



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: EA/02918/2020

THE IMMIGRATION ACTS

**Heard at Bradford (via Microsoft
Teams)
On 1 October 2021**

**Decision & Reasons Promulgated
On 1 November 2021**

Before

UPPER TRIBUNAL JUDGE HANSON

Between

KOUSER PARVEEN FAROOQ
(Anonymity direction not made)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ghafoors Immigration Service.

For the Respondent: Mr Diwnycz, a Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant, a citizen of Pakistan born on the 13 April 1998, appeals with permission a decision of First-tier Tribunal Judge Ali ('the Judge') promulgated on the 6 April 2021 in which the Judge dismissed the appellants appeal against the refusal of an Entry Clearance Officer (ECO) of her application for a Derived Right of Residence Permit.

Error of law

2. The appellant has two children Zaman born on the 10 October 2012 and Arman born on the 10 July 2014. Although the children have always lived with their mother in Pakistan, they are British citizens on account of the fact their father was British.
3. The facts of this case are unusual in that their father, who was in the process of applying for the appellant and their children to join him in the UK, passed away unexpectedly on 12 January 2019.
4. It was accepted before the Judge, who also makes a finding to this effect that the appellant is the primary carer of the children.
5. Permission to appeal was granted by another judge of the First-tier Tribunal on the basis the Judge may not have applied the guidance in the decisions referred to in the Grounds correctly, referring also to MA and SM (Zambrano – EU children outside EU) Iran [2013] UKUT 00380 (IAC), the headnote of which reads:
 - (1) *In EU law terms there is no reason why the decision in Zambrano could not in principle be relied upon by the parent, or other primary carer, of a minor EU national living outside the EU as long as it is the intention of the parent, or primary carer, to accompany the EU national child to his/her country of nationality, in the instant appeals that being the United Kingdom. To conclude otherwise would deny access, without justification, to a whole class of EU citizens to rights they are entitled to by virtue of their citizenship.*
 - (2) *The above conclusion is fortified by the terms of The Immigration (European Economic Area) (Amendment) (No.2) Regulations 2012 (SI 2012/2560), brought into force on 8 November 2012. Paragraphs 2 and 3 of the Schedule to the Regulations give effect to the CJEU’s decision in Zambrano by amending regulations 11 and 15A of the Immigration (European Economic Area) Regulations 2006 in order to confer rights of entry and residence on the primary carer of a British citizen who is joining the British citizen in, or accompanying the British citizen to [regulations 11(5) (e) and 15A(4A)], the United Kingdom and where the denial of such a right of residence would prevent the British citizen from being able to reside in the United Kingdom or in an EEA State.*
6. In relation to this case Mr Dimnycz stated: “Although it is not perfectly on all fours with this appellant’s situation, primarily as it pre-dates the 2016 EEA regs under which this appellant was treated, there is considerable force in the ratio, if applied to these circumstances. I note the date of decision is 30 03 2020, which of course means at that date, the children were EU citizens, and again, that lends weight to the application of the ratio in MA and SM”.
7. The Judge notes the case is somewhat unusual on its facts but found the appellants could not succeed on the basis the 2016 regulations, regulation 16, which imposed a series of requirements which the appellant could not satisfy. A lot of the provisions referred to by the Judge are drafted on the basis of an individual seeking a derived right of residence from within the United Kingdom where the EU national

will also be residing. That is not the factual matrix applicable on the facts of this case.

- 8.** The comment by the Judge that the appellant could make an application under the UK domestic Immigration Rules is noted, but that fails to engage with a fundamental point of EU law that if the appellant is not allowed to enter the United Kingdom and accompany her children there will be a denial of a right of residence as the decision under challenge prevents the EU citizen children from being able to reside in the United Kingdom or any other EEA State. That is contrary to the principles of EU law to which the UK government was bound on the facts.
- 9.** I find the Judge has erred in law as pleaded in the grounds seeking permission to appeal and grant permission to appeal.
- 10.** Although the matter was not conceded by Mr Dimnycz it was accepted that the proper decision to be made in this appeal, to enable the children to enter the United Kingdom and enjoy their rights as EU citizens accompanied by their mother (as their father cannot care for them as he is no longer with us and there is no other family member who could assume that role), is for the appeal to be allowed.
- 11.** I therefore set aside the decision of the Judge as I am satisfied that legal error material to the decision to dismiss the appeal has been made and substitute a decision to allow the appeal on the basis the refusal is not in accordance with Community law.

Decision

- 12. The Judge materially erred in law. I set the decision aside. I substituted decision to allow the appeal.**

Anonymity.

- 13.** The First-tier Tribunal made an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

I make such order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Signed.....
Upper Tribunal Judge Hanson

Dated 1 October 2021