



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM
CHAMBER

Case No: UI-2022-002886
First-tier Tribunal No: EA/13457/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 26 March 2023

Before

UPPER TRIBUNAL JUDGE KEBEDE

Between

NAILA QAMAR
(no anonymity order made)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr J Otieno, Counsel
For the Respondent: Mr A Tan, Senior Home Office Presenting Officer

Heard at Manchester Civil Justice Centre on 24 January 2023

DECISION AND REASONS

1. The appellant is a national of Pakistan born on 29 June 2021. On 29 June 2021 she made an application under the Immigration (European Economic Area) Regulations 2016 (“the EEA Regulations”) for a Family Permit under the Zambrano principles as the primary carer of her British children. The children were living with her in Pakistan at the time and their father, a British citizen, was living in the UK.

2. In a decision dated 8 August 2021, the respondent considered the appellant’s application under regulation 16(5) of the EEA Regulations 2016 and refused it on the grounds that the appellant’s British husband would be able to look after the children in the UK and they would therefore not be required to leave the UK in her absence. It was therefore not accepted that the appellant met the requirements of regulation 16(5)(c).

3. The appellant lodged an appeal against that decision and her appeal came before First-tier Tribunal Judge Eldridge on 24 March 2022 to be determined on the papers, as requested. That followed a previous decision on the papers by First-tier Tribunal Judge Louveau on 18 February 2022 which was set aside when it became apparent that the judge did not have sight of the relevant documents. Judge Eldridge found that the appellant could not succeed under regulation 16(5) of the EEA Regulations 2016 because none of her children was residing in the UK. He dismissed the appeal in a decision promulgated on 28 March 2022.

4. The appellant sought, and was granted, permission to appeal to the Upper Tribunal and the matter came before Upper Tribunal Judge Bruce on 5 December 2022. At the hearing, Mr McVeety on behalf of the Entry Clearance Office, accepted that the judge's decision was flawed for error of law since there was no legal basis for the judge to have concluded that the Zambrano route was not open to the parent of British children who were currently residing abroad. Upper Tribunal Judge Bruce set aside Judge Eldridge's decision on that basis. However she was unable to go on to re-make the decision herself as Mr McVeety raised a new issue which required further submissions to be made. That issue was that there was in fact no right of appeal since there had never been a valid application made by the appellant in the first place and there was therefore no immigration decision giving rise to an appeal, the appellant having made her application in June 2021 before the end of the 'grace period', and therefore after 31 December 2020. Mr McVeety requested an adjournment to enable him to take instructions and produce a skeleton argument and for the appellant to file a response. The appeal was accordingly adjourned. Upper Tribunal Judge Bruce gave directions for both parties to file and serve skeleton arguments.

5. Both parties then filed skeleton arguments.

6. For the respondent it was submitted in the skeleton argument that there was no legal basis for the appellant's application under regulation 12 with reference to regulation 16(5) of the EEA Regulations 2016 or for the ECO to make a decision on that application, as the 2016 Regulations had been revoked by the time of the application and the saving provisions did not apply. As a matter of law, therefore, the application did not exist, the ECO did not make an immigration decision and there was no right of appeal under regulation 36. The appellant had not made an Article 8 human rights claim and the SSHD had not refused a human rights claim, so there was no appeal under section 82 of the Nationality, Immigration and Asylum Act 2002. It was submitted that the Upper Tribunal should therefore dispose of the appeal by finding that there was no jurisdiction to consider the appeal because there was no legal basis for the application to have been made or for the decision to be made and no statutory right of appeal. It was also noted that the respondent had made a decision refusing an EUSS family permit in error and that the decision would be withdrawn as the appellant had not made an application for an EUSS family permit.

7. A skeleton argument was produced for the appellant from Mr Otieno in which it was submitted that the appellant was a Zambrano carer of British children and had made an application for a family permit within the deadline set by the respondent. The ECO had made an immigration decision and had wrongly declined her application. The appellant had the benefit of the Transitional provisions as she had made an application under the EEA Regulations. The respondent should have "facilitated" her residence in accordance with the decision in Batool & Ors (other family members: EU exit) [2022] UKUT 219.

8. At the hearing, both parties made submissions, relying on their skeleton arguments.

Discussion

9. Mr Otieno did not accept the respondent's position in her skeleton argument for three reasons: firstly, that the ECO had made a decision on the basis of the respondent's legal guidance; secondly, that the appellant's family was suffering the consequences of the decision of the ECO and the First-tier Tribunal; and thirdly, that the ECO's decision was based on Zambrano and the respondent's legal guidance. He submitted that the appeals should therefore be allowed.

10. I asked Mr Otieno if his position was that I had to accept the ECO's decision as being an immigration decision giving rise to an appeal even if it was incorrect in law and he replied that I did. That is clearly wrong. As Mr Tan properly submitted, I have to make a decision based upon statute and law and am not required to accept a decision of the respondent if it was incorrectly made, whether or not the error should never have been made in the first place and whether or not the appellant and her family has been inconvenienced. The respondent has conceded that that decision was wrongly made and did not in fact constitute an 'immigration decision'. Mr Otieno did not offer any basis upon which it could be said that the ECO's decision was legally correct.

11. As for the position stated by Mr Otieno in his skeleton argument, that was clearly erroneous since it was based upon the premise that the appellant had made her application during the transitional period in which applications could be made either under the EUSS or under the EEA Regulations 2016, which he stated at paragraph 13 of his skeleton argument was from 30 March 2019 to 31 December 2020. However the appellant's application was made on 29 June 2021, after the end of the transition period ending on 31 December 2020, by which time the EEA Regulations 2016 had been revoked. In such circumstances the 'Zambrano' route under the EEA Regulations 2016 had closed by the time the appellant made her application and the application should never have been accepted and considered by the respondent. Put simply, there was no legal basis for the appellant's application, the respondent's decision was therefore not a valid 'immigration decision' giving rise to a right of appeal and the appellant's appeal was not a valid one.

12. In the circumstances the appropriate way to dispose of this case is to re-make the decision by dismissing the appellant's appeal for lack of jurisdiction on the basis that there was no valid appeal before the Tribunal.

DECISION

13. The making of the decision of the First-tier Tribunal involved an error on a point of law and First-tier Tribunal Judge Eldridge's decision has accordingly been set aside.

14. I re-make the decision by dismissing the appellant's appeal for want of jurisdiction.

Signed: S Kebede
Upper Tribunal Judge Kebede

Judge of the Upper Tribunal
Immigration and Asylum Chamber
24 January 2023