



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-003786

First-tier Tribunal Nos: EA/53734/2021
IA/16712/2021

THE IMMIGRATION ACTS

**Decision & Reasons Issued:
On 5th June 2024**

Before

**UPPER TRIBUNAL JUDGE PERKINS
DEPUTY UPPER TRIBUNAL JUDGE DAVEY**

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

BASIMA AJAIB

(no anonymity order made)

Respondent

Representation:

For the Appellant: Mr T Melvin, Senior Home Office Presenting Officer

For the Respondent: Mr A Papatotiriou, Counsel, instructed by Legal Rights Partnership

Heard at Field House on 9 October 2023

DECISION AND REASONS

1. This is an appeal by the Secretary of State against a decision of the First-tier Tribunal allowing the appeal of the respondent, hereinafter “the claimant”, against a decision of the Secretary of State to refuse her an EEA family permit.
2. The Secretary of State did not appear and was not represented by the First-tier Tribunal. The claimant was represented by Mr Papatotiriou who appeared before us.
3. Both parties made appropriate oral submissions but they did not add anything substantial to the Grounds of Appeal and the Rule 24 Notice.
4. The decision subject to this appeal was a refusal of an application for an EEA family permit for the claimant to accompany her children who are British citizens to the United Kingdom under Regulation 16(5) of the Immigration (EEA) Regulations 2016. The decision, dated 19 October 2021, is the result of a

reconsideration of a decision made on 21 April 2021. For reasons that are not clear, the Secretary of State first decided the application, inappropriately, as if it depended on a **Surinder Singh** right rather than a **Zambrano** right. Nothing turns on this but we mention it because it explains why the Secretary of State withdrew the decision made on 21 April 2021 and made the decision complained of on 19 October 2021.

5. The First-tier Tribunal Judge described the appeal, correctly, as an appeal against the respondent's decision on 19 October 2021 to refuse an EEA permit to a person asserting a "**Zambrano**" right to enter the United Kingdom. The Secretary of State regards a "**Zambrano**" rights as a right of last resort and only applicable when refusing would prevent the claimant's children exercising their rights to live in the EEA, in this case in the United Kingdom.
6. The First-tier Tribunal Judge directed herself correctly on the burden and standard of proof and considered carefully the written and oral evidence.
7. The judge was not persuaded by the Secretary of State's arguments about the proper application of the Rule in **Zambrano**. The judge found that there were two very young British children in Pakistan who could only enjoy their rights as British citizens if accompanied by their mother and the Judge allowed the appeal.
8. The grounds supporting the appeal were settled by Mr P Deller who is a very senior and experienced Home Office official. The grounds assert, inter alia:

"Although the application [for leave to enter the United Kingdom] was made before the specified date (31 December 2020), the date on which the Regulations were repealed, the relevant statute did not operate to extend regulation 16 for the purpose of deciding an appeal against a decision made after the specified date. Accordingly the appellant could not be issued with an EEA family permit under regulation 12(4) or consequently be admitted under regulation 11(5)(e) as both actions were contingent on regulation 16 requirements continuing to be met. Moreover, at the date of the regulation 36 appeal against the decision the only ground of appeal had been modified by paragraph 6 of schedule 3 of the 'Consequential SI' (The Immigration and Social Security Co-ordination (EU Withdrawal) Act 2020 (Consequential, Saving, Transitional and Transitory Provisions) (EU Exit) Regulations 2020) to raising a breach of the 2016 Regulations as they continued after 31 December 2020, i.e. with regulation 16 not preserved".
9. Regulation 16 extends to twelve subparagraphs and is headed "Derivative right to reside".
10. Stripped of the detail necessary to explain the point, the ground essentially says that the decision complained of is not appealable and the appeal, if entertained, should have been dismissed. For the reasons given below we agree.
11. The Secretary of State's grounds of appeal to the Upper Tribunal must have been particularly unwelcome because they begin by recognising, correctly, that the point taken in the grounds had not been raised before the First-tier Tribunal. However as the appeal raises an arguable jurisdiction point it has to be considered. If the Tribunal had no power to entertain the appeal it has no power to allow it.
12. In order to understand the issues here we found the claimant's skeleton argument before the First-tier Tribunal particularly helpful. It sets out the terms of Regulation 12(2), Regulation 11(5)(e) and Regulation 16(5) and then summarises the relevant requirements as being the claimant is the primary carer

of a British citizen child and the claimant wishes to accompany her British citizen child and would be entitled to reside in the United Kingdom if the claimant and the British citizen child were both in the United Kingdom and the British citizen child would be unable to reside in the United Kingdom without the claimant. We regard this as a helpful and sensible summary of the relevant provisions. That is what the claimant thought that she had to prove to satisfy the Regulations and that is what the Secretary of State decided she had not done and what the First-tier Tribunal Judge decided she had done. However this is of limited application to the case before us.

13. But for withdrawal from the European Union, the decision in response to the application would have been an EEA decision under the Immigration (European Economic Area) Regulations 2016 and Regulation 36 provides that there is a right of appeal against a decision under the Regulations to the First-tier Tribunal.
14. That the decision was with reference to regulation 16 is not disputed and the decision could hardly be clearer. The decision states, inter alia:

“For the reasons noted above, I am not satisfied that you have provided sufficient evidence that you meet all of the requirements in accordance with Regulation 16(5) of the Immigration (European Economic Area) Regulations 2016. I therefore refuse your EEA Family Permit application because I am not satisfied that you meet all of the requirements of regulation 12 of the Immigration (European Economic Area) Regulations 2016”.
15. The Notice of Decision informed the claimant that she had a right to appeal but gave no details other than indicating where on the “www.gov.uk” website she could find how to appeal from outside the UK. We do not suggest that this was in any way deficient but it is not particularly helpful given how the matter was argued before us.
16. The refusal notice was dated 19 October 2021 and the appellant gave notice of appeal on 14 November 2021.
17. We have not been able to find anywhere a copy of the grounds of appeal to the First-tier Tribunal.
18. There is an extensive skeleton argument provided for the First-tier Tribunal which was clearly considered by the First-tier Tribunal Judge. We have already outlined the First-tier Tribunal’s Decision and Reasons. As has been explained it does not illuminate the points taken by the Secretary of State before us which had not been anticipated at the time of the hearing.
19. The Rule 24 notice at paragraph 6 acknowledges the gist of the grounds and asserts that the Secretary of State’s position is just wrong in law. The claimant applied for an EEA family permit under Regulation 12 of the 2016 Regulations at a time when they were still in force. However, the application was decided after the Regulations were repealed on 31 December 2020. The application was finally decided on 19 October 2021 and it is that decision that was appealed successfully to the First-tier Tribunal. The Rule 24 notice then recognises that as the 2016 Regulations were repealed (they plainly were) “it is relevant to consider the statutory basis on which the ECO proceeded to make the relevant decisions and on which those were appealed, following 31 December 2020”.
20. It is against this background that we test the argument advanced by the Secretary of State.

21. We turn now to the 2016 Regulations themselves. Regulation 16 is headed “Derivative right to reside”. The wording of Regulation 16 defines the circumstances in which “a person has a derivative right to reside”. However, although Regulation 16 sets out the circumstances in which a person may have established a derivative right to reside that, of itself, does not assist the claimant. Before being allowed to enter the United Kingdom she would need something to give effect to that right. In this case, assuming that the application satisfied the requirements of regulation 16, the claimant would be issued with a family permit, which process is regulated by Regulation 12. Broadly Regulation 12 provides that a person who meets certain criteria, including but not limited to a person who has a derivative right of residence, must be issued with an EEA family permit and Regulation 11 provides that a person with one of several qualifying criteria, including possessing an EEA family permit issued under Regulation 11 must be admitted to the United Kingdom. Importantly, regulation 11 and 12 have a purpose for people other than those who have established a Derivative Right of Residence under regulation 16.
22. Appeals against decisions under the 2016 Regulations are regulated by Regulation 36. Existing appeals and applications after the 2016 Regulations were revoked are ruled by the Immigration and Social Security Co-ordination (EU Withdrawal) Act 2020 (Consequential, Saving, Transitional and Transitory Provisions) (EU Exit) Regulations 2020. Paragraph 5(1)(d) of Schedule 3 provides that some of the provisions of the EEA Regulations 2016 continue to apply but that general observation is subject to considerable restraint.
23. Most importantly it is only the “provisions of the EEA Regulations 2016 specified in paragraph 6” that continue to apply and regulation 16 is not specified in paragraph 6.
24. It is for these reasons that the Secretary of State argues that it follows that there is no possibility of an appeal based on Regulation 16(5) succeeding. At the risk of needless repetition, by the time the application was decided, Regulation 16(5) no longer applied.
25. The Rule 24 notice asserts that the applicant applied for an EEA family permit under Regulation 12 before their repeal but the application was not decided until 19 October 2021, that is after the Regulations generally cease to have effect on 31 December 2020.
26. This may well be right, but as explained above, we find that regulations 11 and 12 are “enabling provisions” rather than “entitling” provisions. It is not a proper analysis of the application to consider it as an application under Regulation 12 without more. Such an application only has meaning if it is related (in this case) to Regulation 16 and, by the time the application was decided, there was no Regulation 16.
27. The claimant relied on Schedule 3 of the “Consequential SI” and particularly paragraph 3. This refers to “Pending applications for documents under the EEA Regulations 2016”. The Rule 24 notice asserts that this is relevant because it provides for the continuing application of Regulation 12. This is a reworking of the point that we have rejected above. Regulation 12 is meaningless without reference to a further regulation and that relevant further regulation (16) had ceased to apply.
28. Paragraph 4 is headed “Application of EEA Regulations 2016 to pending applications” but this concerns an appeal and, as the Rule 24 notice recognises, paragraph 5 relates to “existing appeal rights and appeals”. For the purposes of

this appeal, paragraph 4 does not add to paragraph 5. Paragraph 5 is a complex paragraph. It begins “5. - (1) Subject to sub-paragraph (4), the provisions of the EEA Regulations 2016 specified in paragraph 6 continue to apply –”.

29. We look then to see what is said to “continue to apply”.
30. Regulation 6(2)(u) says “regulation 36 (appeal rights)” continues to apply. It follows therefore that appeal rights are preserved in some case. Paragraph 15 of the Rule 24 notice states:

“It is clear that the ECO’s decisions to refuse the Appellant’s EEA family permit application made under regulation 12 of the 2016 Regulations before commencement (before IP completion, i.e. 31 December 2020) were EEA decisions within the meaning of the 2016 Regulations. As both decisions were made after commencement date, the provisions of the 2016 Regulations specified in paragraph 6 of the Consequential SI continue to apply under paragraph 5(1)(d) of Schedule 3 of the Consequential SI. This is the common position between the parties.”
31. The Rule 24 notice also accepts that the Secretary of State is correct to assert that the only permitted ground of appeal is that the decision breaches the claimant’s rights under the 2016 Regulations as continued in effect by the Consequential SI.
32. However, this is where the parties separate. It is the Secretary of State’s case that Regulation 16 was not preserved. The Rule 24 notice accepts that the long list of specified provisions under paragraph 6 does not preserve any of the rights of residence under the 2016 Regulations which were covered by Regulation 13 through to Regulation 16. However, it is said the right of admission to the UK under Regulation 11 is preserved by paragraph 6(1)(k) of Schedule 3. Again, the terms of that part of the Regulations are perfectly clear. Under the list of specified provisions we read at 6(1)(k) “regulation 11 (right of admission to the United Kingdom)”. It follows therefore that if there is a right under the 2016 Regulations they Regulations continue to apply in respect of an EEA decision being an appeal which was brought under the 2016 Regulations and has not been finally determined before commencement date.
33. Paragraph 20 of the Rule 24 notice says:

“It should be noted that paragraph 6 does not preserve any of the rights of residence of the 2016 Regulations, which were set out in regulations 13-16 of Part 2 of the 2016 Regulations, titled *EEA Rights*. Only the right of admission to the UK of regulation 11 is preserved by paragraph 6(1)(k) of Schedule 3 of the Consequential SI”.
34. This is not considered to be fatal to the claimant’s case. Rather, reference is made to the explanatory memorandum and the impact assessment. This indicates that Schedule 3 makes saving provisions in relation to the EEA Regulations, the provisions continue the effect of deportation exclusion orders made in the EEA and “ensure applications made under the EEA Regulations before the end of the transition period can continue to be processed, including any related appeal”. The commentary goes on to say that the applications for documentation under the Regulations can continue to be considered “and ensure pending appeals under those Regulations continue”.
35. It was the contention of the claimant that Parliament had clearly decided that the rights of residence were not to be preserved and so they were not listed under paragraph 6 but it was also asserted it was quite clear that the intention

was to ensure that the pending application for documentation and appeals should continue. This is why, again according to the claimant, that the 2016 Regulations require rather than simply empower documentation under the Regulations to be issued. This is why our attention was drawn to Section 3 (Pending applications for documentation under the EEA Regulations 2016).

36. The claimant argued Regulation 12(2) was preserved under paragraph 3 of Schedule 3, that is the Regulation continues to apply for the purposes of considering and where appropriate granting applications and 6(1)(k) specifically preserves Regulation 11 (the right to admission to the United Kingdom).
37. The Rule 24 notice acknowledges the Secretary of State's point but suggests that it cannot have been Parliament's intention to exclude rights of appeal under Regulations that were kept in force. Mr Papasotiriou said that the First-tier Tribunal Judge was right in its approach and conclusions. The EEA family permit application did breach her rights under the same provisions.
38. We do not agree. As indicated above, we find that the continuance of regulations 11 and or 12 does not, without more, operate to continue regulation 16 and the claimant needs regulation 16 in order to succeed.
39. Parliament's intentions are drawn from statutory provisions, not explanatory notes but, in any event, the note make sense because some appeals are preserved because some rules are preserved.
40. Our attention has been drawn to the case of **Geci (EEA Regs: transitional provisions; appeal rights) [2021] UKUT 285 (IAC)**. Although this confirms certain of our findings and our approach, we do not find that this is particularly helpful in determining the outcome of this appeal.
41. We have considered too **Osunney (Zambrano; transitional appeal rights) [2023] UKUT 00162 (IAC)** which we have found helpful because it confirmed our approach but we do not rely on except in the sense that we agree with it. We have given our reasons for our decision.
42. In addition to the ground that we have considered the Grounds of Appeal include a comment addressing the Judge's observations about there being no obligation to apply under Appendix FM before making a "Zambrano" application. Other than confirming that this is not a human rights based appeal we see no need to comment on the comment.
43. We find that the Secretary of State's ground was clearly made out. There was no right of appeal against a decision under regulation 16 made after 31 December 2020.

Notice of Decision

44. The First-tier Tribunal erred in law. We set aside its decision and substitute a decision dismissing the claimant's appeal against the Secretary of State's decision.

Jonathan Perkins

Judge of the Upper Tribunal

Appeal Number: UI-2023-003786
First-tier Tribunal Numbers: EA/53734/2021
IA/16712/2021

Immigration and Asylum Chamber

4 June 2024