Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: OA/05635/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 5 June and 24 October 2017	**On 7 March 2018**

Before

UPPER TRIBUNAL JUDGE GLEESON

Between

AISHA AHMED FAWZI RAGAB BEN KATO
[NO ANONYMITY ORDER]

Appellant

and

THE ENTRY CLEARANCE OFFICER
ISTANBUL

Respondent

Representation
For the appellant: Mr Mohammed Al-Rashid, Counsel instructed by Carlton Law Chambers
For the respondent: Mr Stephen Whitwell, a Senior Home Office Presenting Officer, at the hearing on 5 June 2017 and Mr Peter Deller, a Senior Home Office Presenting Officer, at the hearing on 24 October 2017

DECISION AND DIRECTIONS

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1. The appellant appeals with permission against the decision of the First-tier Tribunal dismissing her appeal against the respondent's decision on 13 March 2015 to refuse her an EEA family permit to enter the United Kingdom based on her derived right of residence, pursuant to the decision of the Court of Justice of the European Union in *Zambrano,* now provided for by Regulation 15(A) of the Immigration (European Economic Area) Regulations 2006 (as amended). The appellant's husband is a British citizen and thus an exempt person for the purposes of the Regulations.

2. The appellant has not made any application for entry clearance under Article 8 ECHR within the Immigration Rules HC395 (as amended), or outside the Rules. It is her case that the EEA Regulations entitle her to a family permit and that she should not be required to make an application for entry clearance under the Rules. In his submissions of 5 January 2018, Mr Al-Rashid confirmed that Article 8 ECHR 'has no present applicability as the children are living with both their parents'.

Procedural matters

3. This appeal was heard in the Upper Tribunal on 5 June 2017 and 24 October 2017. At the hearing on 24 October 2017, I received oral submissions on the basis of the evidence and the authorities as they stood. It is common ground that this appeal turns on whether the appellant is entitled to be treated as the primary carer of her children, for EEA purposes.

4. On 24 October 2017, the meaning of 'primary carer' was under consideration in a number of conjoined cases in the Court of Appeal. The Court of Appeal's decision in those appeals was handed down on 13 December 2017 and is reported as *Patel v The Secretary of State for the Home Department* [2017] EWCA Civ 2028.

5. By agreement, I directed that the remaking of the decision in this appeal stand adjourned to await the decision of the Court of Appeal in *Patel*. The parties were then given an opportunity (if so advised) to serve and file supplemental submissions, following which I indicated that I would either proceed to remake the decision, or reconvene the hearing for further oral argument. Both parties made submissions: neither asked for a further oral hearing and I do not consider that one is necessary. The decision is therefore remade as set out below.

Background

6. The factual matrix in this appeal is not contentious. This appellant is a Libyan citizen married to a British citizen, who works for a Libyan company, sometimes in Libya and sometimes in Turkey. The appellant was last in the United Kingdom with leave as an EEA spouse, for 2 years from 31 August 2007 to 31 August 2009. The couple had a child, born in the United Kingdom in September 2008, who is a British citizen. Since leaving the United Kingdom in December 2009 for the appellant's husband to take up his post in Libya, they have had a further two children, who are also British citizens.

7. The appellant remains a Libyan citizen and has no other nationality. At present, the family all live together, but it is the parents' intention that the appellant and the

children should come and live in the United Kingdom. No Article 8 ECHR application has been made, nor any application for leave to enter outside the Rules. In December 2011 at the latest, the appellant had been out of the United Kingdom for more than 2 years and her EEA spouse leave has lapsed: she cannot re-enter the United Kingdom without her husband, who remains in Libya/Turkey, save by way of an EEA family permit.

8. In August 2014, the husband's work took the family to Turkey. On 2 October 2014, the appellant applied for a visit visa to come to the United Kingdom for a 2-month visit, but the Entry Clearance Officer in Islamabad refused because he was not satisfied that the appellant was lawfully in Turkey, or that her husband still had employment there. The husband's payslips indicated that he had last been paid on 20 July 2014 and might no longer be in the employment on which the parties rely, as an obstacle to his living with his children in the United Kingdom.

9. On 21 February 2015, the appellant made the present application for an EEA family permit to enable her to accompany her children to the United Kingdom. Her British citizen children were then 7, 6 and 3 years old but would now be 9, 6 and 5 years old respectively. The family were living together in Turkey and being supported by the husband's employment: the husband did not intend to travel with his family. He intended to continue working in Turkey, and support his family financially in the United Kingdom. Once she reached the United Kingdom, the appellant would therefore have to raise the children alone.

Entry Clearance decision

10. The Entry Clearance Officer refused the EEA family permit application because he was not satisfied that the appellant was the children's primary carer, since the family were still living together in Turkey. The respondent considered that the appellant's British citizen husband could return to the United Kingdom and care for his children here and that, therefore, failure to admit the appellant to the United Kingdom would not result in the children being unable to enjoy the full substance of their rights as European citizens while growing up in the country of their nationality, the United Kingdom.

11. The appellant appealed to the First-tier Tribunal.

Entry Clearance Manager review

12. Following receipt of the grounds of appeal, an Entry Clearance Manager reviewed and upheld the Entry Clearance Officer's decision. The husband, as a British citizen, was an exempt person under section 15A(6) of the Rules. The Entry Clearance Manager was not satisfied that the appellant could meet Regulation 15A(4A) of the 2006 Regulations, either by showing that she had primary responsibility for her children's care at the date of application, or that she shared equally that responsibility with a person who was not an exempt person. Accordingly, applying Regulation 15A(2)(b), the Entry Clearance Manager was satisfied that this appellant did not qualify for derivative residence status.

13. The Entry Clearance Manager considered that section 55 of the Borders, Citizenship and Immigration Act 2009 did not apply as the children were outside the United Kingdom. The respondent had no obligation to consider their best interests if they were not in the United Kingdom. The Entry Clearance Manager commented that wilfully to split the family as proposed was probably not in the children's best interests.

14. The Entry Clearance Manager maintained the refusal, stating that the Entry Clearance Officer's decision respected the family's Article 8 rights as they stood. The Entry Clearance Manager considered that the appellant should seek entry clearance under the Article 8 ECHR provisions of the Immigration Rules.

First-tier Tribunal decision

15. First-tier Tribunal Judge Ross considered the reasoning of the Upper Tribunal in *MA and SM* (*Zambrano*: EU children outside the EU) Iran [2013] UKUT 380. He did not accept that Regulation 15(2A) covered the situation where the parent was not yet in the United Kingdom with the European Union citizen children and was not their primary carer in the place and at the time where the entry clearance application was made.

16. The First-tier Tribunal concluded that this appellant not being an EEA national, 'consequently the Entry Clearance Officer was not obliged to issue her with a derivative residence card under Regulation 18A of the Regulations'. The Judge dismissed the appeal under what he described as the 'Immigration (EEA) Regulations 1986'. The appellant appealed to the Upper Tribunal.

Permission to appeal

17. The grounds of appeal raise two issues. First, the appellant says, supported by a witness statement from Mr Al-Rashid, that at the end of the First-tier Tribunal hearing the Judge gave an indication that he would allow the appeal, and she complains that the decision does not explain why he went on to dismiss it, having given that indication.

18. Second, in relation to the substance of the decision, the appellant argues that the operation of Regulations 12(1A) and Regulation 11(5), which together govern the issue of an EEA family permit, is to be analysed as though the appellant and her children were already in the United Kingdom, and that the question for the Tribunal is:

> "If the 3 British citizen children aged 3, 6, and 7, who are now in Libya, were to be present in the UK, would they be able to reside here (i.e. enjoy the benefits of their citizenship) if P (their mother and appellant) were not to be permitted entry/was not permitted to reside in the UK with them, in the absence of other family members or close relatives in the UK who could care for them."

19. The appellant contends that the First-tier Tribunal failed properly to apply the guidance of the Upper Tribunal in *MA and SM* at [44] such that the 'primary carer' criteria in Regulation 15A should be considered based on the situation as it would be if the appellant were allowed to enter the United Kingdom with her children, not as it

presently stands, in circumstances in which she lives with her husband and her children together, in Turkey or Libya.

20. It is the appellant's case that there are no other family members in the United Kingdom who could care for the children and that it would be unreasonable to expect them to go to boarding school, especially as the youngest was only 3 years old at the date of decision.

Rule 24 Reply

21. The respondent filed a Rule 24 Reply on 4 May 2017. It is of limited assistance to me since at [3] the respondent stated that, having not been provided with Mr Al-Rashid's witness statement, she was unable to comment on the allegation therein that the First-tier Tribunal Judge said during the hearing that he would allow the appeal. At [4], the respondent says that the present shared responsibility for the children is fatal to the appeal and that such finding was open to the First-tier Tribunal Judge.

22. That is the basis on which this appeal came before me.

Error of law decision

23. There is no explanation for the difference between what the appellant says was the orally announced outcome of the appeal, and the written decision of the First-tier Tribunal. The question has not been put to the First-tier Tribunal Judge and the record of proceedings on the file does not assist me. At a hearing on 5 June 2017, I found an error of law, both on that point and in relation to the Judge's self-direction on the Regulations. I therefore set aside the decision of the First-tier Tribunal, and the decision in this appeal will be remade in the Upper Tribunal.

24. There is no challenge to the findings of fact and credibility in the First-tier Tribunal.

Remaking the decision

Appellant's submissions

25. For the appellant, Mr Al-Rashid in his skeleton argument set out the history of this family and the birth of the children. Article 20(1) of the Charter of Fundamental Rights of the European Union ('the Charter'), established citizenship of the European Union and that every person holding nationality of a Member State was also a citizen of the Union, which citizenship was additional too, but did not replace, national citizenship. Article 21(1) of the Charter gave every citizen of the European Union the right of free movement. He then set out the key findings of the Court of Justice in *Zambrano,* and the guidance of the Upper Tribunal in *MA and SM:*

> "*(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."

26. The appellant would rely on the decision of the Upper Tribunal in *Mundeba* (s.55 and para 297(i) (f)) Democratic Republic of Congo [2013] UKUT 88 (IAC) that:

> "…Although the statutory duty under s.55 UK Borders Act 2009 only applies to children within the UK, the broader duty [to have due regard to the provisions of the UN Convention on the Rights of the Child] doubtless explains why the Secretary of State's IDI invites Entry Clearance Officers to consider the statutory guidance issued under s.55."

27. After setting out the applicable 2006 Regulations, Mr Al-Rashid argued that once in the United Kingdom (if admitted) this appellant would not be sharing responsibility for the children with any other person in the United Kingdom. The respondent's continued refusal to admit her was contrary to European Union law and the Regulations. Regulation 11(5) was a forward-looking provision, envisaging that the factual matrix should be considered 'as if' the British citizen children were already in the United Kingdom, and should be so interpreted. On that basis, it was clear that the children would be unable to reside here, if their mother could not accompany them. The question to be considered under Regulation 15A(4A) was also whether, if the appellant were in the United Kingdom, she would be the children's primary carer, and that question must be resolved in her favour. The wording of Regulation 11(5)(e) was based upon an artificiality, but in the appellant's favour.

28. Nor was it appropriate to treat the appellant as having sought to circumvent the Rules, or that she was required to make an entry clearance application thereunder. The appellant manifestly could not meet the requirements of sub-paragraphs E-ECP.2.1(a), E-ECP.2.10 or E-ECPT.2.2.(b), which respectively required the appellant's partner to be in the United Kingdom, the couple to intend to live together permanently in the United Kingdom, and the children to be already in the United Kingdom. The appellant could not lawfully enter the United Kingdom within the Rules. The respondent should have had regard to the best interests of these British citizen children and the appeal should be allowed.

29. In oral submissions, Mr Al-Rashid summarised the argument above. If the right question were asked, the answer followed. The decision in *MA and SM* did not greatly assist since it was decided before the introduction of Regulation 11(5)(e) and 15(4A).

Nor was there any need to exhaust the Article 8 ECHR options under the Rules before relying on *Zambrano* derivative status.

30. The Tribunal should not rely on the husband's choice to remain in Libya or Turkey: suppose the appellant had been a widow, the husband had been the subject of an exclusion order preventing his return to the United Kingdom, or he were seriously physically incapacitated and unable to travel with his family. In those circumstances, would the appellant still be unable to apply to travel with her children to the United Kingdom? Mr Al-Rashid submitted that the husband should not be penalised for being employed outside the United Kingdom: the Regulations did not require the Tribunal to understand the husband's motives for remaining outside his country of nationality without his family members.

31. Mr Al-Rashid made written submissions on *Patel*. He set out the factual history, and the issue in relation to the meaning of Regulation 11 of the Immigration (European Economic Area) Regulations 2006 (as amended). He argued that *Patel* was not of assistance in this appeal, since the issue in *Patel* was whether a British citizen would be compelled to leave the United Kingdom/European Union if their primary carer was removed. Regulation 11(2) was not in contention. Mr Al-Rashid observed that the legal test in *Patel* is set out at [77]-[78] thus:

> "77. …The correct approach would have been to ask is the situation of the child or children such that, if the non-EU citizen parent leaves, the British citizen will be unable to care for the child or children, so that the latter will be compelled to leave. In so doing, the Tribunal must pay regard to all the relevant circumstances indicated by the CJEU in *Chavez-Vilchez*, and in particular in paragraphs 70 to 72 quoted above.
>
> 78. I would wish to emphasise that consideration of the respect for family life (whether considered under Article 8 ECHR or Article 7 of the Charter), although a relevant factor, cannot be a trump card enabling a court or tribunal to conclude that a child will be compelled to leave because Article 8 (or Article 7) are engaged and family life will be diminished by the departure of one parent. Family life will be diminished by the departure of one parent in the great majority of cases. The question remains whether, all things considered, the departure of the parent will mean the child will be compelled to follow."

32. At [14]-[15] in his further submissions, Mr Al-Rashid said this:

> "14. In the instant appeal, the continued refusal of the admission of their mother denies these British children their Art 20 TFEU rights. It is no answer to say they can enter the UK and reside here with their father, as he has made no attempt to enter the UK to care for his children since 2009 when he left the UK. In the instant appeal, such an approach (i.e. giving precedence to his conduct) can amount to gender discrimination as it invests the patriarchy with disproportionate authority over the future of the children. The Tribunal is invited to adopt an approach that favours neither parent above the other, but assesses the appellant's application through the prism of the children's best interests; the law clearly mandates such an approach.

15. In respect of the assertion that the appellant is circumventing Immigration Rules (per ECM), or that an application for EC under Appendix FM (per respondent's skeleton #28), those positions are plainly unsustainable. Para E-ECP.2.1.(a) requires the appellant's British citizen partner to be "in the UK," (which he is not), and para E-ECP.2.10. requires them to "intend to live together permanently in the UK" (which he does not). Para E-ECPT.2.2.(b) requires the child to be "living in the UK" (which they do not). The Immigration Rules are therefore manifestly inapplicable/ unhelpful to the appellant in her attempt to lawfully accompany her children into the UK."

33. Mr Al-Rashid accepted that Article 8 ECHR was inapplicable, as refusal to allow the appellant to leave Libya or Turkey and come to the United Kingdom did not affect their family life in those countries, because the children were living with both parents at present. He submitted that, on the proper interpretation and application of the law to the facts in this appeal, including the best interests of the British citizen children, as a primary consideration, the appeal should be allowed.

Respondent's submissions

34. For the respondent, Mr Deller in his skeleton argument set out the history. He did not dispute that the First-tier Tribunal Judge had given the oral indication upon which Mr Al-Rashid relied. Mr Deller set out the applicable law, and the ratio decidendi of *Ruiz Zambrano* and subsequent decisions, all of which are based on a factual matrix where the caring parent, or both parents, are already in the country where the derivative residence permit is sought.

35. Mr Deller set out the guidance of the domestic Courts before *Chavez-Vilchez,* in *Harrison v Secretary of State for the Home Department* [2-12]EWCA Civ 1736 and in *Hines v Lambeth LBC* [2014] EWCA Civ 660, both of which took a restrictive view of the *Zambrano* principle. None of those decisions, nor the decisions of the Court of Justice relied upon, deals with a fact set where by the parents' choice, both parents and the children are living outside the European Union. Mr Deller submitted that the Court's references to the Charter which, he contends, is not capable of creating new residence rights which did not previously exist.

36. An application for a family permit on the basis of a derivative right of residence was distinct from an application for entry clearance under the Immigration Rules or Article 8 ECHR (*Amirteymour v Secretary of State for the Home Department* [2017] EWCA Civ 353 at [31]-[36] in the judgment of Lord Justice Sales, with whom the Senior President of Tribunals and Lord Justice Beatson agreed).

37. In this appeal, the proposal was that the children, by operation of their rights as British citizens, would return to the United Kingdom as a matter of their parents' choice, not necessity. The Immigration Rules provided for circumstances in which a parent wished to return to the United Kingdom as the primary carer of her children. Mr Deller accepted that the application should be treated as if the children were living in the United Kingdom, since that was their entitlement. On a proper analysis, the appellant was their joint carer, not their sole carer, and the appeal should be dismissed.

38. In oral submissions, Mr Deller distinguished the decision of the Upper Tribunal in *MA and SM,* which was based on section 82(2) of the Nationality, Immigration and Asylum Act 2002 as it then stood, which included a right of appeal on EEA grounds. The law had moved on: section 82 at the date of decision excluded any consideration of EEA decisions, the appeal structure for which was contained within the Regulations themselves. The present decision pre-dated the further reforms in 2014 and section 85A(1) was inapplicable. The children were all British citizens, thus European Union nationals, and it was right that they could not live in the United Kingdom if their primary carer could not accompany them here. Mr Deller conceded that if the proper approach was to consider the children's virtual presence in the United Kingdom as having the effect of separating them from the 'primary carer' parent, the nuances of the 'compulsion to leave the European Union' arguments were overridden by the operation of the 2006 Regulations.

39. In *Chavez-Vilchez and Others* (Union citizenship - Article 20 TFEU - Access to social assistance and child benefit conditional on right of residence in a Member State : Judgment) [2017] EUECJ C-133/15, the Court of Justice held that the children's ties to both the EEA national and the non-EEA parent must be assessed as part of a factual analysis whether the child would in reality be forced to leave the European Union if the non-EEA parent was removed. It was to be hoped that the cases before the Court of Appeal on the question as to who is a 'primary carer' would be of assistance (the *Patel* decision) and Mr Deller would make further submissions once the outcome of that appeal was known.

40. In written submissions following the *Patel* decision on 13 December 2017, Mr Deller said this:

> "Although this represents no concession in respect of any of Mr Al Rashid's points or in the appeal generally, I have no further very detailed submissions to make on *Patel* and simply ask that Judge Gleeson takes the judgment into careful consideration in reaching her decision. My position is that the Court has ruled on the question of constructive denial of rights on the *Zambrano* principle (where a person's residence here is necessary for a Union citizen to enjoy rights conferred by TFEU) and that no material difference arises whether the affected British citizens are currently within or outside the United Kingdom.
>
> So far as paragraph 35 of *Patel* is concerned no challenge was brought in the Court of Appeal proceedings to the First tier Tribunal's findings that Mr Shah was the primary carer in that case. That does not represent a general concession and does not dispose of the separate "required to leave" (remain outside) question. Where the question of "primary carer" is not resolved below it remains at large. It may well follow, as Mr Al-Rashid suggests, that what the situation would be were the appellant and her children in the United Kingdom and the husband/father not, must dictate the "primary carer" requirement.
>
> I would be amenable to a further hearing should it be considered necessary, but do not request one."

41. The following is my reserved decision, with the benefit of all the facts, matters and argument now before me. I am grateful both to Mr Al-Rashid and Mr Deller for the assistance given to me in their skeleton and oral arguments, and in their response to the *Patel* judgment.

***MA and SM* (*Zambrano*: EU children outside EU) Iran 2013 UKUT 00380 (IAC)**

42. In *MA and SM,* the Upper Tribunal gave the following guidance:

> "*(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."*

43. In that decision, the Tribunal also dealt with Article 8 ECHR, but that is no longer good law following *Amirteymour & Ors* (EEA appeals; human rights) [2015] UKUT 466 (IAC), which held that Article 8 can only be relied upon in an in-country EEA Regulations appeal if the failed EEA application may place an appellant at risk of removal (see also *JM (Liberia) v Secretary of State for the Home Department* [2006] EWCA Civ 1402). That is also clearly set out in paragraph 5 of the Immigration Rules:

> "Save where expressly indicated, these Rules do not apply to a European Economic Area (EEA) national or the family member of such a national who is entitled to enter or remain in the United Kingdom by virtue of the provisions of the Immigration (European Economic Area) Order 1994. But an EEA national or his family member who is not entitled to rely on the provisions of that Order is covered by these Rules.
>
> Save where expressly indicated, these Rules do not apply to those persons who are entitled to enter or remain in the United Kingdom by virtue of the provisions of the 2006 EEA Regulations But any person who is not entitled to rely on the provisions of those Regulations is covered by these Rules."

I do not approach the present appeal on the basis that I am seised of anything other than the EEA family permit issue.

***Chavez-Vilchez and Others* (Union citizenship - Article 20 TFEU - Access to social assistance and child benefit conditional on right of residence in a Member State: Judgment) [2017] EUECJ C-133/15**

44. In these conjoined appeals, the judgment on which was handed down on 10 May 2017, the Court of Justice of the European Union considered whether a mother could be the primary carer of her children in a variety of circumstances in which the father was not living with the family. The relevant national law considered was that of the Netherlands, which contains a similar provision to that in Regulation 15(4A).

45. The circumstances underlying the reference by the Netherlands Courts to the Court of Justice in *Chavez-Vilchez* was not properly comparable with those of this appellant, in that all 8 of the mothers whose cases were referred were already living apart from the fathers of their children, who were citizens of the Netherlands. All the children in those cases were already in the European Union, living with their mothers in the Netherlands, and in each case, at least one child was a citizen of the Netherlands.

46. The principal applicant, Ms Chavez-Vilchez, was living in the Netherlands after living together with her former partner in Germany. She had been compelled to leave the family home there and return with her child to the Netherlands: she was caring for the child without any contribution from the father. That is the closest fact set to that of this appellant, save that in this appeal, the children are not in the United Kingdom, and a joint family decision has been taken that the appellant should leave her husband in Turkey or Libya, and bring the children to live in the United Kingdom. The factual matrices for the other seven applicants in the *Chavez-Vilchez* case all related to fathers who did not contribute much, if anything, financially, and who lived apart from their former partner and child, but still within the Netherlands.

47. The Grand Chamber gave guidance to the national Court that:

> "1. Article 20 TFEU must be interpreted as meaning that for the purposes of assessing whether a child who is a citizen of the European Union would be compelled to leave the territory of the European Union as a whole and thereby deprived of the genuine enjoyment of the substance of the rights conferred on him by that article if the child's third-country national parent were refused a right of residence in the Member State concerned, the fact that the other parent, who is a Union citizen, is actually able and willing to assume sole responsibility for the primary day-to-day care of the child is a relevant factor, but it is not in itself a sufficient ground for a conclusion that there is not, between the third-country national parent and the child, such a relationship of dependency that the child would indeed be so compelled were there to be such a refusal of a right of residence. Such an assessment must take into account, in the best interests of the child concerned, all the specific circumstances, including the age of the child, the child's physical and emotional development, the extent of his emotional ties both to the Union citizen parent and to the third-country national parent, and the risks which separation from the latter might entail for the child's equilibrium."

The *Patel* decision

48. The effect of *Chavez-Vilchez* on the United Kingdom's 2006 EEA Regulations was considered by the Court of Appeal in *Patel.* The judgment of the Court was given by Lord Justice Irwin, with whom Lady Justice Thirlwall and Lord Justice Lindblom agreed. In a footnote, Irwin LJ noted that as the judgment was in a final state of preparation, the Court's attention had been drawn by Counsel to the decision of the

Supreme Court in *R (HC) v Secretary of State for Work and Pensions and others* [2017] UKSC 73, the approach in that case being consistent with the Court of Appeal's analysis in *Patel.*

49. The Court held that the decision in *Chavez-Vilchez* represented no departure from the *Zambrano* principle, but constituted a reminder that the *Zambrano* principle must be applied with careful enquiry, paying attention to the relevant criteria and considerations, and focusing not on whether the European Union citizen child or dependant could remain in the Union in legal theory, but whether they could do so in practice. English reported cases implementing *Zambrano,* which pre-dated *Chavez-Vilchez* remained good law.

50. The core of the Court's judgment is at [76]-[79]

> "76. Quite a number of years ago, Parliament chose to abrogate the historic approach that marriage to a British citizen would bring, in effect automatically, residence in Britain for the spouse. No such automatic consequence now follows, see s.6(2) of the British Nationality Act 1981 and s.2 of the Nationality, Immigration and Asylum Act 2002. Those who marry a British citizen and have children, without having (or acquiring) leave to remain, do so at the risk that they may be compelled to leave the country, facing the real quandary that arises for these families. The *Zambrano* principle cannot be regarded as a back-door route to residence by such non-EU citizen parents.
>
> 77. I would allow the Secretary of State's appeals in Shah and Bourouisa. In each case, it seems to me, the Tribunal started with the desirability of maintaining the family life, and jumped to the conclusion that there was the requisite compulsion on the child. In my view, that was an error. The correct approach would have been to ask, is the situation of the child or children such that, if the non-EU citizen parent leaves, the British citizen will be unable to care for the child or children, so that the latter will be compelled to leave. In so doing, the Tribunal must pay regard to all the relevant circumstances indicated by the CJEU in *Chavez-Vilchez*, and in particular in paragraphs 70 to 72 quoted above.
>
> 78. I would wish to emphasise that consideration of the respect for family life (whether considered under Article 8 ECHR or Article 7 of the Charter), although a relevant factor, cannot be a trump card enabling a court or tribunal to conclude that a child will be compelled to leave because Article 8 (or Article 7) are engaged and family life will be diminished by the departure of one parent. Family life will be diminished by the departure of one parent in the great majority of cases. The question remains whether, all things considered, the departure of the parent will mean the child will be compelled to follow.
>
> 79. In these two cases, the question of compulsion did not really even arise, in my view. If one parent left, each British parent would have been perfectly capable of looking after the child. There was no real evidence to the contrary. There would have been a loss of earnings, a diminution in material things and an important loss of two parents living together with their child, but as the evidence stood, it seems to me, there was no proper basis for a finding of compulsion. In Shah, a claim under Article 8 has already been rejected. In Bourouisa, it has not been made. That is a separate matter legally. I should not be understood to close off such a claim, in theory or in practice**."**

51. The Court gave no general guidance as to the meaning of 'primary carer': the thrust of the judgment is that whether a person is another person's 'primary carer' is a question of fact in each case, the more important question being whether a child will be forced to leave the United Kingdom, if leave to remain is not given to such carer.

Discussion

52. The appellant's application is for a family permit to enable her to accompany her EEA national children to the United Kingdom. There is no intention for the appellant and her husband to enter the United Kingdom together. The effect of the issue of a family permit would be to create the situation where this appellant would become the children's primary carer, and would be able carry out the couple's joint decision that she should bring up the children here, with her husband supporting them financially from Libya/Turkey.

53. Regulation 12(1A) requires a person applying abroad for an EEA family permit to show that when they first intend to use the EEA family permit to enter the United Kingdom, they:

> "12(1A) …(a) would be entitled to be admitted to the United Kingdom by virtue of regulation 11(5); and
> (b) will … be accompanying to, or joining in, the United Kingdom any person from whom his right to be admitted to the United Kingdom under regulation 11(5) will be derived. …"

This appellant would be accompanying her children, from whom any right she has under Regulation 11(5) would be derived.

54. Regulation 11(5)(e) sets out the circumstances in which a non-EEA national is entitled to derivative residence:

> **"Right of admission to the United Kingdom**
>
> 11 …(5) A person ("P") meets the criteria in this paragraph where—…
> (e) P is accompanying a British citizen to, or joining a British citizen in, the United Kingdom and P would be entitled to reside in the United Kingdom pursuant to regulation 15A(4A) were P and the British citizen both in the United Kingdom."
>
> **18A. Issue of a derivative residence card**
>
> (1) The Secretary of State must issue a person with a derivative residence card on application and on production of– …
> (b) proof that the applicant has a derivative right of residence under regulation 15A. …"

55. Regulation 15A sets out the circumstances in which a person is entitled to a derivative right of residence, applying the decision of the Court of Justice of the European Union in *Ruiz Zambrano (European citizenship)* [2011] EUECJ C-34/09 (08 March 2011):

"15A. Derivative right of residence

…(4A) P satisfies the criteria in this paragraph if–

(a) P is the primary carer of a British Citizen ("the relevant British citizen");

(b) the relevant British citizen is residing in the United Kingdom; and

(c) the relevant British citizen would be unable to reside in the UK or in another EEA State if P were required to leave. …

(6) For the purpose of this regulation– …

(c) "an exempt person" is a person–

(ii) who has a right of abode in the United Kingdom by virtue of section 2 of the 1971 Act; …

(7) P is to be regarded as a "primary carer" of another person if

(a) P is a direct relative or a legal guardian of that person; and

(b) P–

(i) is the person who has primary responsibility for that person's care; or

(ii) shares equally the responsibility for that person's care with one other person who is not an exempt person. …

56. It is not disputed that the children, who are all minors, are too young to live here without a parent or carer. The appellant is her children's direct relative. As a British citizen, the appellant's husband is an exempt person. The appellant's husband being an exempt person, if the situation is assessed at the date of application, the evidence is that she shares care equally with him, and thus falls outside the definition of 'primary carer' in Regulation 15A(7)(ii).

57. The question, therefore, is whether Regulation 11(5)(e) enables the appellant to make an application on the basis that if she were to reach the United Kingdom, she would then be the children's primary carer. In the event, as both Counsel accepted in their written submissions, the decision of the Court of Appeal in *Patel* does not assist with this question.

58. It is settled law that section 55 does not apply to children who do not live in the United Kingdom. I am not required to consider whether the respondent erred in assessing the situation as one where the proposed separation would be likely to be contrary to the children's interest thereunder.

59. I have considered whether *MA and SM* avails the appellant, that being the strongest indication of the possible existence of a right to derivative residence exercisable before the European Union citizen reaches the United Kingdom. The guidance there given is that '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'.

60. The difficulty here is that the appellant is not her children's primary carer, and will become so only if this appeal succeeds and she enters the United Kingdom with them. Nor is *MA and SM* capable of assisting on the interpretation of Regulation 11(5)(e) and

15(4A), both of which were introduced into the Regulations after *MA and SM* had been decided.

61. The reality in this appeal is that the children are outside the United Kingdom because their father, who is a British citizen and a joint carer with their mother, is not prepared to return here with them. On that basis, I am not persuaded that the linguistic infelicity of the Regulations is sufficient to enable the appellant to rely on her putative future status as their primary carer, when that is not her status now and she still lives in the same household as their father.

62. It follows that this appeal cannot succeed and I remake it by dismissing the appeal on all grounds.

DECISION

(a) For the foregoing reasons, my decision is as follows:
The making of the previous decision involved the making of an error on a point of law. I set aside the previous decision. My decision is that the appeal is dismissed.

Date: 5 March 2018 Signed: *Judith A J C Gleeson*
Upper Tribunal Judge Gleeson