Michaelmas Term

[2019] UKSC 59

On appeal from: [2017] EWCA Civ 2028

JUDGMENT

Patel (Appellant) v Secretary of State for the Home Department (Respondent)
Secretary of State for the Home Department (Respondent) v Shah (Appellant)

before

Lady Hale, President

Lord Carnwath

Lord Briggs

Lady Arden

Lord Sales

JUDGMENT GIVEN ON

16 December 2019

Heard on 7 May 2019

Appellant (Nilay Patel)	Respondent
Thomas Roe QC	David Blundell
Rowan Pennington-Benton	Julia Smyth
Ahmad Badar	
(Instructed by Connaught Law Limited)	(Instructed by The Government Legal Department)

Appellant(Adil Shah)

Zane Malik

Darryl Balroop

(Instructed by Lincolns Solicitors)

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LADY ARDEN: (with whom Lady Hale, Lord Carnwath, Lord Briggs and Lord Sales agree)

1.
These two appeals were heard together by the Court of Appeal and raise common issues as to the scope of the principle in Ruiz Zambrano v Office national de l'emploi (Case C-34/09) [2012] QB 265 (" Zambrano "). In Zambrano , the Court of Justice of the European Union ("the CJEU") held that a third-country (ie non-member state) national parent ("TCN" parent), of a Union citizen child resident in Union territory, was entitled to a right of residence to avoid the child being deprived of the genuine enjoyment of the substance of their Union citizenship rights on removal of the TCN parent. The principle extends to dependents who are not children, and has been applied even where the Union citizen has not exercised their right of free movement. The right of residence is a "derivative right", that is, one derived from the dependent Union citizen. A key to this derivative right is the deprivation of the benefits of the Union citizenship as a result of the Union citizen being compelled, by the TCN's departure, to leave Union territory. This case is about the nature or intensity of that compulsion.

2.
The derivative residence right was implemented in UK law by regulation 15A(4A) of the Immigration (European Economic Area) Regulations 2006. At the material time, this provided a TCN, "P", with a derivative right to reside where:

"(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."

3.
So the relevant wording of the domestic legislation is "unable to reside". These words must be interpreted so far as possible compatibly with EU law. This depends upon the jurisprudence of the CJEU.

4.
In the first appeal, the appellant, Mr Nilay Patel, for whom Mr Thomas Roe QC appears, is a TCN with no right to remain in the UK. He has Indian nationality. He cares for his parents, both of whom are British citizens and both of whom are ill. His father suffers from end-stage kidney disease and needs dialysis for some eight hours per day. Mr Patel, though not medically qualified, is able through training and experience to administer this. His mother is also ill and immobile. Mr Patel's case is that

that his parents are dependent on him. The First-tier Tribunal ("FTT") accepted that they were dependent on him. However, it could not be said with confidence that the medication required for the dialysis which Mr Patel performed for his father was available in India. The FTT found that in those circumstances his father would not in fact return with his son but would remain in the UK and be provided with a social services care package and appropriate medical treatment, although this might not give him the same quality of life as he would have if Mr Patel continued to provide him with dialysis and other primary care in his own home. Mr Patel's subsequent appeals to the Upper Tribunal ("UT") and the Court of Appeal were similarly unsuccessful. Mr Patel had sought to establish a right to remain under article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") but his claim was dismissed.

5.
On this appeal, Mr Roe submits that, in determining whether the parents would be compelled to leave, the tribunals and Court of Appeal approached the issue of compulsion with excessive rigidity and should have taken into account that Mr Patel's father could not be treated in the UK with the same level of care if Mr Patel were no longer here.

6.
In the second appeal, Mr Shah, a Pakistani national, is the primary carer of his infant son, who is a British citizen. His wife also has British nationality. Mr and Mrs Shah and their son all live together. Mrs Shah is in full-time work outside the home to earn an income for the family. While she is at work, the son remains with Mr Shah, who has no right to live or work in the UK. If Mr Shah were to return to Pakistan, Mrs Shah, on the findings of the FTT, would not remain in the UK but would accompany her husband to Pakistan, and the child would have no option but to go too. In those circumstances the FTT and UT in Mr Shah's case found that the child would be compelled to leave Union territory and that Mr Shah was, therefore, entitled to a derivative residence card. The Court of Appeal came to a different conclusion. They considered that Mrs Shah would be able to look after their son in the UK and so the requirement for compulsion to leave the UK was not satisfied.

Zambrano jurisprudence

7.
The CJEU has effectively adopted an incremental approach to the development of the derived right of residence in a member state that may be enjoyed by a TCN, taking one step at a time in a number of cases which it has decided. It has consolidated much of that jurisprudence in the recent case of KA v Belgium (Case C-82/16) [2018] 3 CMLR 28, which was decided after the Court of Appeal gave its judgment. This court can therefore go to that case, although the facts are not relevant as they concern the compatibility with EU law of entry bans on TCN carers of Union citizen children. The case considered the application of article 20 of the Treaty on the Functioning of the European Union (the "TFEU"), and articles 7 and 24 of the Charter of Fundamental Rights of the European Union ("the Charter"), and so it is convenient to set those provisions out first.

8.
Article 20 TFEU provides:

" **Article 20 (ex article 17 TEC)**

1. Citizenship of the Union is hereby established. Every person holding the nationality of a member state shall be a citizen of the Union. Citizenship of the Union shall be additional to and not replace national citizenship.

2. Citizens of the Union shall enjoy the rights and be subject to the duties provided for in the Treaties. They shall have, inter alia:

a) the right to move and reside freely within the territory of the member states; …”

9.
The right to EU citizenship is, therefore, a Treaty right. It lies at the heart of the European legal architecture. In UK law, prominence is not generally given to the distinction between citizenship of, and nationality within, the UK. The concept of EU citizenship is perhaps more easily understood in the context of countries where the borders have altered or been created in recent times, and the population includes peoples of different nationalities, such as Romania. The purport of the TFEU is that a person may have both EU citizenship and member state nationality. EU citizenship is a Treaty right and it is to be anticipated that it may be treated as a dynamic concept.

10.
This court has held that article 20 does not confer any rights on a TCN: R (Agyarko) v Secretary of State for the Home Department [2017] 1 WLR 823, para 62.

11.
Articles 7 and 24 of the Charter provide:

“ Article 7

Respect for private and family life

Everyone has the right to respect for his or her private and family life, home and communications.

Article 24

The rights of the child

1. Children shall have the right to such protection and care as is necessary for their well-being. They may express their views freely. Such views shall be taken into consideration on matters which concern them in accordance with their age and maturity.

2. In all actions relating to children, whether taken by public authorities or private institutions, the child’s best interests must be a primary consideration.”

12.
Article 7 reflects article 8 of the Convention. Article 24 does not, however, have an equivalent standalone right in the Convention although the best interests of the child may require to be considered in appropriate cases under specific articles, such as article 8. Needless to say, adults cannot rely on article 24. There is a further right in article 25 of the Charter. This sets out the rights of the elderly and provides that:

“The Union recognises and respects the rights of the elderly to lead a life of dignity and independence and to participate in social and cultural life.”

13.
Passing to the CJEU’s analysis in KA [2018] 3 CMLR 28, it is also convenient to set out its own summary of the relevant holdings in para 76 of its judgment, which was as follows:

“It follows from paras 64 to 75 of this judgment that article 20 TFEU must be interpreted as meaning that:

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where the Union citizen is an adult, a relationship of dependency, capable of justifying the grant to the third-country national concerned of a derived right of residence under article 20 TFEU, is conceivable only in exceptional cases, where, in the light of all the relevant circumstances, any form of separation of the individual concerned from the member of his family on whom he is dependent is not possible;

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where the Union citizen is a minor, the assessment of the existence of such a relationship of dependency must be based on consideration, in the best interests of the child, of all the specific circumstances, including the age of the child, the child’s physical and emotional development, the extent of his emotional ties to each of his parents, and the risks which separation from the third-country national parent might entail for that child’s equilibrium. The existence of a family link with that third-country national, whether natural or legal, is not sufficient, and cohabitation with that third-country national is not necessary, in order to establish such a relationship of dependency.”

14.
Importantly, the CJEU drew a distinction between the case of a Union citizen who is an adult and one who is a child.

15.
The CJEU’s process of reasoning leading up to the conclusions in para 76 began with article 20 TFEU. The CJEU emphasised the importance of the right to Union citizenship, being a Treaty right. The CJEU explained that a TCN might acquire a purely derived right of residence if their removal might deprive a Union citizen of the benefits of their Union citizenship [2018] 3 CMLR 28:

“47. It must be recalled, first, that, in accordance with the court’s settled case law, article 20 TFEU confers on every individual who is a national of a member state citizenship of the Union, which is intended to be the fundamental status of nationals of the member states (see, inter alia, Grzelczyk v Centre public d’aide sociale Ottignies-Louvain-la-Neuve (Case C-184/99) [2002] ICR 566, para 31; Ruiz Zambrano , para 41 and Rendón Marín v Administración del Estado (Case C-165/14) [2017] QB 495, para 69 and the case law cited).

48. Citizenship of the Union confers on each Union citizen a primary and individual right to move and reside freely within the territory of the member states, subject to the limitations and restrictions laid down by the Treaty and the measures adopted for their implementation (Rendón Marín , para 70 and the case law cited).

49. In that context, the court has held that article 20 TFEU precludes national measures, including decisions refusing a right of residence to the family members of a Union citizen, which have the effect of depriving Union citizens of the genuine enjoyment of the substance of the rights conferred by virtue of their status (Ruiz Zambrano , para 42; O v Maahanmuuttovirasto (Joined Cases C-356/11 and C-357/11) [2013] Fam 203, para 45 and Chavez-Vilchez v Raad van bestuur van de Sociale verzekeringsbank (Case C-133/15) [2018] QB 103, para 61).

50. On the other hand, the Treaty provisions on citizenship of the Union do not confer any autonomous right on third-country nationals. Any rights conferred on third-country nationals are not autonomous rights of those nationals but rights derived from those enjoyed by a Union citizen. The

purpose and justification of those derived rights are based on the fact that a refusal to allow them would be such as to interfere, in particular, with a Union citizen's freedom of movement (Chavez-Vilchez , para 62 and the case law cited)."

16.
The CJEU explained that in very specific situations a TCN may have a right of residence if the Union citizen would otherwise be obliged to leave Union territory. Those limits are very important in considering these appeals because Charter rights are not engaged unless an EU law right is triggered. As stated, the TCN's derived right of residence is only given in order that the Union citizen's rights should be effective. That would be the limit of the entitlement under EU law of the TCN to reside in the Union. Moreover, there must be a "relationship of dependency" between the Union citizen and the TCN:

"51. In this connection, the court has previously held that there are very specific situations in which, despite the fact that secondary law on the right of residence of third-country nationals does not apply and the Union citizen concerned has not made use of his freedom of movement, a right of residence must nevertheless be granted to a third-country national who is a family member of that Union citizen, since the effectiveness of Union citizenship would otherwise be undermined, if, as a consequence of refusal of such a right, that citizen would be obliged in practice to leave the territory of the European Union as a whole, thus depriving him of the genuine enjoyment of the substance of the rights conferred by that status (see, to that effect, Ruiz Zambrano , paras 43 and 44 and Chavez-Vilchez , para 63).

52. However, a refusal to grant a right of residence to a third-country national is liable to undermine the effectiveness of Union citizenship only if there exists, between that third-country national and the Union citizen who is a family member, a relationship of dependency of such a nature that it would lead to the Union citizen being compelled to accompany the third-country national concerned and to leave the territory of the European Union as a whole (see, to that effect, Dereci v Bundesministerium für Inneres (Case C-256/11) [2012] All ER (EC) 373, paras 65 to 67; O , para 56 and Chavez-Vilchez , para 69)."

17.
The distinction noted between dependence in the case of an adult Union citizen and that of a Union citizen child is then explored. A TCN could have a relationship of dependency with an adult Union citizen capable of justifying a derived right of residence under article 20 TFEU only in "exceptional circumstances" [2018] 3 CMLR 28:

"65. As regards, first, the cases in the main proceedings where the respective applicants are KA, MZ and BA, it must, at the outset, be emphasised that, unlike minors and a fortiori minors who are young children, such as the Union citizens concerned in the case that gave rise to the judgment Ruiz Zambrano , an adult is, as a general rule, capable of living an independent existence apart from the members of his family. It follows that the identification of a relationship between two adult members of the same family as a relationship of dependency, capable of giving rise to a derived right of residence under article 20 TFEU, is conceivable only in exceptional cases , where, having regard to all the relevant circumstances, there could be no form of separation of the individual concerned from the member of his family on whom he is dependent." (Emphasis added)

18.
Mr David Blundell, who appeared for the Secretary of State, emphasises that in order for a TCN to have a derived right pursuant to article 20 TFEU the case must fall within one of the categories of

very specific situations discussed in KA and the circumstances must be such that if the TCN is removed the Union citizen would in fact depart with them. These points are illustrated by a case to which the CJEU had already referred, namely Dereci v Bundesministerium für Inneres (Case C-256/11) [2012] All ER (EC) 373. In that case, Mr Dereci, a Turkish national, applied for a residence permit to live in Austria so that he could live there with his Austrian wife and had three children. He applied for a residence permit, but this was refused. The CJEU held that the refusal would not breach EU law so long as it did not deprive his family of the genuine enjoyment of the substance of their rights, which was a question for the referring court to determine. The Union citizen children lived with their mother and so were not emotionally dependent on Mr Dereci, although he gave them financial support. It was not enough that it was desirable for him to live with his wife and family for economic reasons or reasons of family unification [2012] All ER (EC) 373:

“66. [It follows that] the criterion relating to the denial of the genuine enjoyment of the substance of the rights conferred by virtue of European Union citizen status refers to situations in which the Union citizen has, in fact, to leave not only the territory of the member state of which he is a national but also the territory of the Union as a whole.

67. That criterion is specific in character inasmuch as it relates to situations in which, although subordinate legislation on the right of residence of third-country nationals is not applicable, a right of residence may not, exceptionally, be refused to a third-country national, who is a family member of a member state national, as the effectiveness of Union citizenship enjoyed by that national would otherwise be undermined.

68. Consequently, the mere fact that it might appear desirable to a national of a member state, for economic reasons or in order to keep his family together in the territory of the Union, for the members of his family who do not have the nationality of a member state to be able to reside with him in the territory of the Union, is not sufficient in itself to support the view that the Union citizen will be forced to leave Union territory if such a right is not granted.”

19.
The CJEU held that any interference with Mr Dereci’s right to a family life would have to be raised under the Convention, not the Charter. The CJEU held that the Charter right to respect for private and family life did not extend further than the Convention in any event. Nor did the Charter extend the application of EU law beyond the powers of the Union because of article 51(1), which so provides. The CJEU did not discuss the jurisprudence of the European Court of Human Rights on this point, but this court has already held, on the basis of that jurisprudence, that article 8 does not give non-settled TCNs a general right to avoid the application of immigration control (see R (Agyarko) v Secretary of State for the Home Department [2017] 1 WLR 823). Thus, the CJEU went on to hold [2012] All ER (EC) 373:

“70. As a preliminary point, it must be observed that in so far as article 7 of the Charter of Fundamental Rights of the European Union (‘the Charter’), concerning respect for private and family life, contains rights which correspond to rights guaranteed by article 8(1) of the [Convention], the meaning and scope of article 7 of the Charter are to be the same as those laid down by article 8(1) of the [Convention], as interpreted by the case law of the European Court of Human Rights (McB v E (Case C-400/10PPU) [2011] Fam 364, para 53).

71. However, it must be borne in mind that the provisions of the Charter are, according to article 51(1) thereof, addressed to the member states only when they are implementing European Union law. Under article 51(2), the Charter does not extend the field of application of European Union law

beyond the powers of the Union, and it does not establish any new power or task for the Union, or modify powers and tasks as defined in the Treaties. Accordingly, the court is called upon to interpret, in the light of the Charter, the law of the European Union within the limits of the powers conferred on it (McB , para 51, see also criminal proceedings against Gueye (X intervening) (Joined Cases C-483/09 and C-1/10) [2012] 1 WLR 2672, para 69).

72. Thus, in the present case, if the referring court considers, in the light of the circumstances of the disputes in the main proceedings, that the situation of the applicants in the main proceedings is covered by European Union law, it must examine whether the refusal of their right of residence undermines the right to respect for private and family life provided for in article 7 of the Charter. On the other hand, if it takes the view that that situation is not covered by European Union law, it must undertake that examination in the light of article 8(1) of the [Convention]."

20.
Mr Blundell placed considerable reliance on Dereci in relation to the Patel appeal. He submits that in the light of the evidence the required level of compulsion to leave under Zambrano was not reached because it can only be said that it is desirable that Mr Patel should reside in the UK to be with his parents. His father could be given treatment in the UK in the absence of his son, albeit not in the comfort of his own home and among his family. The rights of Mr Patel's parents under the Charter could not extend the right conferred by EU law: see article 51(2) of the Charter, summarised in para 16 above, and see also R (HC) v Secretary of State for Work and Pensions (The AIRE Centre intervening) [2017] 3 WLR 1486 (especially at paras 27 to 28). Therefore, the appellant was not entitled to a derivative residence card.

21.
Mr Roe's response to that was to rely on the parents' right to family life and their rights under article 25 of the Charter. He contends that they should have been given greater weight. He relies on the decision in Chavez-Vilchez v Raad van bestuur van de Sociale verbekeringsbank (Case C-133/15) [2018] QB 103 (" Chavez-Vilchez "), which was decided shortly before the Court of Appeal decided these appeals. That decision relates to a Union child and, as explained, different considerations apply to a child. The CJEU relied on Dereci in both Chavez-Vilchez (paras 63 and 69 of the judgment) and KA (see para 16 of this judgment) as one of the authorities for the requirement of compulsion, so it is clear that Dereci remains unqualified by its decisions in Chavez-Vilchez and KA . Moreover, the Charter cannot extend the application of EU law, which imposes limits on entitlement to derivative residence rights, as explained above.

22.
What lies at the heart of the Zambrano jurisprudence is the requirement that the Union citizen would be compelled to leave Union territory if the TCN, with whom the Union citizen has a relationship of dependency, is removed. As the CJEU held in O v Maahanmuuttovirasto (Joined Cases C-356/11 and C-357/11) [2013] Fam 203 , it is the role of the national court to determine whether the removal of the TCN carer would actually cause the Union citizen to leave the Union. In this case, the FTT found against Mr Patel and concluded that his father would not accompany him to India. That means that, unless Chavez-Vilchez adopts a different approach to compulsion, Mr Patel's appeal must fail. There is no question of his being able to establish any interference with his Convention right to respect for his private and family life as he has failed already in that regard.

23.

As explained, in KA , the CJEU drew a distinction between an adult Union citizen and a Union citizen who is a child. In the case of children, it is first necessary to determine who the primary carer is, and whether there is a relationship of dependency with the TCN or the national parent.

“70. As regards, on the other hand, the actions in the main proceedings brought by MJ, NNN, OIO and RI, it must be recalled that the court has already held that factors of relevance, for the purposes of determining whether a refusal to grant a derived right of residence to a third-country national parent of a child who is a Union citizen means that that child is deprived of the genuine enjoyment of the substance of the rights conferred on him by that status, by compelling that child, in practice, to accompany the parent and therefore leave the territory of the European Union as a whole, include the question of who has custody of the child and whether that child is legally, financially or emotionally dependent on the third-country national parent (see, to that effect, Chavez-Vilchez , para 68 and the case law cited).

71. More particularly, in order to assess the risk that a particular child, who is a Union citizen, might be compelled to leave the territory of the European Union and thereby be deprived of the genuine enjoyment of the substance of the rights conferred on him by article 20 TFEU if the child’s third-country national parent were to be refused a right of residence in the member state concerned, it is important to determine, in each case at issue in the main proceedings, which parent is the primary carer of the child and whether there is in fact a relationship of dependency between the child and the third-country national parent. As part of that assessment, the competent authorities must take account of the right to respect for family life, as stated in article 7 of the Charter, that article requiring to be read in conjunction with the obligation to take into consideration the best interests of the child, recognised in article 24(2) of the Charter (Chavez-Vilchez , para 70).

72. The fact that the other parent, where that parent 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 be compelled to leave the territory of the European Union if a right of residence were refused to that third-country national. In reaching such a conclusion, account must be taken, in the best interests of the child concerned, of 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 that child’s equilibrium (Chavez-Vilchez , para 71).

73. Accordingly, the fact that the third-country national parent lives with the minor child who is a Union citizen is one of the relevant factors to be taken into consideration in order to determine whether there is a relationship of dependency between them, but is not a prerequisite (see, to that effect, O , para 54).

74. On the other hand, the mere fact that it might appear desirable to a national of a member state, for economic reasons or in order to keep his family together in the territory of the Union, for the members of his family who do not have the nationality of a member state to be able to reside with him in the territory of the European Union, is not sufficient in itself to support the view that the Union citizen will be compelled to leave the territory of the European Union if such a right is not granted (see, to that effect, Dereci , para 68 and O , para 52).”

24.

It is not necessary to cite further passages from KA . It will be observed that in KA the CJEU drew on its earlier decision in Chavez-Vilchez . That case concerned several TCN mothers, whose children were Dutch and who claimed a derivative right to reside in The Netherlands. The Dutch Government rejected these claims on the basis that the fathers of the children were also Dutch. Some of the fathers had a degree of involvement in their child's upbringing but they lived apart from the child's mother and were not the primary carer. The CJEU held that it was not a sufficient answer to the mother's claim for residence that the father could in theory become the child's carer. The Dutch court had to assess whether the child would be compelled to leave the Union, and in making that decision the national court had to take into account all the circumstances, including the best interests of the child. The CJEU held [2018] QB 103:

"70. In this case, in order to assess the risk that a particular child, who is a Union citizen, might be compelled to leave the territory of the European Union and thereby be deprived of the genuine enjoyment of the substance of the rights conferred on him by article 20 TFEU if the child's third-country national parent were to be refused a right of residence in the member state concerned, it is important to determine, in each case, which parent is the primary carer of the child and whether there is in fact a relationship of dependency between the child and the third-country national parent. As part of that assessment, the competent authorities must take account of the right to respect for family life, as stated in article 7 of the Charter of Fundamental Rights of the European Union, that article requiring to be read in conjunction with the obligation to take into consideration the best interests of the child, recognised in article 24(2) of that Charter.

71. For the purposes of such an assessment, the fact that the other parent, 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 be compelled to leave the territory of the European Union if a right of residence were refused to that third-country national. In reaching such a conclusion, account must be taken, in the best interests of the child concerned, of 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 that child's equilibrium."

25.
The final sentence of para 71 of the CJEU's judgment in Chavez-Vilchez identifies the matters which the national court must take into account when deciding whether the requirement for compulsion is fulfilled. Chavez-Vilchez has to be read in the light of the particular facts before the CJEU, which were of separated parents where the Union citizen parent was not the primary carer and where the national court might well conclude that, having regard to the child's best interests and the extent of their ties to their mother, the relevant relationship of dependency on the mother was made out. There is no direct analogy with a case, such as the Shah appeal, where the family is living together. In that situation, where the TCN is the primary carer and the parent with whom the child has the relevant relationship of dependency and the Union parent will stay with them so as to keep the family together, it will be in the child's best interests to remain with both parents. Because Mr Shah was the primary carer, the need for a relationship of dependency with the TCN was fulfilled. Moreover, the quality of that relationship is under the jurisprudence of the CJEU a relevant factor in determining whether the child is compelled to leave the jurisdiction (see Chavez-Vilchez , para 71; KA, para 70).

26.

It is argued that the reference to the need to consider the child's best interests points to a shift in the law, and that the CJEU refined or diminished the requirement that there has to be compulsion to leave the Union. It is said that that diminution would enable consideration to be given to desirability of the family remaining together and to respect for family life, even in the case of adults. In that way, in judging when a person was compelled to leave the Union, regard would be had to a person's family life and what he would have to do to maintain that family life.

27.

I do not consider that this deduction can be made. In Chavez-Vilchez , the CJEU were concerned with the case of a child and it is clear from KA that the case of a child is quite separate from that of an adult and that in the case of an adult it will only be in "exceptional circumstances" that a TCN will have a derivative right of residence by reference to a relationship of dependency with an adult Union citizen. An adult Union citizen does not have a right to have his family life taken into account if this would diminish the requirement to show compulsion to leave. It must be recalled that in KA the CJEU effectively reaffirmed the need to show compulsion even after making it clear that the decision in Chavez-Vilchez was good law. Accordingly, Chavez-Vilchez does not relax the level of compulsion required in the case of adults, and thus provides no assistance to Mr Patel, whose appeal must therefore fail.

28.

Nor does Chavez-Vilchez in fact have any impact on the Shah appeal. The outcome of that appeal depends on the findings of fact by the FTT and on whether the Court of Appeal correctly identified the relevant findings for the purposes of the test of compulsion. The FTT found as a fact that Mr Shah was the primary carer of his infant son and that he, rather than the mother, had by far the greater role in his son's life (para 15). Accordingly, the child had the relevant relationship of dependency with Mr Shah. The FTT was entitled to make this finding on the facts, because the mother's evidence that Mr Shah was the primary carer of her child and that she could not assume full responsibility for him because she worked full time was not challenged. The mother's evidence that if Mr Shah was not allowed to stay in this country they would move as a family was also unchallenged. The FTT went on to reach what it called "an inescapable conclusion" that the son would have to leave with his parents and that accordingly the requirement for compulsion was met.

29.

The Court of Appeal [2018] 1 WLR 5245, however, introduced into the question of whether the son was compelled to leave the fact that the mother's decision to leave was her own choice, and that she, like her husband, would have been "perfectly capable of looking after the child" (para 79). The Court of Appeal considered that it followed that there was no question of compulsion. Mr Blundell sought to uphold this conclusion, submitting that the mother simply wished to keep the family together and that reliance on a desire for family reunification was on the authorities not sufficient to justify a derivative right of residence (see Dereci , para 68; O , para 52; and KA , para 74).

30.

I do not accept that submission. The overarching question is whether the son would be compelled to leave by reason of his relationship of dependency with his father. In answering that question, the court is required to take account, "in the best interests of the child concerned, of 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 that child's equilibrium" (Chavez-Vilchez , para 71). The test of compulsion is thus a practical test to be applied to the actual facts and

not to a theoretical set of facts. As explained in para 28 of this judgment, on the FTT’s findings, the son would be compelled to leave with his father, who was his primary carer. That was sufficient compulsion for the purposes of the Zambrano test. There is an obvious difference between this situation of compulsion on the child and impermissible reliance on the right to respect for family life or on the desirability of keeping the family together as a ground for obtaining a derivative residence card. It follows that the Court of Appeal was wrong in this case to bring the question of the mother’s choice into the assessment of compulsion.

31.

It is likewise not relevant, contrary to the submission of Mr Blundell, that, had Mrs Shah remained in the UK with the child, Mr Shah could have had no derivative right of residence. On the facts as found by the FTT, the relevant relationship of dependency with Mr Shah was made out and that was not going to happen.

32.

In those circumstances I consider that the Court of Appeal made an error of law when it treated as determinative what could happen to Mr and Mrs Shah’s son if the father left the UK, rather than what the FTT had found would happen in that event. In other words, it was not open in law to the Court of Appeal to hold that Mr Shah had no derivative right of residence because the mother could remain with the child in the UK even if the father was removed.

33.

For these reasons I would allow the Shah appeal and dismiss the Patel appeal.