



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM
CHAMBER

Ce-File Number: UI-2022-005155
First-tier Tribunal No: HU/51200/2020
IA/02818/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 01st March 2023

Before

UPPER TRIBUNAL JUDGE SMITH
DEPUTY UPPER TRIBUNAL JUDGE CHANA

Between

MR NERITAN GJETA

Appellant

And

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr T Bahja, Counsel instructed by Duncan Lewis

For the Respondents: Ms H Gilmour, Senior Home Office Presenting Officer

Heard at Field House on 15 February 2023

DECISION

BACKGROUND

1. The Appellant appeals against the decision of First-tier Tribunal Judge Beach dated 15 August 2022 (“the Decision”) allowing the Appellant’s appeal on human rights grounds (Article 8 ECHR) against the Respondent’s decision dated 16 December 2020 refusing the Appellant’s human rights claim. The Appellant’s application was treated as one to revoke a deportation order made against the Appellant on 8 July 2014. Although Judge Beach allowed the appeal,

she rejected arguments made to her on EU law grounds. It is against that part of the Decision that the Appellant seeks to appeal.

2. The Appellant is a national of Albania. He originally entered the UK as a student in 2009. On 8 February 2014, the Appellant was convicted in the UK of offences involving false identity documents. He was sentenced to a term of imprisonment. The sentencing Judge recommended that he be deported.
3. On 12 June 2014, the Appellant was notified of his liability to deportation. The Appellant was thereafter deported to Albania under the Facilitated Returns Scheme on 25 July 2014, the deportation order having by then been signed.
4. On 22 December 2015, the Appellant was encountered attempting to enter the UK in breach of the deportation order. He claimed asylum. His asylum claim was certified on safe third country grounds, the Appellant having previously claimed asylum in Germany in July 2015. Having been released from detention, the Appellant failed to report for removal.
5. The Appellant was next encountered on 18 July 2019 when an application was made by his solicitors for the right to remain on human rights grounds. That was predicated in the main on his family life with his partner and two children who are British citizens.

THE FIRST-TIER TRIBUNAL DECISION

6. As we note above, the application which led to the decision here under appeal was one seeking to remain on human rights grounds. It is relevant to what follows that, although the solicitors mentioned the case of Zambrano ([2010] EUECJ C-34/09) in the context of the EU Charter in their covering letter, no application was made under the Immigration (European Economic Area) Regulations 2016 (“the EEA Regulations”) on that basis. Mr Bahja conceded as much.
7. The Respondent did refer to Zambrano in the decision under appeal in four paragraphs headed “Consideration of European Union Law”. She concluded that the Appellant did not have a Zambrano derivative right to reside since the children could remain in the UK with his partner. It is however worthy of note that the Respondent did not make any decision under the EEA Regulations, no doubt because that was not the application made to her. The decision under appeal is clearly headed “Decision to Refuse a Human Rights Claim”.
8. The Appellant appealed the decision on human rights grounds. The decision appealed against is clearly stated to be a refusal of a human rights claim. The ground of appeal is clearly stated to be that removing the Appellant from the UK would be unlawful under section 6 Human Rights Act 1998 (“Section 6”). When asked for the details of the appeal and in particular whether there were “any new reasons [your client] wishes to remain in the UK or any new grounds on which

they should be permitted to stay”, the Appellant’s solicitors answered that question in the negative.

9. However, the skeleton argument of Mr Bahja submitted by the Appellant for the appeal majored on Zambrano and what were said by the Appellant to be his EU law rights to remain. It is perhaps therefore scarcely surprising that Judge Beach was led down the path of considering the case of Zambrano and whether the Appellant had the rights he claimed. However, having considered that aspect, the Judge made the following findings:

“48. The appellant sought to rely on the Zambrano provisions. The respondent did not suggest that the appellant was an exempt person or that he was not a primary carer of British Citizen children. Neither the appellant nor the respondent raised any issue with regard to whether it was possible for the appellant still to rely on the Zambrano principle. Despite express reference to the decision in Velaj in the appellant’s skeleton argument, the part in the decision which confirmed that the Zambrano provisions were not preserved post 30 June 2021 was not included or addressed. The relevant date for consideration is the date of the appeal hearing and not the date of the decision. Even if I found that the appellant was a relevant person for the purposes of the EEA Regulations pre 31st December 2020, this would only have assisted the appellant up until 30 June 2021 (and the appeal was heard post 30 June 2021). In those circumstances, I find that the appellant cannot rely on the Zambrano provisions.”

10. Judge Beach thereafter went on to make findings at [49] and [50] of the Decision about the application of Zambrano to this case. She accepted that the Appellant’s children would be compelled to leave the UK if the Appellant were deported. She also found, based it appears on a concession by the Respondent, that the Appellant was not precluded from relying on Zambrano due to his criminality. She found that the Appellant was not a genuine, present and sufficiently serious threat to UK society but concluded at [50] of the Decision, that “this does not assist the appellant because he can no longer rely on Regulation 16 of the EEA Regulations.”
11. Judge Beach then went on to consider the human rights claim. She concluded that deportation of the Appellant would lead to unjustifiably harsh consequences for his children and therefore the decision to deport would be disproportionate. The concluding part of the Decision records that the Judge allowed the appeal.
12. The Respondent has not challenged the allowing of the appeal on human rights grounds. Indeed, we have been informed that the Appellant has now been granted leave to remain (as the Appellant accepts). As we come to below, that has implications for the continuation of this appeal.

APPEAL TO THE UPPER TRIBUNAL

13. The Appellant seeks to appeal the Decision on the ground that the Judge erred in finding that the relevant date for consideration of the Zambrano right is date of hearing. The Appellant's grounds submit, based on this Tribunal's decision in Geci (EEA Regs: transitional provisions; appeal rights) [2021] UKUT 00285 (IAC) ("Geci") that the relevant date in a deportation case was the "date the relevant conduct took place". Reference is made to what is said in Geci about the transitional provisions relating to the EEA Regulations following the UK's withdrawal from the EU. Reference is also made to the Citizens' Rights (Restrictions of Rights of Entry and Residence (EU Exit) Regulations 2020 and Judge Rintoul's observations about those regulations in Geci. We observe in passing that although the case of Geci did involve deportation issues, it was an appeal against a refusal to grant a residence permit to the family member of an EEA national. It was not concerned with Zambrano at all.
14. The Appellant also submitted that it made no difference that he had succeeded in his human rights appeal. He could still appeal on a ground on which he was unsuccessful.
15. Permission to appeal was granted by First-tier Tribunal Judge Haria in the following terms so far as relevant:
 - “... 4. On the jurisdictional point, I accept that right to appeal to the Upper Tribunal is given to any party to a case (TCEA 2007 section 11(2)). It is not restricted to the losing party EG and NG (UT rule 17: withdrawal; rule 24: scope) Ethiopia [2013] UKUT 00143 (IAC).
 5. In an otherwise well- reasoned decision in which the Judge considered the decision in Velaj (EEA Regulations - interpretation; Reg 16(5); Zambrano) [2021] UKUT 235 (IAC) and the Immigration and Social Security Co-ordination (EU Withdrawal) Act 2020 (Consequential, Saving, Transitional and Transitory Provisions) (EU Exit) Regulations (SI2020/1309) it is arguable the Judge erred as asserted in that for the purpose of deciding whether the appellant was entitled to succeed on the EU ground of appeal. *'The relevant date for consideration is the date of the appeal hearing and not the date of the decision...'*
 6. For the sake of clarity permission is granted on all grounds.”
16. The matter came before us to consider whether the Decision contains an error of law as asserted and if we so find to decide whether to set aside the Decision and, if set aside, to either remit the appeal to the First-tier Tribunal or re-make the Decision in this Tribunal.
17. We had before us a skeleton argument from Mr Bahja. We also had a Rule 24 reply from the Respondent dated 22 December 2022 which raised the issue of statutory abandonment to which we come below. In a supplementary skeleton argument dated 8 February 2023 following sight of that reply, Mr Bahja made the point that the Rule 24 reply was out of time and that the Respondent would require permission to rely on it. As we come to below, we do not need to consider the substance of the Rule 24 reply because the outcome of

this appeal arises by operation of statute and not the views of the parties.

THE TRIBUNAL'S JURISDICTION

18. The Tribunal derives its jurisdiction from statute. As such, and as we began by pointing out to Mr Bahja, we need to be satisfied that Judge Beach and this Tribunal had or have jurisdiction to deal with an appeal on EU law (Zambrano) grounds at all.
19. As Mr Bahja accepted, the application made by the Appellant was not under the EEA Regulations. Mr Bahja suggested that there was however a decision under appeal arising under those regulations. That is incorrect for the reasons which follow.
20. Paragraph 36 of the EEA Regulations provides a right of appeal against an "EEA decision". An "EEA decision" is defined at paragraph 2 as a "decision under these regulations" (our emphasis) concerning various types of decision dealing with EU law rights. Put very simply, the fact that the Respondent's decision dealt with an argument raised about Zambrano, rejecting a claim in that regard, does not amount to a decision under the EEA Regulations. As such, there was no EEA decision.
21. That is then relevant to this appeal which proceeds under section 82 Nationality, Immigration and Asylum Act 2002 ("Section 82" of the "2002 Act"). Section 82 provides a right of appeal against a refusal of a human rights claim. Section 82 and various of the other appeal provisions of the 2002 Act are extended by schedule 2 to the EEA Regulations to cover "an appeal under these Regulations to the First-tier Tribunal as if it were an appeal against a decision of the Secretary of State under section 82(1) of the 2002 Act" (our emphasis). That depends however on there being an appeal under the EEA Regulations. For the above reasons, there was no right of appeal under the EEA Regulations because there was no EEA decision under appeal.
22. If further support were needed, it is to be found in section 84 of the 2002 Act ("Section 84"). As Mr Bahja correctly notes in his skeleton arguments, in relation to a refusal of a human rights claim, an appellant must appeal on the ground that removal would be in breach of Section 6. That is no doubt why the Appellant did so. We accept that Section 84 is also extended by schedule 2 to the EEA Regulations to cover an appeal against an EEA decision "as though the sole permitted grounds of appeal were that the decision breaches the appellant's rights under the EU Treaties in respect of entry to or residence in the United Kingdom". However, that does not avail the Appellant, first because, as above, there is no appeal against an EEA decision and, second, in any event because the Appellant did not raise that as a ground of appeal (and on our analysis could not do so).

23. We accept that the Respondent's Rule 24 reply does suggest that she did not take issue with the Appellant having raised an EU law ground which she appears to have thought arose from section 85 of the 2002 Act ("Section 85"). However, on any view and however Section 85 operates, the raising of a new ground of appeal would amount to a "new matter" for which the Respondent's consent would be required. Mr Bahja confirmed that the Appellant had never asked for a new matter to be considered. He suggested that he could make that application before us but that would of course depend on us finding that the Decision contains an error of law on the substantive merits of the Zambrano argument and that there was something remaining to be decided.
24. As we have pointed out, our jurisdiction and that of the First-tier Tribunal derives from statute and not the agreement or consent of the parties. Irrespective of the Respondent's view, and for the reasons given above, we conclude that we have no jurisdiction to decide any EU law ground of appeal and nor did Judge Beach. Judge Beach was therefore right to conclude that the Appellant could not rely on the Zambrano provisions but not for the reasons she gave at [48] of the Decision.

STATUTORY ABANDONMENT

25. Having reached that point, we also conclude that the Appellant's appeal is abandoned by operation of statute. As the Respondent has pointed out, section 104(4A) of the 2002 Act provides as follows:

"An appeal under section 82(1) brought by a person while he is in the United Kingdom shall be treated as abandoned if the appellant is granted leave to enter or remain in the United Kingdom (subject to subsection (4B))."

Section 104(4B) concerns protection claims and has no relevance to this appeal.

26. Accordingly, the Appellant having been granted leave to remain in the United Kingdom following the Decision, the Appellant's appeal is to be treated as abandoned. We so conclude.

NOTICE OF DECISION

The Decision of First-tier Tribunal Judge Beach dated 15 August 2022 does not contain an error of law. The Judge did not have jurisdiction to decide an appeal on EU law grounds. However, her conclusion that the Appellant could not rely on EU law rights (at [48] of the Decision) was not in error albeit for different reasons.

Judge Beach having allowed the Appellant's appeal on the only ground on which he could rely (human rights: Article 8 ECHR), and since he has now been granted leave to remain on that basis the appeal is to

be treated as abandoned under section 104(4A) Nationality, Immigration and Asylum Act 2002.

Signed: L K Smith
Upper Tribunal Judge Smith

Dated: 20 February 2023