



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

Case No: UI-2022-006554

First-tier Tribunal Nos: EA/53342/2021  
IA/13823/2021

**THE IMMIGRATION ACTS**

**Decision & Reasons Issued:  
On 30 July 2024**

**Before**

**UPPER TRIBUNAL JUDGE PERKINS**

**Between**

**The Secretary of State for the Home Department**

Appellant

**and**

**Mimoza Gjoniku**

(NO ANONYMITY ORDER MADE)

Respondent

**Representation:**

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

For the Respondent: Mr P Georget, Counsel instructed by Malik & Malik Solicitors

**Heard at Field House on 11 October 2023**

**DECISION AND REASONS**

1. This is an appeal by the Secretary of State against the decision of the First-tier Tribunal allowing the appeal of the respondent, hereinafter “the claimant”, against the decision of the Secretary of State refusing her an EEA family permit to enable her to accompany her three British children to the United Kingdom. It is her case that she is a person who would be entitled to reside in the United Kingdom under Regulation 16(5) of the Immigration (European Economic Area) Regulations 2016. Regulation 16 deals with a “derivative right to reside” and the claimant says that she has such a right as the care of British children.
2. The First-tier Tribunal allowed the appeal and the Secretary of State appealed to the Upper Tribunal, on extremely detailed grounds, which I consider below. For the purposes of introduction, it is the gist of the case that the law had changed by the time the First-tier Tribunal determined the appeal so that the appeal could not be allowed. It seems clear that this was not explained to the Judge but the Judge still had to apply the law correctly.

3. I begin by summarising the decision that was the subject of the appeal. It was made on 9 April 2021. It was described as a “Refusal of EEA Family Permit”.
4. The application was identified as an application based on **Zambrano** principles by the mother of a British citizen. The main reason for refusing the application (page 175 in the bundle) is that it was the claimant’s case that she lived in Albania and therefore, according to the Secretary of State, had not been able to show that the British citizen would be unable to reside in the United Kingdom. The Secretary of State’s decision enclosed the standard paragraphs telling the claimant of her appeal rights, which she chose to exercise.
5. The decision was subject to review and the decision was maintained for the same reasons. The outcome of the review is a little more illuminating than the original reasons but concluded unequivocally that the Secretary of State  

“has seen no evidence to suggest that [the child] would not be able to reside in the United Kingdom without [the appellant]”.
6. It is, with respect to the Judge, a conspicuously careful decision. The Judge noted the “obvious tension” that arose because a strict reading of the Rules required the applicant to be in the United Kingdom when the application was made.
7. I set out below paragraphs 21 and 22 of the First-tier Tribunal’s Decision and Reasons because it explains particularly succinctly how the Judge went about his task:  

“21. However, it does not appear to be disputed in the respondent’s review, nor was it disputed by [the Presenting Officer] in closing submissions, that the appellant had (prior to the end of the transition period on 31 December 2020) a right of admission under Regulation 11 on the basis that, if she was already hypothetically in the UK with her British citizen children, she would have a derivative right of residence under Regulation 16(5), provided that the British citizen children would be compelled to leave the United Kingdom if she herself were required to leave the UK for an indefinite period.

22. So, the issue which remains in dispute is whether the requirement of compulsion is satisfied.”
8. At Paragraph 30 of the Decision and Reasons the Judge concluded that he was:  

“... in no doubt that overwhelmingly their best interests lie in them remaining with their mother and at the same time being able to exercise the substance of the rights conferred on them by virtue of their status as citizens of the UK.”
9. The Judge allowed the appeal.
10. As indicated above, this prompted a very detailed application for permission to appeal from the Secretary of State. The grounds were settled by Mr Peter Deller. Ground 1, although no doubt extremely unwelcome to the claimant, is very clear. It asserts that the Judge:

“...errs on a statutory basis, admittedly not referenced in the decision or in advance of the appeal. Simply put, the timing of the decision and ensuing appeal meant that the relevant 2016 EEA Regulations were not preserved in the manner stated and neither the application nor the appeal was capable of succeeding. [The Judge’s] only mention of the position after 31 December 2020 is an inaccurate citation of the relevant modified ground of appeal, and he thus misses the fact the critical provisions were not preserved in the circumstances of the case.”

11. This point is then explained in more detail in subsequent paragraphs.
12. Ground 2 asserts that the application was made before the specified date of 31 December 2020 but decided afterwards. This much is uncontroversial. The ground then asserts that both the consideration of the application and the appeal were limited to the Regulations as preserved by the relevant parts of the Immigration and Social Security Co-ordination (EU Withdrawal) Act 2020 (Consequential, Saving, Transitional *and* Transitory Provisions) (EU Exit) Regulations 2020. The grounds assert that:

“In particular paragraph 4(1) provided that the application was to be considered by reference to the regulations preserved by paragraph 6, which did not include regulation 12 (issue of family permit) or regulation 16 (derivative rights of residence). Moreover the ensuing appeal, one to which paragraph 5(1)(d) applied as the decision was made after the specified date, could be brought only on the modified ground at paragraph 6(cc)(bb) that the decision is contrary to the rights under the Immigration (European Economic Area) Regulations 2016 *as they are continued in effect by these Regulations...* (or by another instrument not relevant here). Thus, the absence of regulations 12 or 16 gave no basis on which the appeal could succeed going forwards. This should have been dispositive of the appeal.”
13. The reference to “paragraph 4(1)” must be a reference to Schedule 3, paragraph 4(1) of the (Consequential SI) and once that is appreciated the grounds start to make sense.
14. I remind myself of key facts. That application was made on 11 December 2020 and was an application for an EEA family permit. It was refused on 9 April 2021 and subsequently upheld on review. It follows that, although the application was made before commencement date, the decision was made after it and the appeal (obviously) was after that. It is therefore uncontroversial that the appellant could not rely on the EEA Regulations 2016 unless they were in some way preserved. Some certainly are. This application relies on Regulation 12 of the EEA Regulations 2016 and paragraph 3 of Schedule 1 makes plain that (broadly) applications under Regulation 12 that have already been made can be decided, which is what has happened here.
15. However, the rights of appeal against such decisions are not preserved, or rather they are not all preserved. The power to deal with “existing appeal rights and appeals” comes under paragraph 5 of Schedule 3 and this shows that (again broadly) appeals can continue against decisions under the EEA Regulations “taken before commencement day”.
16. However, paragraph 5(1)(d) describes different appeal rights in the case of decisions (such as this one) taken after commencement day. The relevant text says:

“(d) In respect of an EEA decision, within the meaning of the EEA Regulations 2016 as they continue in effect by virtue of these Regulations or the Citizens’ Rights (Application Deadline and Temporary Protection) (EU Exit) Regulations 2020, which is taken on or after commencement day.”

17. In other words, where the decision is made after commencement day, the right of appeal against an EEA decision is only meaningful when it relates to an EEA decision identified as one that continues to be relevant by the Consequential Provisions (EU Exit) Regulations 2020 or the Citizens’ Rights (Application Deadline and Temporary Protection) (EU Exit) Regulations 2020 and Regulation 12 of the EEA Regulations is not preserved. This was considered rather fully by Upper Tribunal Judge Smith in **Osunneye (Zambrano; transitional appeal rights) [2023] UKUT 00162 (IAC)**. There Judge Smith said at paragraph 38:

“I have carefully considered how that interpretation is consistent with the removal of regulations 16 and 20 of the EEA Regulations which, as the Tribunal pointed out in **James**, are not part of the EEA Regulations which are preserved by the 2020 Regulations. However, the ground of appeal is not whether the Respondent’s decision is contrary to the EEA Regulations but whether it accords with the EU Treaties (as now modified by what is said in paragraphs 5 and 6 of Schedule 3). As the Respondent points out in her supplementary skeleton argument, the impact of the modifications made by paragraph 6(cc) of Schedule 3 is broadly that, in relation to an application made to the Respondent before 31 December 2020 but not decided after that date, an appellant can appeal only on the basis that the Respondent’s decision breaches the EEA Regulations (which no longer include regulations 16 and 20 as a result of paragraph 6 of Schedule 3), or the Withdrawal Agreement (which no longer confers any **Zambrano** right to reside). However, in relation to decisions taken prior to 31 December 2020 (as here) and appeals against decisions brought but not determined prior to 31 December 2020 an appellant continues to have a right of appeal on the basis that the Respondent’s decision breaches the EU Treaties as they applied prior to withdrawal.”

18. I respectfully agree and adopt this reasoning here and confirm that, as far as this case is concerned, the decision in **Osunneye** shows that in a case such as this, where the decision was made before but decided after commencement day, there is no appeal because the appellant needs to show that she satisfies the requirements of the relevant Rules and the list of relevant Rules, (if I may be excused for being a little casual) do not contain the one she needs to rely on.
19. Mr Georget, of course, was aware of this and argued in effect that the conclusion indicated above was wrong.
20. I checked Mr Georget’s determined argument that the right of appeal was preserved. Paragraph 3 of Schedule 3 does not help. Paragraph 3 is about pending applications and this appeal does not come from pending application; it comes from determined application and a pending appeal. The appeal rights are under paragraph 5 and for the reasons already indicated, I have indicated that there are none.
21. The Judge, again rightly, pointed out that there appears to be a continuing right of appeal against a decision under Regulation 11 concerning a right of admission to the United Kingdom but that does not help. Regulation 11 is basically about EU nationals asserting a right to enter the United Kingdom and this was a case

about an Albanian national claiming a derivative right. It concerns a different point.

22. Again, Mr Georget is plainly right to refer my attention to paragraph 27A(2)(cc). He refers to continuing appeals to the First-tier Tribunal. It distinguishes between the appeals within paragraph 5(1)(a) through to (c) which are not applicable here and then under (bb) in relation to appeals under paragraph 5(1)(d) refers to appeals “under the EU Treaties” but that is qualified by reference to the 2016 Regulations “as they are continued in effect by these Regulations ..”. The relevant Regulations are not continued.
23. I remind myself that this is a case which an experienced First-tier Tribunal Judge in a considered decision decided ought to have succeeded on its facts. The Secretary of State has appealed, I think I may say rather sheepishly, on the basis that the Judge misapplied the law but had not been told before the hearing the points relied on now. That is unattractive but judges have to apply the law as it is and the fact the Secretary of State did not take this point does not stop it being a law.
24. I am quite satisfied that, for the reasons outlined in Mr Deller’s grounds, there was no useful right of appeal against the decision and, for the reasons set out above, that approach urged in the grounds of the Secretary of State, is clearly right. The Judge just had no power to allow the appeal on the basis that he did or any other, as far as I can see.

### **Notice of Decision**

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

**Jonathan Perkins**

Judge of the Upper Tribunal  
Immigration and Asylum Chamber

**29 July 2024**