination promulgated

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Before

UPPER TRIBUNAL JUDGE SMITH

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MS SYLVIA SONKOR

Respondent

ERROR OF LAW DECISION AND DIRECTIONS

1. This is an appeal by the Secretary of State. For ease of reference, I refer to the parties as they were before the First-tier Tribunal. The Respondent challenges the decision of First-tier Tribunal Judge Mills promulgated on 22 December 2021 ("the Decision") allowing the appeal.

2. By a decision dated 3 August 2022 and made following a hearing on that day, I adjourned the hearing for the reasons set out in that decision. That decision is appended hereto for ease of reference. It was not sent to the parties until 18 August but I had given directions orally at the hearing itself.

3. Broadly, the directions given were to enable the Respondent to set out her case more fully following the Court of Appeal's judgment in Akinsanya v Secretary of State for the Home Department [2022] EWCA Civ 37 ("Akinsanya") and for the Appellant to have time to consider those arguments and to respond. The parties were directed to request a further oral hearing if that were considered necessary. Otherwise, it was agreed that I should make a decision on the papers in relation to the error of law

issue following written submissions. Neither party has sought a further oral hearing.

4. Neither party complied with the deadlines in the directions given. Both sought extensions of time which were granted by an Upper Tribunal lawyer. Neither party has objected to the other having the extensions sought.

5. I now have written submissions made by the Respondent by way of supplementary skeleton argument filed on 18 August 2022 ("the Respondent's Supplementary Skeleton), and by the Appellant by skeleton argument filed on 26 September 2022 (the Appellant's Supplementary Skeleton). I have had regard to both documents in what follows. I have also had regard so far as still relevant to the Respondent's position statement filed on 2 August 2022 ("the Position Statement") and the Appellant's skeleton argument for the previous hearing dated 3 August 2022 ("the Appellant's Skeleton").

6. Following the adjournment of the hearing on 3 August, this appeal remains at error of law stage in this Tribunal. Accordingly, I first have to decide whether the Decision contains any error of law. If I conclude that it does, I must then decide whether to set it aside. If I set it aside, I must either go on to re-determine the appeal in this Tribunal or remit the appeal to the First-tier Tribunal for re-hearing. The parties did not agree that the appeal could be re-determined on the papers (although the Respondent did indicate in an email following the Appellant's Supplementary Skeleton that disposal of the appeal could be dealt with on the papers). If I set aside the Decision, I have concluded that it will be necessary for there to be a further oral hearing to deal with re-making.

7. I do not need to set out the facts of the Appellant's case in any detail. I have referred to those which are relevant at [2] of my adjournment decision. I have also referred to the basis on which the Respondent's application for permission to appeal was first refused by the First-tier Tribunal and then granted by this Tribunal (see [6] and [8] of my adjournment decision). I do not need to repeat those matters.

DISCUSSION AND CONCLUSIONS

The Decision

8. Judge Mills' reasons for allowing the appeal read as follows:

> "28. Neither the respondent's decision letter, nor her presenting officer, disputed that the strict requirements of Regulation 16(5) were met, in that the appellant is the primary carer of two British children who would be compelled to leave the UK with her if she were to be removed. The only reason the appellant has been found by the respondent to not currently be entitled to rely on this provision, or more specifically on paragraph EU11(3) of Appendix EU, is that her policy guidance requires that applicants exhaust all other routes before relying on this one.
> 29. I do not agree. As was made clear by the Supreme Court in Mahad v ECO [2009] UKSC 16, the respondent's internal guidance cannot be used as a guide to interpret the immigration rules and it is necessary

to determine the requirements of the rules simply by looking at the natural and ordinary meaning of the words used within them.

30. Having done so, I find that the appellant meets the requirements of regulation 16(5). I find that she must also meet the requirements for settled status under EU11(3), given that it is not disputed that, if she has ever had a derivative Zambrano right at all, then she has had it for more than five years, since [E] gained his British citizenship in April 2015.

31. My conclusions are in line with the views of Mostyn J in Akinsanya, which is persuasive authority and which, as of my writing of this decision, is good law on which I am entitled to place weight.

32. My conclusion is that Ms Sonkor is entitled to settled status under the EUSS, as she has enjoyed a Zambrano right to reside for a period of more than five years. The appeal is therefore allowed."

Appendix EU to the Immigration Rules ("Appendix EU") and regulation 16 of The Immigration (European Economic Area) Regulations 2016 ("Regulation 16")

9. I do not understand it to be in dispute that, as an application made under the EUSS, the only grounds available to the Appellant were that the Respondent's decision was not in accordance with the Immigration Rules governing the scheme (therefore Appendix EU) or was not in accordance with the withdrawal agreement between the UK and the EU ("the Withdrawal Agreement"). Again, I do not understand it to be disputed that the Appellant does not rely on the Withdrawal Agreement.

10. The starting point for consideration of the Decision is therefore Appendix EU. Paragraph EU11(3) is relied upon by Judge Mills and I therefore set out the relevant parts of EU11 as follows:

"Persons eligible for indefinite leave to enter or remain as…or as a person with a derivative right to reside or with a Zambrano right to reside

EU11. The applicant meets the eligibility requirements for indefinite leave to enter or remain as…(or as a **person with a derivative right to reside** or a **person with a Zambrano right to reside**) where the Secretary of State is satisfied, including (where applicable) by the **required evidence of family relationship,** that, at the date of application and in an application made by the **required date,** one of conditions 1 to 7 set out in the following table is met:

Condition	**Is met where:**
…	
3.	(a) The applicant: **…** or (iv) is a person with a derivative right to reside; or (v) is a person with a Zambrano right to reside; or (vi) is a **person who had a derivative or Zambrano right to reside;** and (b) The applicant has completed a **continuous qualifying period** of five years in any (or any combination) of those categories; and (c) Since then no supervening event has occurred in respect of the applicant."

11. It is a particular feature of Appendix EU that the words which are emboldened within the main provisions are the subject of a definition in Annex 1 to Appendix EU ("Annex 1"). Paragraph EU7(1) provides that "[a]nnex 1 sets out definitions which apply to this Appendix" and that "[a]ny provision made elsewhere in the Immigration Rules for those terms, or for other matters for which this Appendix makes provision, does not apply to an application made under this Appendix".

12. Accordingly, one has to look to Annex 1 for the definition of "a person with a Zambrano right to reside" (which is the specific right relied upon here), "required evidence of family relationship" (which is not in dispute), "required date" and "continuous qualifying period".

13. The main definitions of relevance in this appeal are "a person with a Zambrano right to reside" and "a person who had a Zambrano right to reside". Those are defined in Annex 1 which now reads as follows:

"person who had a derivative or Zambrano right to reside	a person who, before the specified date, was a person with a derivative right to reside or a person with a Zambrano right to reside, immediately before they became (whether before or after the specified date): … (c) a person with a derivative right to reside; or (d) a person with a Zambrano right to reside;… and who has remained or (as the case may be) remained in any (or any combination) of those categories… in addition, 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."
"person with a Zambrano right to reside	a person who has satisfied the Secretary of State by evidence provided that they are (and for the relevant period have been) or (as the case may be) for the relevant period they were: (a) resident for a continuous qualifying period in the UK which began before the specified date and throughout which the following criteria are met: (i) they are not an exempt person; and (ii) they are the primary carer of a British citizen who resides in the UK; and (iii) the British citizen would in practice be unable to reside in the UK, …if the person in fact left the UK for an indefinite period; and (iv) they do not have leave to enter or remain in the UK

unless this was granted under this Appendix or in effect
by virtue of section 3C of the Immigration Act 1971; and
… or…
in addition:
(a) 'relevant period' means here the continuous qualifying period in which the person relies on meeting
this definition; and
(b) unless the applicant relies on being a person who had a derivative or Zambrano right to reside or a relevant EEA family permit case, the relevant period must have been continuing at 2300 GMT on 31 December 2020; and
(c) where the role of primary carer is shared with another person in accordance with sub-paragraph (b)(ii) of the entry for 'primary carer' in this table, the reference to 'the person' in sub-paragraph (a)(iii) above is to be read as 'both primary carers'."

14. The Respondent also relies on paragraph EU14 which relates to limited leave to enter or remain for those with a Zambrano right. I do not need to set that out as the provision incorporates the same definitions as set out above. As the Respondent points out, both EU11 and EU14 provide that an applicant must satisfy the condition as at the date of application.

15. As I have already set out, Judge Mills allowed the Appellant's appeal because he found that the Appellant met Regulation 16. The relevance of Regulation 16 stems from the previous definitions in Annex 1 which have since been amended to those set out above. The definition of a "person with a Zambrano right to reside" previously in force both at date of the Respondent's decision and date of the hearing before Judge Mills (and until very recently) read as follows:

> "a person who has satisfied the Secretary of State by evidence …that, by the specified date, they are (and for the relevant period have been) or (as the case may be) for the relevant period in which they rely on having been a person with a Zambrano right to reside (before they then became a person who had a derivative or Zambrano right to reside) they were:
>
> (a) resident for a continuous qualifying period in the UK with a derivative right to reside by virtue of regulation 16(1) of the EEA Regulations, by satisfying:
>
> (i) The criterion in paragraph (1)(a) of that regulation; and
>
> (ii) The criteria in:
>
> (aa) paragraph (5) of [Regulation 16]; or …and …
>
> (b) without leave to enter or remain in the UK, unless this was granted under this Appendix."

16. Regulation 16 therefore remains of relevance to this case. Although Regulation 16 has now been revoked, it previously read as follows (so far as relevant):

"(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 …if the person left the United Kingdom for an indefinite period.
…
(7) In this regulation –
…
(c) an 'exempt person' is a person –
(i) who has a right to reside under another provision of these Regulations;
(ii) who has the right of abode under section 2 of the 1971 Act;
(iii) to whom section 8 of the 1971 Act, or an order made under subsection (2) of that section, applies; or
(iv) who has indefinite leave to enter or remain in the United Kingdom."

17. Although Judge Mills set out the relevant provisions of Appendix EU including the full definition at Annex 1 at [17] of the Decision, he made no reference in his findings to that part of the definition which required an applicant to be "without leave to enter or remain". Similarly, although he set out Regulation 16, he did not set out the definition of "exempt person" in Regulation 16 and therefore made no reference to the requirement that an applicant should not have indefinite leave to remain. The fact that the Appellant had leave to remain under a different provision of the Immigration Rules lay at the heart of the Respondent's decision refusing the EUSS application and was therefore clearly relevant. It appears that the Judge may have been misled into thinking that this issue arose only from a policy of the Respondent (see [20] and [28] of the Decision). This is a point made also in the Appellant's Supplementary Skeleton. That ignores the very clear wording in (b) of the definition in Annex 1. The Respondent's position is not confined to Home Office guidance. It is part of Appendix EU.

Akinsanya

18. It may be that Judge Mills thought that he did not need to deal with this issue since he thought that it had been comprehensively dealt with in Akinsanya. Judge Mills relied on the judgment of Mostyn J in that case ([2021] EWHC 1535 (Admin). That judgment has since been appealed, as I will come to.

19. The facts in Akinsanya were somewhat different from that of the Appellant. The appellant in that case had previously had a Zambrano right of residence, granted to her in 2014 and valid to September 2019. The appellant would therefore have satisfied Appendix EU if all things had remained equal. However, whilst her right of residence continued, she applied to lift the "no recourse to public funds" restriction on her leave, as a result of her ill-health. She was told that this could not be lifted unless she made an application under the Immigration Rules, specifically

Appendix FM which she duly did. The application was granted. The appellant therefore held thirty months' leave to remain at the time that the EUSS was introduced. In that context, the appellant made an application under EUSS which was refused on the basis that she had leave to remain on some other basis and would not therefore be required to leave the UK.

20. Mostyn J first considered whether EU law provided the appellant with a right to reside irrespective of the position in domestic law. He concluded at [37] of the judgment that "a proper analysis of the EU cases clearly demonstrates that the court did not consider a limited leave to remain under national law to be a *Zambrano* extinguishing factor". The right would only be extinguished where indefinite leave to remain was held (consistent with the definition of an exempt person under Regulation 16(7)). Mostyn J then went on to consider the Supreme Court's judgment in Patel and another v Secretary of State for the Home Department; Shah v Secretary of State for the Home Department [2020] UKSC [2019] UKSC 59 and whether either that judgment or the judgment of the Court of Appeal in those cases compelled any different conclusion. He concluded that they did not ([49]).

21. Having reached those conclusions, Mostyn J went on to look at Regulation 16. He held that Regulation 16 was "impeccably drafted and accurately reflected the true legal scope of the decision in *Zambrano*, namely that holding indefinite leave to remain in the UK, and nothing but such indefinite leave, would automatically debar an application from being made for a *Zambrano* derivative right of residence".

22. Judge Mills could not be faulted for finding that Mostyn J's analysis of the legal position supported his conclusion that the Appellant's appeal should be allowed. It is however worthy of note that Mostyn J did not by his judgment order that paragraph (b) of the Annex 1 definition should be quashed (as he could have done since Akinsanya was a judicial review challenge).

23. In any event, that is not the end of the matter since Mostyn J's judgment was appealed.

24. The Secretary of State appealed on two grounds. First, she submitted that Mostyn J was wrong to find that EU law only precluded a "Zambrano" right if an applicant held indefinite leave to remain. The second issue however considered whether the Secretary of State had misinterpreted Regulation 16 when framing the definition of "a person with a Zambrano right to reside" in Annex 1.

25. At [33] of its judgment, the Court of Appeal pointed out that "[o]n the face of it, the Secretary of State was plainly entitled to refuse [Ms Akinsanya's] application". That was because "[l]imb (b) of the definition of the Annex 1 definition was that they should be 'without leave to enter or remain in the UK'". The Court noted that Ms Akinsanya had such leave from October 2019.

26. The Court of Appeal allowed the Secretary of State's appeal on the first ground as follows:

“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.

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).

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.

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.

58. I have not found it necessary to refer to Mostyn J's reasoning on this issue, which broadly, though not in all respects, corresponded to the submissions of Mr Cox which I have rejected."

27. As the Court indicated at [57] of its judgment, however, that was not the end of the matter. On the second issue, the Court concluded that the Secretary of State may have misinterpreted Regulation 16. It was accepted on the Secretary of State's behalf that, on the face of Regulation 16, a person with limited leave would be entitled to a "Zambrano" right to reside. However, it was argued that Regulation 16 went beyond what EU law required and that Regulation 16 should be interpreted consistently with that law.

28. The Court considered, however, that, when drafting Regulation 16, the Secretary of State might have intended to go further than EU law required. There was no "general presumption against 'gold-plating'". As the Court indicated at [65] of its judgment, it may have been the case that the Secretary of State had misunderstood the requirements of EU law at the stage of drafting Regulation 16 or she may have intended to go further than that law required. In the end, however, the Court concluded that "the language of regulation 16(7)(c)(iv) is simply too clear to allow it to be construed as covering people with limited leave to remain". For that reason, the Court dismissed the Secretary of State's appeal in spite of its conclusion on the first ground. The decision in Ms Akinsanya's case was therefore quashed (this being a judicial review challenge). However, the Court went on to record a modified version of the order made by Mostyn J at [69] of its judgment as follows:

"The Secretary of State erred in law *in her understanding of regulation 16 of the Immigration (European Economic Area) Regulations 2016* when providing in Annex 1 to Appendix EU to the Statement of Changes to the Immigration Rules HC395 as amended that the definition of a 'person with a Zambrano right to reside' includes paragraph (b) 'a person … without leave to enter or remain in the UK, unless this was granted under this Appendix."

[the italicised wording reflects the changes made]

29. As the Court went on to note, following the declaration made, the Secretary of State had agreed to reconsider her position in relation to the relevant provisions of Appendix EU. Importantly, none of those provisions were quashed either by Mostyn J or by the Court of Appeal. Paragraph (b) of the definition in Annex 1 therefore remained in being. As the Respondent has indicated in the Position Statement, "having reconsidered the relevant provisions of Appendix EU to the Immigration Rules in accordance with the consent order in Akinsanya, Home Office ministers decided that the definition of a 'person with a Zambrano right to reside' in Annex 1 …will continue (under paragraph (b) of that definition) to exclude applicants who held leave to enter or remain in the UK (other than under Appendix EU) at the relevant time(s)". It may be that this is the reason why the Annex 1 definition is now formulated in a slightly different way and no longer makes any reference to Regulation 16.

30. Before turning to the competing submissions made by the parties, I need to refer to one other case on which the Respondent relies – Velaj v

Secretary of State for the Home Department [2022] EWCA Civ 767 ("Velaj"). Again, Velaj post-dates the Decision and indeed post-dates the Court of Appeal's judgment in Akinsanya. The Respondent relies on Velaj as an explanation of the ambit and consequences of the judgment in Akinsanya. Those are explained at [59] to [64] of the judgment. The Court went on to say this:

> "65. 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.
> 66. The Court in *Akinsanya* did not have the benefit of hearing the arguments that were advanced in the present case. Those arguments would have had no bearing on the point of construction of Regulation 16(7) which determined the outcome. In those circumstances, even if I had not been a member of the constitution in that case, and able to gainsay the suggestion from my own personal knowledge of what was and was not considered, it would have been impossible to draw the inference that the Court must have interpreted Regulation 16(5)(c) in a particular way in order to reach the conclusion that it did."

31. The Respondent's position by reference to what is said in Velaj is that the Court of Appeal in Akinsanya did not purport to and did not determine the meaning of Regulation 16(5). It was concerned only with Regulation 16(7).

Error of law

32. As the Respondent points out in her Position Statement, the Appellant is required to demonstrate that she is "a person with a Zambrano right to reside" as at the date of application. The Appellant made her application on 20 August 2020. As at that date, she continued to have leave to remain based on her Article 8 rights which continued in force until October 2020.

33. On the face of it, therefore, the Appellant could not meet paragraph (b) of the definition of "a person with a Zambrano right to reside" in Annex 1 to Appendix EU.

34. As I have already pointed out, Judge Mills made no reference to paragraph (b) of the definition. It is not clear whether that was because he considered that the point no longer needed to be considered and, if so, whether that was because of the definition in Regulation 16(5) or because of Mostyn J's judgment in Akinsanya. Whichever is the case, the Judge fell into error by failing to make any reference to that paragraph and/or provide any reasons for discounting it. As the Respondent points out in her Supplementary Skeleton, it is not open to the Tribunal to simply ignore the requirements of Appendix EU. At the very least, Judge Mills needed to explain why and how he was able to disregard this requirement.

35. The Appellant in her Supplementary Skeleton relies on Regulation 16(5) and in particular Article 16(5)(c). However, that is a separate requirement from that in (b) of the definition. It does not appear to be disputed that the Appellant could meet Article 16(5)(c) if she were otherwise entitled to a "Zambrano" right. That though is not the issue.

36. Relying on the previous definition of "a person with a Zambrano right to reside" which also required that an applicant meet Regulation 16(1)(a), I have also considered whether it might be argued that there is a disjoinder between the definition of "exempt person" under Regulation 16(7) and paragraph (b) of the Annex 1 definition which impacts on the validity of the latter provision. However, whilst the inconsistency between the requirement for indefinite leave to remain in the definition of an "exempt person" and any form of leave to remain in paragraph (b) is what led the Court of Appeal to require the Secretary of State to reconsider her position in relation to the definition under paragraph (b), neither the Court of Appeal nor Mostyn J quashed paragraph (b) of the definition. As such, the fact that the Appellant can meet the definition in paragraph (a) of the Annex 1 definition (because she satisfies the Article 16(5) definition) does not determine the appeal in her favour.

37. The Appellant also relies in the Appellant's Skeleton on what is said at [68] (and I infer [69]) in Velaj as follows:

> "68. Although I see the force of that argument, 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.
> 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."

38. Although I accept, as did the Court of Appeal, that there might be implications to the Respondent's policy of excluding from a "Zambrano" right to reside for those who are entitled to remain on some other basis, the Court of Appeal was not there reaching any conclusion about the Annex 1 definition and the very clear words in paragraph (b). I do not consider therefore that this assists the Appellant. Moreover, I return to the main point I have made which is that none of this was considered by the Judge. Judge Mills could not of course know what the Court of Appeal would later decide in Akinsanya nor what would be said in Velaj. He did however have to provide some reason for disregarding as I find he did the clear requirement in paragraph (b) of the Annex 1 definition.

39. An issue is raised in the written submissions (by the Supplementary Skeleton of each party) in relation to the application of section 3C Immigration Act 1971. As I understand the Respondent's position it is that the Appellant's leave would continue by reference to that section while her application was decided and then whilst any appeal was pending, notwithstanding that the application made was under EUSS and not by reference to the Appellant's Article 8 rights. The Respondent's position is that this is in any event irrelevant because the Appellant had to meet the Annex 1 definition at the date of application and not date of hearing or today's date. I do not intend to proffer any view in relation to that issue at this stage. It was not an issue raised with Judge Mills and forms no part of the Decision.

CONCLUSION AND NEXT STEPS

40. For the foregoing reasons, I conclude that the Decision contains an error of law. Judge Mills failed to deal with paragraph (b) of the Annex 1 definition of "a person with a Zambrano right to reside" and therefore failed to explain how the Appellant could succeed in her appeal in circumstances where she had leave to remain based on her Article 8 rights at the date of her EUSS application.

41. I indicated in my adjournment decision directions that I would determine the error of law decision on the papers. I did not indicate that I would go on to re-make the decision if I found there to be an error of law as I have now done. Accordingly, I have set out below directions for a re-making hearing before this Tribunal.

DECISION

The decision of First-tier Tribunal Judge Mills promulgated on 22 December 2021 contains an error of law. I therefore set that decision aside. I give directions below for a resumed hearing.

1. **Within 28 days from the date when this decision is sent, the parties shall file with the Tribunal and serve on the other party skeleton arguments setting out their position on the outcome of this appeal, by reference to relevant statutory provisions and case-law.**
2. **The appeal will be re-listed before Judge Smith on the first available date after 42 days from the date when this decision is sent. Time estimate – one day. No interpreter required unless the Appellant notifies the Tribunal within 14 days from the date when this decision is sent that one is required.**

Signed: L K Smith Dated: 15 November 2022
Upper Tribunal Judge Smith

APPENDIX: ADJOURNMENT DECISION

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: UI-2022-001129; EA/02357/2021

THE IMMIGRATION ACTS

Heard at Field House, London
On Wednesday 3 August 2022

Determination promulgated

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Before

UPPER TRIBUNAL JUDGE SMITH

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MS SYLVIA SONKOR

Respondent

Representation:
For the Appellant: Mr P Deller, Senior Home Office Presenting Officer
For the Respondent: Mr C Appiah, Counsel instructed on a direct access basis

ADJOURNMENT DECISION AND DIRECTIONS

1. This is an appeal by the Secretary of State. For ease of reference, I refer to the parties as they were in the First-tier Tribunal. The Respondent appeals against the decision of First-tier Tribunal Judge Mills promulgated on 22 December 2021 ("the Decision"). By the Decision, Judge Mills allowed the Appellant's appeal against the Respondent's decision dated 2 February 2021 refusing her application to remain in the UK under the EU Settlement Scheme ("EUSS").

2. The facts of this case are largely agreed. The Appellant is the primary carer of two British Citizen children. She was granted leave to remain based on her relationship with those children and her Article 8 ECHR rights. She was

granted a period of thirty months in 2015 and again in 2018. Her leave was due to expire in October 2020. On 20 August 2020, she made an application under EUSS based on a derivative right of residence ("a Zambrano right"). It is common ground that this application was made whilst she still had leave remaining and was made under the EUSS rather than under the Immigration (European Economic Area) Regulations 2016 ("the EEA Regulations") which remained in force at that time.

3. The Appellant's application was refused on the basis that she had been previously granted leave to remain based on her human rights and could not show that a further application on that basis would not succeed. She would not therefore be required to leave the UK and she did not therefore enjoy a Zambrano right. It was not disputed that the Appellant is the primary carer of the children who, as minors, would have to leave the UK if the Appellant was required to leave.

4. Judge Mills allowed her appeal finding that the Appellant "meets the requirements of Regulation 16(5)" (of the EEA Regulations) and "must also meet the requirements for settled status under EU11(3)" ([30] of the Decision).

5. The Respondent challenged the Decision initially on the basis that she was awaiting judgment from the Court of Appeal in Akinsanya v Secretary of State for the Home Department (subsequently reported at [2022] EWCA Civ 37) ("Akinsanya") which it was expected would be of relevance to this appeal.

6. Permission to appeal was refused by First-tier Tribunal Judge Aldridge on 31 January 2022 in the following terms so far as relevant:

> "..2. The grounds are wholly without merit. There has been no material error of law identified by the Respondent. The Judge clearly and demonstrably considered all of the evidence and, properly, made findings in respect of it. These findings are adequately reasoned and based on all of the evidence available to the tribunal. The judge provided explanation of the findings. The judge was entitled to make these findings and did so in a reasoned manner considering the evidence in the round.
> 3. The grounds disclose no arguable error of law."

7. Following the handing down of judgment in Akinsanya, the Respondent recast her grounds of appeal on renewal. She contended that the First-tier Tribunal Judge "has provided no proper basis on which a Citizens' Rights appeal could have succeeded in circumstances where the rule enabling refusal or grant of the application has been impugned as not being in agreement with the unambiguous meaning of the regulations which set out the Ruiz Zambrano right to reside". She also contended that "there is a vacuum in the rules framework which means that not to challenge on this basis would fix the Secretary of State with a duty to grant leave to remain when no proper basis exists to do so".

8. Permission to appeal was granted by Upper Tribunal Judge Pickup in the following terms:

> "1. The renewed grounds follow the promulgation of the decision of the Court of Appeal in Akinsanya.
> 2. It is arguable that in light of an apparent vacuum in the framework of the rules, there is an error of law in the decision of the First-tier Tribunal.
> 3. At the time the respondent's refusal decision was taken, it was arguably consistent with the EUSS rules as they were and that until such time a new rules are implemented there is no basis upon which leave could be granted. It is also arguable that the First-tier Tribunal has provided no proper basis upon which a Citizens' Rights appeal could succeed where the rule providing for grant or refusal has been found to be note in agreement with the meaning of the regulations relating to the Zambrano right to reside in the UK.
> 4. For the reasons explained above, an arguable material error of law is disclosed by the grounds."

9. This matter came before me to determine whether the Decision contains an error of law and if I so concluded, whether to remit the appeal or retain it in this Tribunal for re-making of the decision.

10. By letter dated 2 August 2022, the Respondent made more detailed submissions setting out her position in consequence of the judgment in Akinsanya and the Respondent's review following that judgment. In light of the decision to adjourn the hearing as set out below, I do not need to refer to the substance of that letter save to note that the Respondent contends that the Decision cannot now stand and that the Appellant's appeal must be dismissed.

11. In the course of Mr Deller's very helpful submissions and discussion, it became clear that there are a number of points raised by this appeal which are potentially of some wider legal significance and which are under consideration by the Respondent. Those concern for example the impact of section 3C Immigration Act 1971 in the factual circumstances of this case and the interplay between applications under EUSS and those made under the EEA Regulations. As I understood Mr Deller to accept, if the Respondent is right in her analysis, the Appellant may have been able to succeed for example if she had made an application under the EEA Regulations but not under EUSS. She might also have succeeded if her application had been made out of time after her existing leave to remain expired.

12. Although Mr Appiah made short but very able written submissions in response to the 2 August letter (which he had very little time to consider), it became clear to me that the arguments raised in the appeal were both complex and developed way beyond those raised in the initial grounds of appeal. I therefore suggested of my own volition and in order to assist the Tribunal that an adjournment might be appropriate to allow both sides to develop their submissions in writing in slower time. Both parties agreed that this was a sensible course, particularly given the implications for both sides.

13. In particular, Mr Appiah indicated that he would wish to consider the Respondent's review following Akinsanya and the arguments made about Section 3C in light of any changes made to that section following the introduction of the EUSS. He also wished to consider further the interplay between applications under EUSS and the EEA Regulations. In that regard, I

referred him to two Presidential panel decisions (currently unreported) in Batool and others v Entry Clearance Officer (EA/02864/2020 and others) and Celik v Secretary of State for the Home Department (UI-2022-000222; EA/11062/2021) which may be relevant to that point. Mr Deller confirmed that the Respondent is aware of and has received the promulgated decisions in those cases. They should therefore be available on the internet.

14. For the reasons set out above, I adjourned the hearing with the following directions:

[Directions omitted]

Signed: L K Smith Dated: 3 August 2022
Upper Tribunal Judge Smith