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Zambrano: what next after Akinsanya (No 1) and Velaj



Friday 8 July 2022

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ZAMBRANO: STATE OF PLAY

31 May 2022 - Velaj judgment – Court of Appeal

13 June 2022 – Home Office review outcome & guidance

Pending: Akinsanya JR of Appendix EU
Velaj's application to Supreme Court

AKINSANYA “(NO 1)”

25 January 2022, Court of Appeal

EU Zambrano right only exists where “carer has no domestic (or other EU) right to reside (or to work, or to receive necessary social assistance)”, 56
Therefore extinguished by grant of leave to remain. (*NB which gives right to work and receive necessary social assistance?*)

But right to reside conferred by reg 16(5) of Immigration (European Economic Area) Regs 2016 is not extinguished by grant of limited leave to remain.

HOME OFFICE REVIEW

13 June 2022, Home Office

Home Office dropped policy that the possibility of leave to remain affects Zambrano right to reside. Home Office now accepts that Zambrano carers with no leave to remain on 31 December 2020 and date of Appendix EU application qualify.

Home Office maintained Appendix EU definition of Zambrano carer para (b) which states requirement that applicant did not have leave to enter or remain (other than under Appendix EU).

AKINSANYA (NO 2)

Court of Appeal (like Mostyn J) decided a preliminary issue: scope of Zambrano and reg 16(5) rights. Did not quash para (b); only declared it unlawfully made, because Home Office had misunderstood reg 16 when making para (b).

Ms Akinsanya's JR was founded on her reg 16(5) argument, but she argued for quashing para (b) as irrational, discriminatory and disproportionate.

High Court stayed that argument pending Court of Appeal, and now stay is lifted.

WHAT LEAVE DISQUALIFIES?

Under para (b) any leave counts, except Appendix EU leave.

But in *Akinsanya*, Court referred also to the right to work or to receive necessary social assistance.

Is it lawful to keep para (b) so broad? Or should leave which prohibits work, eg visitor leave, be excluded?

Doesn't arise for Ms *Akinsanya* – her leave was Appendix FM with no NRPF condition.

5 YEARS DONE BEFORE LEAVE?

Home Office new guidance expressly states Zambrano carers must have no leave to remain on 31 December 2020 or the date of application.

But what does of a Zambrano carer who completed 5 years with no leave?

Zambrano definition applies where “by” (not “on”) 31/12/20 person “is and was resident for a continuous qualifying period”.

CQP definition - the period must continue at date of application “unless it is of at least five years’ duration”.

In those cases, only a supervening event disqualifies – and a grant of leave is not a supervening event.

VELAJ

Immigration (EEA) Regs16(5)(c)

“BC would be unable to reside in the United Kingdom or in another EEA State if the person [both primary carers] left the United Kingdom for an indefinite period”

Mr Velaj argued that this applies whether or not both primary carers will leave.

Court of Appeal disagreed – ruled that “if . . . left” is an additional requirement that the carer/s will in fact leave the UK

NOT APPLIED UNDER APP EU?

Home Office will accept there were reasonable grounds for Zambrano (re) applications under Appendix EU not meeting deadline of 30 June 2021 if made by 25 July 2022.

But, where a person has limited leave which expires on or after 1/7/21, then under definition of “required date” in App EU, SSHD will accept reasonable grounds if application is made before that leave expires.

So deadline is:

25 July 2022, for person with no leave

Date of expiry of leave to remain

PARALLEL APPLICATIONS

Usual immigration rule is that a further application varies a pending application: para 34BB

Para 34BB does not apply to applications under Appendix EU: EU10(2)

This means that an application under Appendix EU does not affect a pending application under say Appendix FM, and vice versa.

SOME HAVE HARD CHOICES

Where a person would only be entitled to Pre-Settled Status under Appendix EU, they will be worse off as regards benefits than if they had Appendix FM with no NRPF.

But they will get Indefinite Leave to Remain (Settled Status) after 5 years of being a Zambrano carer, not have to wait for 10 years on the 10 year route.

WHAT'S NEXT

Home Office will decide Ms Akisanya's application, again.

Unless they grant ILR, her JR of para (b) will proceed.

Supreme Court will decide Mr Velaj's application for permission to appeal.



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Q&A



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