IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-003789

First-tier Tribunal No: EA/50429/2020

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 11 May 2023

Before

UPPER TRIBUNAL JUDGE STEPHEN SMITH

Between

Albert Toska
(ANONYMITY DIRECTION REVOKED)

Appellant

and

Secretary of State for the Home Department

Respondent

Representation:
For the Appellant: Ms G. Loughran, Counsel instructed by Gulbenkian Andonian Solicitors
For the Respondent: Ms J. Isherwood, Senior Home Office Presenting Officer

Heard at Field House on 3 April 2023

DECISION AND REASONS

1. By a decision dated 12 December 2022 (promulgated by the Upper Tribunal on 8 February 2023), I found that a decision of First-tier Tribunal Judge Parkes ("the judge") involved the making of an error of law and set it aside with directions for the appeal to be reheard in the Upper Tribunal. A copy of that decision may be found in the **Annex** to this decision.

2. In his decision, the judge dismissed an appeal brought by the appellant, Albert Toska, a citizen of Albania born on 25 June 1978, against the refusal of the Secretary of State to grant him a derivative residence card pursuant to regulation 20 of the Immigration (European Economic Area) Regulations 2016 ("the 2016 Regulations"), dated 9 October 2020. The judge heard the appeal under regulation 36 of the 2016 Regulations. By this decision, I remake the decision of the First-tier Tribunal, acting under section 12(2)(b)(ii) of the Tribunals, Courts and Enforcement Act 2007.

The central issue

3. The essential issues in these proceedings are whether (i) the appellant is the joint primary carer for his children with his partner EK, and (ii) whether, if the appellant is required to leave the UK, his British children would be compelled to leave with him. It was on that basis that he applied for a so-called "Zambrano" right to reside under regulation 20 of the 2016 Regulations.

4. A Zambrano right to reside is a right conferred by the EU Treaties on a third country national who would otherwise be outside the scope of the residence rights conferred by EU law, on the exceptional basis that it is necessary to do so to prevent an EU citizen from having to leave the territory of the EU. The term derives from *Ruiz Zambrano v Office National de l'Emploi* (Case No. C34/09) [2012] QB 265.

Factual background

5. The appellant arrived in the United Kingdom in 1999 clandestinely and claimed asylum, purporting to be a Kosovar. The claim was refused, and he left the country in 2006.

6. In 2007, the appellant was granted six months' entry clearance to marry a Polish citizen resident in the UK (this may, in fact, have been an EEA family permit under the Immigration (European Economic Area Regulations) 2006, but nothing turns on this). In August 2007, he applied for leave to remain as the spouse of a British citizen. That application was refused.

7. On 1 March 2010, the appellant was convicted of fraud-based offences, for which he was sentenced to three years and six months' imprisonment, reduced on appeal from four years and six months. For those offences, the appellant was made the subject of the deportation order which, following an unsuccessful appeal before the First-tier Tribunal, was implemented on 12 July 2011. At some point in 2012, the appellant returned to the United Kingdom, in breach of the deportation order. In September 2015, he voluntarily departed. He returned to the UK at some point thereafter, again in breach of the deportation order. That order remains in force.

8. The appellant's partner is EK. She is also a citizen of Albania. She was born in 1981. EK arrived at or around the same time as the appellant in 1999, and also claimed to be Kosovan. EK and the appellant have three children together; a daughter, A, who was born here in 2005, and twin sons, B and C, born here in 2007. All three children are now British citizens. When registering A's birth in early 2006, EK again claimed to be Kosovan. She now accepts that she is Albanian, and apologies for what she claims to have been a mistake. EK now holds limited leave to remain granted under Appendix FM in respect of her role as the primary carer of three British children.

The parties' cases

9. The appellant's case is that he is the joint primary carer for A, B and C with EK. EK could not cope in his absence. If the appellant is required to leave the UK, the children's emotional, practical and financial dependence upon him is such that they would be compelled to return to Albania with him. That would be contrary to their best interests. He is therefore entitled to a Zambrano right to reside in order to prevent the children from having to leave the UK.

10. In the refusal letter dated 9 October 2020, the Secretary of State said that it was incumbent upon the appellant to apply for leave to remain under the Immigration Rules before being able to establish his eligibility for a derivative right to reside. However, she now accepts that such an application would be likely to be refused, on account of the extant deportation order: see para. 17 of the Secretary of State's skeleton argument dated 30 March 2023. It is therefore not necessary to determine the issue identified at para. 21 of the Error of Law decision. The Secretary of State's case is simply that (i) the appellant is not a joint primary carer for the children; and (ii) in any event, the children would not leave the UK if he were required to leave.

Impact of the UK's withdrawal from the EU

11. Although the United Kingdom has now withdrawn from the European Union, it is common ground that transitional provisions contained in the Immigration and Social Security Co- ordination (EU Withdrawal) Act 2020 (Consequential, Saving, Transitional and Transitory Provisions) (EU Exit) Regulations 2020 ("the 2020 Regulations") make provision to enable these proceedings to continue. See in particular paras 5(1)(c) and 6(1)(cc)(aa) of Schedule 3. The effect of the latter provision is that the sole permitted ground of appeal in an appeal against an "EEA decision" as defined by regulation 2 to the 2016 Regulations has effect as though it read as follows:

> "… the decision breaches the appellant's rights under the EU Treaties in respect of entry to or residence in the United Kingdom [so far as they were applicable to and in the United Kingdom by virtue of Part 4 of the EU Withdrawal Agreement]."

12. Part 4 of the EU Withdrawal Agreement provided that, during the so-called transition period (which ended at 11PM on 31 December 2020), EU law continued to apply to the UK. See Article 127(1). That being so, since the preserved, modified ground of appeal under the 2016 Regulations looks back to the position as it stood during the transition period, the Zambrano analysis which lies at the heart of this appeal must be conducted on the footing that the UK remains a member of the EU, and that the constructive expulsion of a British citizen to a third country engages the Zambrano criteria.

13. A curious feature of the 2020 Regulations is that they do not preserve some of the provisions of the 2016 Regulations which expressly pertained to Zambrano rights to reside. Regulations 16 and 20 of the 2016 Regulations, concerning the definition of a derivative right to reside, and the issue of a derivative residence card, were not preserved. It may be said that the omission of those provisions from the preserved, modified version of the 2016 Regulations means that the appellant no longer enjoys a right of appeal, for the operative provisions by which his Zambrano claim would be scrutinised are no longer in force. In my judgment, the omission of those provisions is not a barrier to this appeal being heard or determined. Zambrano rights to reside are (or, more accurately in the case of the UK, were) directly effective rights conferred by the EU Treaties. Their efficacy does not (did not) depend on adequate implementing provision being made as a matter of domestic law.

14. Pausing here, although in practice most appeals under the 2016 Regulations are (or were) advanced on the basis that the impugned decision was contrary to a provision of those Regulations, the available ground of appeal under those Regulations was always anchored solely to the EU Treaties. It was only

because the 2016 Regulations were generally accepted to codify the requirements of EU law that that approach was usually taken. A breach of the Regulations generally amounted to a breach of the EU Treaties. Of course, there have been cases where the 2016 Regulations have been found to fail properly to reflect the requirements of EU law, for example by under-implementing the requirements of EU law, or to have done so in a restrictive way. In those cases, an appeal would succeed by reference to the EU Treaties directly. Such arguments have been open to appellants precisely because the underlying ground of appeal was anchored to the rights conferred by the EU Treaties, rather than conferred by the Regulations themselves.

15. The ground of appeal preserved by paragraph 6(1)(cc)(aa) may be contrasted with that preserved by paragraph 6(1)(cc)(bb), which applies to an appeal falling with paragraph 5(1)(d). In such appeals, the available grounds of appeal are as follows:

> "(bb) in relation to an appeal within paragraph 5(1)(d), in each of paragraphs 1 and 2(4), the words 'under the EU Treaties', **were a reference to 'under the Immigration (European Economic Area) Regulations 2016 as they are continued in effect by these Regulations or the Citizens' Rights (Restrictions of Rights of Entry and Residence) (EU Exit) Regulations 2020**, or by virtue of the EU withdrawal agreement, the EEA EFTA separation agreement (which has the same meaning as in the European Union (Withdrawal Agreement) Act 2020) or the Swiss citizens' rights agreement (which has the same meaning as in that Act)'." (Emphasis added)

The added emphasis demonstrates that for paragraph 5(1)(d) appeals, an appellant may advance a ground of appeal based both on the EU Withdrawal Agreement *and* the 2016 Regulations, as preserved and modified by the 2020 Regulations or the Citizens' Rights (Restrictions of Rights of Entry and Residence) (EU Exit) Regulations 2020. It is significant that for appeals under paragraph 5(1)(a) to (c), those additional grounds of appeal have not been made available.

16. In any event, it is by no means clear that the 2020 Regulations intended to limit the jurisdiction of this tribunal to entertain an appeal against the refusal of an application for a derivative residence card. Paragraph 6(1)(a) of Schedule 3 to the 2020 Regulations preserves regulation 2 of the 2016 Regulations, "general interpretation". While in doing so the 2020 Regulations make certain modifications to regulation 2 of the 2016 Regulations, significantly for present purposes they do not disapply or otherwise modify the definition of "EEA decision", which is defined where relevant as follows:

> "EEA decision" means a decision under these Regulations that concerns—
>
> > (a) a person's entitlement to be admitted to the United Kingdom;
> >
> > (b) a person's entitlement to be issued with or have renewed, or not to have revoked an EEA family permit, a registration certificate, residence card, **derivative residence card**, document certifying permanent residence or permanent residence card (but does not include a decision to reject an

> application for the above documentation as invalid…" (emphasis added)

17. I also note that paragraph 3(6) of Schedule 3 to the 2020 Regulations preserves the ability of the Secretary of State to consider (and, where appropriate, grant) an application for a derivative residence card made under the 2016 Regulations before the conclusion of the implementation period. That provision is preserved in isolation, without corresponding preservation of regulations 16 and 20 of the 2016 Regulations. That suggests that the drafter of the transitional provisions in the 2020 Regulations envisaged a degree of continuing Zambrano functionality even in the absence of the operative provisions of the Regulations remaining in force.

18. The omission of regulations 16 and 20 from the preserved, modified 2016 Regulations is of no operative consequence. Regulation 16 merely codifies the Zambrano criteria. There is no suggestion in these proceedings that regulation 16(5) in the form it existed prior to its revocation fails properly to codify the Zambrano jurisprudence. The parties argued their respective positions pursuant to it and I agree that it sets out an accurate summary of the Zambrano criteria. Neither party has suggested that I apply different criteria. I will therefore use it as the basis for my substantive analysis and will apply it in light of the relevant authorities. As for the omission of regulation 20 (issue of a derivative residence card), when in force that regulation was addressed primarily to, and imposed obligations upon, the Secretary of State and not this tribunal. Further, the drafter of the 2020 Regulations clearly envisaged that derivate residence cards would continue to be issued by the Secretary of State notwithstanding the omission of regulation 20. I find nothing turns on the omission of those regulations in the preserved, modified 2016 Regulations.

19. In summary:

a. The modified right of appeal applicable to an appeal under the 2016 Regulations, as preserved in its modified form by the 2020 Regulations, is based on the EU Treaties as they applied to the UK pursuant to the EU Withdrawal Agreement during the transition period.

b. Zambrano rights to reside were not excluded from the scope of EU law applicable to the UK during the transition period.

c. A decision concerning a Zambrano application continues to be categorised as an "EEA decision" in an appeal brought under the preserved, modified 2016 Regulations.

d. It follows that, in an appeal against an EEA decision to which para. 5(1)(c) of Schedule 3 to the 2020 Regulations applies, an appellant may advance a Zambrano-based ground of appeal.

e. Since the underlying ground of appeal is based on the EU Treaties, as they applied to the UK during the transition period under the EU withdrawal agreement (and not the 2016 Regulations), it is of no consequence that regulations 16 and 20 have not been expressly preserved. An appellant may only pursue a ground of appeal based on the EU Treaties as applied

by the Withdrawal Agreement. Under paragraph 6(1)(cc)(aa) of Schedule 3, a ground of appeal cannot include an argument that the decision is not in accordance with the 2016 Regulations. The sole focus is the EU Treaties, as applied by the Withdrawal Agreement.

f. It will be convenient to apply the criteria contained in regulation 16(5) and (8) of the 2016 Regulations, in the form it stood prior to revocation, since the parties agree that it accurately codifies the Zambrano criteria.

The law

20. The legal principles are not in dispute. An individual is entitled to a derivative residence card if the criteria for a derivative. The essential criteria were set out at regulation 16(5) and (8) of the 2016 Regulations:

> "(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.
>
> […]
>
> (8) A person is the "primary carer" of another person ("AP") if—
>
> (a) the person is a direct relative or a legal guardian of AP; and
>
> (b) either—
>
> (i) the person has primary responsibility for AP's care; or
>
> (ii) shares equally the responsibility for AP's care with one other person…"

21. The test in regulation 16(5)(c) is practical and applied, rather than theoretical: it requires an assessment as to whether, in light of the best interests of the children and any relationship of dependency they have with the appellant, they would be unable to reside in the UK if the appellant was required to leave.

22. It is for the appellant to demonstrate that he meets the criteria contained in regulation 16(5) to the balance of probabilities standard.

The hearing

23. The resumed hearing took place on a face to face basis at Field House. I heard evidence from the appellant and EK, in English, who adopted their statements

dated 28 January 2021.

24. Ms Loughran applied to rely on additional evidence for the appellant. There was no objection from Ms Isherwood. I admitted a psychiatric report from Dr Olusola Olowookere ("the Olowookere report") dated 30 March 2023, an independent social worker's report from Tipezenji Khumalo ("the Khumalo report") dated 19 March 2023, plus an image of EK's medication and her GP notes. Both parties relied on skeleton arguments.

25. At Ms Loughran's invitation, I treated EK as a vulnerable witness on account of her mental health conditions and anxiety. Ms Isherwood for the Secretary of State ensured that her questions during cross-examination were put to EK in an appropriately sensitive manner. Although EK clearly found aspects of the hearing difficult and stressful, I was satisfied that EK's needs were fully accommodated. Ms Loughran confirmed that she too was content.

Findings of fact

26. I reached the following findings of fact having considered the entirety of the evidence in the round.

27. Para. 18 of the error of law decision sets out a number of preserved findings of fact from Judge Parkes' decision. Those findings represent the position as at the date of the hearing before the judge, on 27 May 2021; my findings represent a holistic assessment of the contemporary position, taking account of the preserved findings, but updated in light of the evidence concerning the nearly two years that have elapsed since the hearing before Judge Parkes. The preserved finding of the greatest significance for present purposes (and the only preserved fact that has performed an operative role in my analysis in this decision) is the judge's finding that the children would be *able* to remain in the UK in the appellant's absence. Their ability to do so, of course, does not address the separate (and central) question of whether they *would*, but it is a factor of relevance.

The appellant is a joint primary carer for the children with EK

28. I am not persuaded by Ms Isherwood's submissions that every aspect of the appellant's credibility is irredeemably undermined by his convictions for offences of dishonesty, deportation, re-entry in breach of the deportation order on two occasions, and the two applications as a partner of a Polish and later British citizen. I accept that the appellant's convictions, deportation and double re-entry in breach of the deportation order are factors that affect his overall credibility, and I have borne those factors in mind. But they cannot lead to the wholesale rejection of the appellant's evidence.

29. As for the failed partner applications, there are no other details from the Secretary of State as to what the appellant said in the course of those applications. That being so, it is plausible that he made the applications while separated from EK, as they both claimed in their evidence, and the fact of making at least the first application is not necessarily fatal to his credibility. Whether the appellant's credibility is harmed by making the second application turns to a large extent on the details he gave when making the application, and whether the narrative he now gives is consistent with the explanations for the application he gave at the time. I accept that the second application appears to have been made in unusual circumstances. However,

in the absence of further details from the Secretary of State, I find that the partner applications are a neutral factor. I do not hold them against the appellant.

30. The appellant's evidence, and that of EK, was that he jointly shares responsibility for the children with EK. I accept that the appellant lives in the family home, and that he has a genuine and subsisting relationship with the children for the reasons set out below.

31. The Khumalo report details the views of the children about the role of their father in their lives. The report has a number of weaknesses. For example, it inappropriately expresses a view as to whether it would be "appropriate" for the appellant be allowed to remain in the UK, which is a matter for the tribunal: see, e.g., paras 9.79 and 13.2. It also interweaves academic propositions about the role of a father in his children's lives alongside factual analysis of the appellant's circumstances without linking the two, see, e.g., para. 9.54. However, I accept the accounts it gives concerning the views of the children, and their descriptions of family life with the appellant. I find that the appellant shares primary care for the children with EK. The appellant's oral evidence in this respect was more persuasive than his written evidence; for example, in his statement he wrote at para. 7 that part of his role was to "dress them, make them breakfast and take them to school." It is difficult to believe that the children of the age of those in these proceedings (15, 15 and 17) need help with getting dressed, even allowing for the fact the statement was signed in January 2021. By contrast, in his oral evidence, which I prefer on this issue, the appellant described the emotional support he provides for his children, in particular his sons, and a range of more plausible practical support he provides. The appellant's sons can speak to him about their development in a way that they cannot speak to their mother, he said. I accept that evidence. It was plausible and credible.

32. I pause to address the appellant's employment. He appears to have been granted some form of permission to work by the Secretary of State, perhaps by virtue of a "certificate of application" issued under the 2016 Regulations. Ms Isherwood submitted that the appellant, in fact, worked for more than the claimed 20 hours part time role that he said that he has. He had omitted any details of his work from his witness statement in an attempt to conceal his true day to day activities, she submitted. There is some force to this submission, however the impact of it, even if established, is negligible: even if the appellant and EK both worked full time, as is often the case with parents of teenage children, that does not detract from their ability jointly to share primary care for the children.

33. I therefore accept Ms Loughran's submissions that the fact that the appellant and EK live together in a family unit with the children is a significant factor in this assessment. The notion of being an equal primary carer under regulation 16(8)(b)(ii) should be read with a dose of reality in mind; it does not require a 50-50 equal split of time, emotional, practical and financial support between the two carers. Rather the term encapsulates a joint role, perhaps where each carer has different responsibilities, but where the overall responsibility is shared equally. I find that the appellant is a joint primary carer with EK for the children. Notwithstanding the harm to the appellant's credibility caused by his offending history, I accept that the evidence about the strength of his familial relationships is plausible and credible.

Best interests of the children

34. Against the background of those findings, I find that it is in the children's best interests to remain in the UK with their father and mother. The children are British citizens. Although they are of Albanian heritage, they have only known life in the UK. They have been educated here, speak English as a first language, and are approaching a crucial juncture in their education; A is approaching A Levels, and B and C are approaching GCSEs. I accept the evidence of EK and the appellant that there is a strong bond between the appellant and his children. That chimes with the account that EK gave to Dr Olowookere (see para. 13.6), and the bonds between father and children described in the Khumalo report (see, e.g., paras 9.12, 9.13, 9.22, 9.23, 9.26, 9.36). I find that there is a relationship of dependency between the appellant and his children.

35. The Olowookere report identifies at para. 13.3 that EK has experienced several "stressors" in her life which have contributed negatively to her mental health; Home Office "involvement", the appellant's imprisonment, and "pressure" from social services. It is clear that the appellant's prospective removal has cast a shadow over many years of her life, and that the whole family has experienced the impact of his offending in acute terms. I accept that she displays moderately severe symptoms of depressive disorder.

36. The appellant's imprisonment would have been a very tough time for EK, not least because, on her evidence, she had split from him at that point in any event. She did not have the right to work or leave to remain and so would have faced acute financial pressures. The appellant's removal would therefore have a significant impact upon EK. It would most likely be the culmination of what she has feared for many years of her life. Most of EK's time residing in the UK has been characterised by uncertainty, albeit much of it of her own making. She entered clandestinely in 1999, falsely claiming to be Kosovan, which was a claim she would maintain until at least early 2006 when registering A's birth. She has remained here with the uncertainty of having no immigration status hanging over her, compounded by the breakdown of her relationship with the appellant, and having to cope in his absence. She observed to her GP on 22 December 2022 that, if the appellant does not get "papers… the whole of the past 18 years will have been for nothing", suggesting that the anxiety she experiences is at the prospect of losing the life she and the appellant have sought to establish for themselves in the UK since their arrival.

37. The evidence is that social services have been "involved" with EK and the children in the past, in particular when the appellant was imprisoned. I have not been provided with any social care records, so the impact of the past involvement of social services is something of an unknown quantity.

The children would not, in practice, leave the UK with their father

38. I accept that EK has a number of health conditions, including a moderately severe depressive disorder, as explained in the Olowookere report. I do not accept that those conditions would mean that she would not cope without the appellant to such an extent that she would be compelled to leave the UK, taking the children with her, in the absence of the appellant. It would clearly be a distressing time for her and the family, in the absence of the appellant. But the

resolve that she has demonstrated to remain in the UK over the last two decades, notwithstanding her health conditions, and the previous absences of the appellant, lead me to place little weight on the impact of her health conditions, as part of my overall analysis.

39. EK did not leave the UK when, on her own evidence, she was estranged from the appellant following his departure in 2006, and his subsequent imprisonment. Nor did she leave during the two periods of his absence, in 2011 and 2015. Although the appellant's previous absences were difficult for her, she did not at that time hold leave to remain. She could not work. The children were much younger. While I accept that as the children get older, their needs will have shifted to emotional support from practical support, the reality is that she had more reasons to return Albania previously than she would now. These are factors not considered by the Olowookere report in its assessment of the prospects of EK's future mental health in the prospective absence of the appellant. In my judgment, it is significant that on those occasions, EK chose to remain in the UK despite the difficulties inherent in doing so.

40. As I observed above, from EK's initial arrival as a purported Kosovar in 1999, to her observations to the GP in 2022, her residence in the UK has been part of a long project permanently to relocate to this country from Albania. EK has sought to mislead the immigration authorities in the past, notably falsely claiming to be Kosovan, giving rise to some credibility concerns arising from her evidence as part of this analysis, even making allowances for her vulnerability, and her moderately severe depressive disorder. I reject her evidence that she would leave the UK in the appellant's absence. I also struggle to accept the appellant's evidence on this issue; his credibility is undermined by his criminal past, and double re-entry in breach of a deportation order. I find that EK would not leave the country in EK's absence; she would remain, as she always has, and as has always been her plan.

41. The question then arises as to whether EK and the appellant would choose for the children to remain in the UK with EK or return to Albania with the appellant. I find that the children's relationship of dependency with their father is not such as to compel them to leave with him. EK would, as I have found, remain in the UK in the absence of the appellant, just as she always has. The Khumalo report is instructive in relation to A, B and C. At para. 9.38, the author was asked to address the following question:

> "Does Mr Toska's [sic] enjoy a sufficiently strong bond with his children such that, in your view, his departure from the UK would compel his children to also leave the UK in order to continue their relationship with him?"

42. In response, the report states:

> "9.39. It is important to bear in mind that all three children were born in the United Kingdom, and they are British citizens.
>
> 9.40 **The thought of them moving with the father to Albania is not an option at this stage of their lives** as they are currently in school preparing for GCSE's [sic] and A-level exams in the next year." (Emphasis added)

43. Those observations are significant. The author of the report had the benefit of meeting with the entire family in order to discuss the report's prospective findings. I accept that the extract quoted above is an accurate reflection of the reality of what the family, as a whole, would do in the event of the appellant's departure: leaving is not an option for the children.

44. My finding that the children and EK would remain in the UK in the appellant's departure is consistent with the past actions of the appellant himself. A theme that emerged from his evidence was his commitment to his children; it was because of that commitment, he said, that he had re-entered the UK despite the deportation order that was in force against him; he appears to have reconciled with EK prior to his two re-entries in breach of the deportation order, in 2012, and post-2015 respectively. He could not bear to be away from his children. Significantly, despite the fact that EK did not hold leave to remain at that time, for the appellant it was preferable for him to return to the UK, where the rest of his family remained, rather than for his family to accompany him back to Albania, in order to maintain the consistency of the family unit.

45. Drawing the above analysis together, therefore, I find that the appellant has not demonstrated to the balance of probabilities standard that his children would be unable to reside in the UK if he were to be removed indefinitely. EK and the children have remained during the appellant's previous absences, and during his time in prison. Pursuant to the preserved findings of Judge Parkes, that is something they would be able to do. Perhaps most significantly, the Khumalo report confirms that "moving with their father to Albania is not an option at this stage". Notwithstanding the best interests of the children and their dependence upon their father, nothing in the evidence demonstrates that they would leave the UK to follow him in the event of his removal. They would stay here in order to pursue their academic studies. This applies in relation to each child individually and all three children collectively. That being so, the has not demonstrated that any of the children would be unable to reside in the UK of he left the UK for an indefinite period.

46. I therefore dismiss this appeal against the Secretary of State's decision of 9 October 2020 to refuse the appellant's application for a derivative residence card.

Anonymity

47. The First-tier Tribunal made an order for anonymity. I do not consider that such an order is necessary. While the appellant said in additional evidence in chief that his children had been bullied at school following online publicity arising from his criminal convictions, there is no mention of that in any of the extensive materials relating to the impact of his offending, imprisonment, deportation, and absences in any of the remaining case materials. The social workers' reports are silent on the issue, for example. I consider that the privacy of EK and the children will adequately be protected through the omission of their details from this decision. There is no proper basis to derogate from the principle of open justice by maintaining the anonymity order. I revoke the anonymity order made below.

Notice of Decision

The decision of Judge Parkes involved the making of an error of law and is set

aside, with the findings specified at para. 18 of the Error of Law decision preserved.

I remake the decision, dismissing the appeal.

Stephen H Smith

Judge of the Upper Tribunal
Immigration and Asylum Chamber

19 April 2023

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: UI-2022-003789

THE IMMIGRATION ACTS

Heard at Field House
On 7 December 2022

Decision & Reasons Promulgated

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Before

UPPER TRIBUNAL JUDGE STEPHEN SMITH

Between

AT (ALBANIA)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr R. Toal, Counsel, instructed by Gulbenkian Andonian Solicitors
For the Respondent: Ms H. Gilmour, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal against a decision of First-tier Tribunal Judge Parkes ("the judge") dated 10 June 2021. The judge dismissed the appellant's appeal against the Secretary of State's decision dated 9 October 2020 to refuse his application for a derivative residence card as a so-called "*Zambrano*" carer.

2. The appeal was brought under regulation 36 of the Immigration (European Economic Area) Regulations 2016 ("the 2016 Regulations"), which continue to apply to these proceedings pursuant to transitional provisions.

Factual background

3. The appellant is a citizen of Albania. His date of birth is 25 June 1978. He has a lengthy immigration history, commencing with his illegal entry in 1999,

subsequent conviction and imprisonment for fraud, deportation, and repeated unlawful re-entry. His most recent date of arrival appears to be 2014. The appellant's partner, the sponsor, is Etleva K. She is also Albanian and holds limited leave to remain. Together, they have three children: A, born in December 2005, and B and C, twins born in August 2007. The children are British citizens.

4. The appellant applied for a residence card under regulation 16(5) of the 2016 Regulations on the basis that, if he were required to leave the United Kingdom, his British children would have to accompany him, as he is their primary carer. The sponsor works long hours in multiple jobs and has a number of mental health conditions such that she would be unable to cope in his absence, he claimed.

5. The Secretary of State refused the application on the basis that the appellant had not demonstrated that "the sponsor" (by which the letter appears to mean the appellant's British children) would be unable to reside in the UK or another EEA state if he were required to leave. There was insufficient evidence that the care needs of "the sponsor" could not be met by other means, such as in the care of Ms K. The Secretary of State also refused the application because the appellant had not attempted to regularise his presence under domestic immigration law.

Decision of the First-tier Tribunal

6. The judge's global conclusions, at paragraphs 20 to 22, were expressed in these terms:

> "20. … the evidence does not show that the children would not be able to remain living in the UK in his absence and it does not show that it would be disproportionate having regard to the overall circumstances."
>
> "22. … The evidence does not show that the Appellant's children would be compelled to leave the UK in his absence[,] and I find that they can remain living in the UK with their mother and that would be proportionate."

Grounds of appeal

7. There are three grounds of appeal, contending, variously, that the judge failed to resolve key issues, misdirected himself as to the applicable test under the 2016 Regulations, and approached the evidence erroneously.

8. Permission to appeal was granted by First-tier Tribunal Judge Brewer, who observed:

> "In order to assess the risk that the appellant's children, who are union citizens, might be compelled to leave the UK, it was incumbent on the judge to determine (i) which parent is the primary carer of the children and (ii) whether as a matter of fact there is a relationship of dependency between each of the child and the appellant (see *Chavez-Vilchez* [2017] EUECJ C-133/15 at [70] and *Patel v SSHD* [2019] UKSC 59 at [30]). There is no specific engagement by the judge in his reasons as to the factors identified in [30] of Patel, vis a vis this appellant's children. This is an arguable error of law."

Submissions

9. Mr Toal submitted that the judge failed expressly to determine whether the appellant and Ms K were joint primary carers, failed to address whether there was a relationship of dependency between the appellant and the children, and addressed the appellant's removal as a hypothetical, rather than practical, question.

10. For the Secretary of State, Ms Gilmour submitted that the judge addressed the appellant's prospective removal from the required practical, real world perspective, and engaged with the case advanced before him. The appellant's case before the judge was that he shared primary care with Ms K, and, as such, the appeal could only have been allowed on the basis that *both* he and Ms K would have left. Since it was no part of the appellant's case that Ms K was going to leave the UK, the appeal was bound to fail. Ms K had managed to cope with the children during the appellant's multiple absences previously. It was entirely open to the judge to conclude that she would be able to do so again.

Legal framework

11. The parties are familiar with the *Zambrano* jurisprudence, implemented by regulation 16(5) of the 2016 Regulations, and I need not set it out here. For a summary of the so-called "*Zambrano* circumstances" and the corresponding "*Zambrano* rights", see *R (Akinsanya) v Secretary of State for the Home Department* [2022] 2 WLR 681, [2022] EWCA Civ 37 at paragraph 14.

Discussion

12. I accept Mr Toal's submissions that the judge failed expressly to address certain key features of any *Zambrano* analysis.

13. First, the judge did not make findings as to whether the appellant was the primary carer of the children, or whether his responsibility towards the children was shared jointly with Ms K. The appellant's case as to whether Ms K was a joint primary carer or not appears to have lacked clarity (see, for example, paragraph 23(i) of the Grounds of Appeal to the Upper Tribunal), but it was nevertheless incumbent upon the judge to have reached findings on the issue.

14. Secondly, the judge did not make any findings on the claimed dependency of the children on the appellant in light of an express assessment of their best interests. In turn, he failed to address the question of whether the children would be compelled to leave with the appellant against that background. In *Patel v Secretary of State for the Home Department* [2019] UKSC 59, Lady Arden (with whom the remaining four justices agreed), said at paragraph 23:

> "In the case of children, it is first necessary to determine who the primary carer is, and whether there is a relationship of dependency with the [third country national] or the national parent."

The judge did not address those essential questions. I adopt the reasons given by Judge Brewer when granting permission to appeal. It is nothing to the

point, as submitted by Ms Gilmour, that the appellant had left the family previously, and Ms K – and the children – had coped without him. That may be a factor which the judge could have taken into account as part of a holistic dependency assessment, but it is not a factor which obviates the need for such an assessment to take place.

15. Thirdly, with respect to the judge, some of his terminology concerning the issue of whether the children would leave was clumsily expressed, such that it is unclear whether he applied a practical test of expulsion, or a theoretical test. In isolation, this point would be unlikely to amount to a material error, but in the context of the errors identified above, it acquires a significance it may not otherwise attract. At paragraph 20, the judge addressed the children's *ability* to remain in the United Kingdom in the absence of the appellant ("the evidence does not show that the children *would not be able* to remain living in the UK…"), rather than determining what they would, in fact, do. Similarly, at paragraph 22, the judge said that "they *can* remain living in the UK with their mother…", which again is the theoretical language of ability, rather than a practical, prospective assessment of what would, in practice, take place.

16. I reject Ms Gilmour's submission that, properly understood, the judge reached practical and applied findings. Since the judge failed expressly to address dependency, it is not possible to view the judge's operative findings in that light.

17. For these reasons, I find that the decision of the judge involved the making of an error of law and set it aside.

18. While Mr Toal sought to reformulate certain paragraphs of the grounds as reasons-based challenges to some of the judge's findings of fact, the appellant did not enjoy permission to do so, and made no application to expand the grounds of appeal. It follows that the judge reached a number of findings of fact that have not been challenged. These include:

    a. Ms K has not sought treatment for the mental health conditions she experiences (paragraph 16);

    b. The fact that Ms K has not sought such treatment in the past suggests that the situation is not as bad as the appellant claimed it is, or would be. There is no evidence to suggest that Social Services have sought to remove the children from Ms K during the appellant's previous absences (paragraph 17);

    c. The appellant's medical evidence did not address what prospective medical support or treatment might be available to the appellant's wife in his absence in the future (paragraph 18);

    d. There was insufficient evidence to support a finding that, in the long term, in the absence of the appellant, Ms K would not be able to cope (paragraph 18). Much of the medical evidence was speculative, and relied on the assumption that the appellant's wife would not be able to cope in the future (paragraph 20);

    e. The children would be able to remain in the United Kingdom in the appellant's absence (paragraphs 20 and 22);

f. Nothing about the appellant's inability to pursue his UK-based academic studies would have any direct impact on his family's ability to cope in his absence (paragraph 21).

19. I therefore preserve those findings of fact, insofar as they represent the position at the date of the hearing before the judge, on 27 April 2021.

20. Having considered paragraph 7.2(b) of the *Practice Statements of the Immigration and Asylum Chambers of the First-tier Tribunal and the Upper Tribunal*, I consider that the extent of the required judicial fact finding necessary for the decision to be remade is not such that it is appropriate for the appeal to be remitted. The appeal will be remade in this tribunal.

21. At the resumed hearing it will also be necessary to address the final reason relied upon by the Secretary of State in the refusal letter, namely that the appellant is not eligible for a right to reside under regulation 16(5) until he had exhausted any potential options to regularise his status under domestic law. The parties should address this issue in their skeleton arguments, submitted pursuant to the directions below.

Anonymity

22. The judge granted the appellant anonymity, on account of Ms K's health conditions, and the involvement of the children. My preliminary view is that those are not sufficiently weighty reasons to derogate from the principle of open justice. Subject to consideration of submissions to the contrary by the parties (which should be made in the skeleton arguments I direct below, by reference to the applicable authorities), I am minded to revoke the anonymity order already in force.

Notice of Decision

The decision of Judge Parkes involved the making of an error of law and is set aside, subject to the savings identified at paragraph 18, above.

The decision will be remade in the Upper Tribunal.

If the appellant wishes to rely on any additional evidence, he must file and serve it, along with an application to rely on it, plus a skeleton argument, **within 28 days** of being sent this decision.

Within **42 days** of being sent this decision, the respondent must file and serve a skeleton argument in response.

Signed *Stephen H Smith* Date 12 December 2022

Upper Tribunal Judge Stephen Smith