



**IN THE UPPER TRIBUNAL**  
**IMMIGRATION AND ASYLUM**  
**CHAMBER**

**Case No: UI-2022-005025**  
**First-tier Tribunal No: HU/04339/2021**

**THE IMMIGRATION ACTS**

**Decision & Reasons Issued:**  
**On the 26 March 2023**

**Before**

**UPPER TRIBUNAL JUDGE KEBEDE**

**Between**

**NERMIN SOBHI ABDELMABOUD SAYED AHMED**  
**(no anonymity order made)**

Appellant

**and**

**SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellant: Mr A Tan, Senior Home Office Presenting Officer

For the Respondent: Mr Broachwall, instructed by Elkettas & Associates Solicitors

**Heard at Manchester Civil Justice Centre on 23 January 2023**

**DECISION AND REASONS**

1. This is an appeal by the Secretary of State for the Home Department against the decision of the First-tier Tribunal allowing Ms Ahmed's appeal against the respondent's decision refusing her application for a family permit under the Immigration (European Economic Area) Regulations 2016 ("the EEA Regulations").
2. For the purposes of this decision, I shall hereinafter refer to the Secretary of State as the respondent and Ms Ahmed as the appellant, reflecting their positions as they were in the appeal before the First-tier Tribunal.
3. The appellant, a national of Egypt born on 1 August 1985, made an application on 18 June 2021 for a European Family Permit family permit under the Zambrano principles as the primary carer of a British citizen, her son. There was some confusion as to the basis upon which she was making her application and the respondent

considered the application both under the EU Settlement Scheme (“EUSS”) and the Immigration (European Economic Area) Regulations 2016 (“EEA Regulations 2016”), making two separate decisions.

4. In the first decision, dated 27 July 2021, the respondent refused the appellant’s application under the EUSS on the basis that there was no provision for a primary carer of a British citizen under Appendix EU (Family Permit) unless they were the family member of a relevant naturalised British citizen, a relevant person of Northern Ireland or a qualifying British citizen, of which the appellant was none.

5. In the second decision, dated 16 August 2021, the respondent treated the application as having been made under regulation 16(5) of the EEA Regulations 2016 and refused it on the grounds that the appellant had not provided evidence to show that she was the primary carer of her sponsor and that it was therefore not accepted that she met the requirements of the EEA Regulations 2016.

6. On 6 September 2021 the appellant lodged an appeal against the second decision, of 16 August 2021, asserting that she was the family member of an EEA national, on the basis of the case of Ruiz Zambrano (European citizenship) [2011] EUECJ C-34/09, and that she satisfied the requirements of Appendix EU (Family Permit) of the Immigration Rules. The appellant stated that she had never been served the refusal decision of 27 July 2021.

7. The appellant’s appeal came before First-tier Tribunal Judge Shergill on 15 July 2022. The judge decided that the second decision was the relevant decision for the purposes of the appeal. He accepted that the appellant was a primary carer of her son and that her presence in the UK was in his best interests, such that the requirements of Zambrano were met. The judge concluded that the appellant was therefore entitled to a family permit under the EEA Regulations and/or under Appendix EU (Family Permit). He considered that, given that the route to an EEA family permit was closed, the appellant should be issued with an EUSS Family Permit.

8. The Secretary of State sought permission to appeal to the Upper Tribunal on the basis that there was in fact and law no basis upon which, by the date of the application, an asserted right deriving from regulation 16(5) could have led to the issue of a family permit. That was because the route via the EEA Regulations 2016 for admission of a Zambrano carer had closed on 31 December 2020 and the ability to exercise a Zambrano right via a British child was never covered by the EUSS. The judge had therefore failed to identify a proper basis upon which the appeal could have succeeded on any ground.

9. Permission was granted by the First-tier Tribunal and the matter then came before me.

10. Mr Tan produced a Position Statement for the SSHD in which he submitted that there was no legal basis for the appellant’s application under the regulation 12 with reference to regulation 16(5) of the EEA Regulations 2016 as the 2016 Regulations had been revoked by the time of the appellant’s 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. In addition, the appellant had not appealed against the decision of 27 July 2021 and claimed not to have been served that decision, and therefore no right of appeal arose from the decision. In any event the appellant could not succeed under the EUSS as she could not meet the definition of a family member of a qualifying British citizen.

11. At the hearing, Mr Broachwall quite properly agreed that there had been an error of law in the judge’s decision as the ‘Zambrano’ route under the EEA Regulations 2016

had closed from 31 December 2020. However he submitted that the EUSS decision gave rise to a right of appeal and that the judge was able to deal with that appeal. Mr Broachwall agreed that in order for the judge to consider Article 8, the respondent would have had to have given consent to the matter being raised as a 'new matter', and if consent was now given, the appeal could be stayed so that the Article 8 matter could be considered at another hearing. Mr Tan submitted that the question of consent for a new matter to be considered simply did not arise since there was nothing for the Tribunal to consider, owing to the fact that the appellant had not appealed the decision under the EUSS.

12. It was clear to me that the appellant had never appealed against the EUSS decision of 27 July 2021. Indeed, Mr Broachwall did not seek to argue that she had. Therefore, as Mr Tan submitted, the question of whether or not Article 8 could be raised as a 'new matter' simply did not arise. That was the only potentially valid appeal which the appellant could have made, but she did not do so. The only decision against which she had appealed was the decision made under the EEA Regulations 2016 dated 16 August 2021, but as Mr Broachwell properly conceded, the 'Zambrano' route had closed from 31 December 2020 and the appellant's application was therefore not one open to her to make. The decision made by the respondent on 27 July 2021 was accordingly not a valid decision, there was no right of appeal, and the First-tier Tribunal had had no jurisdiction to entertain the appeal, there having been no valid appeal before it.

13. In the circumstances the appropriate way to dispose of the case in the Upper Tribunal was to find that the Secretary of State had made out her case, to set aside Judge Shergill's decision and 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. Neither party had any objection to that course. As I said to Mr Broachwell, it seemed to me that the most appropriate course available to the appellant would be to make an Article 8 human rights claim, perhaps with reference to the positive findings made by Judge Shergill, albeit that his decision as a whole was not a lawful and valid one.

14. Mr Broachwell also raised the issue of costs, in that the appellant wished to make an application for the wasted costs of appealing a decision for which she ought never to have been given a right of appeal by the ECO. As Mr Tan suggested, such an application would need to be made in writing with relevant information provided.

## **DECISION**

15. The making of the decision of the First-tier Tribunal involved an error on a point of law and First-tier Tribunal Judge Shergill's decision is set aside.

16. I re-make the decision by dismissing Ms Ahmed's appeal for want of jurisdiction.

17. If appellant wishes to make an application for costs, that should be made in writing to the Tribunal.

Signed: S Kebede  
Upper Tribunal Judge Kebede

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