Neutral Citation Number: [2017] EWCA Civ 2028

Case Nos: C9/2016/1660, C9/2015/3917, C9/2015/3673

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM
THE UPPER TRIBUNAL (IMMIGRATION AND ASYLUM CHAMBER),
JUDGE HANSON AND DEPUTY JUDGES DRABU AND HARRIS

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 13/12/2017

Before :

LORD JUSTICE LINDBLOM
LORD JUSTICE IRWIN
and
LADY JUSTICE THIRLWALL

- -

Between :

NILAY PATEL	**Appellant**
- and –	
THE SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Respondent**

And Between :	
THE SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Appellant**
- and -	
(1) ADIL SHAH	**Respondents**
(2) NABIL BOUROUISA	

- -
- -

Thomas Roe QC and Rowan Pennington-Benton (instructed by **Farani Taylor Solicitors**) for the **Appellant Nilay Patel**
David Blundell (instructed by **The Government Legal Department**) for the **Respondent to Patel**
Julia Smyth (instructed by **The Government Legal Department**) for the **Appellant in the matters of Adil Shah and Nabil Bourouisa**
Zane Malik (instructed by **Lincolns Solicitors**) for the **Respondent Shah**
Nabil Bourouisa appeared as a **Litigant in Person**
Hearing dates: 12 and 13 July 2017

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Approved Judgment

Lord Justice Irwin :

Introduction: The Questions

1. In these conjoined appeals, the Court is asked to address the question of derivative claims for residence in the United Kingdom by those without rights of residence, based upon their care for British citizens who are their "direct relatives" whether children or adults in need of care. In particular, we are asked to consider whether the approach is altered by the decision of the CJEU in *Chavez-Vilchez and Others v Raad van Bestuur van de Sociale Verbekeringsbank and Others* (10 May 2017) (Case C-133/15) (Grand Chamber), [2017] 3 WLR 1326, [2017] 3 CMLR 35.

The EU Provisions

2. Article 20 of the Treaty on the Functioning of the European Union ["TFEU"] provides (Article 20.1) that every person holding the nationality of a Member State shall be a citizen of the Union and have the right to move and reside freely within the territory of the Member States (Article 20.2(a)).

3. Directive 2004/38/EC ["the 2004 Directive"] established various provisions bearing on the freedom of the EU citizen and their family members to "move and reside" within the EU. In Articles 2 and 3, the following definitions are given:

> "*Article 2*
>
> **Definitions**
>
> For the purposes of this Directive:
>
> 1) "Union citizen" means any person having the nationality of a Member State;
>
> 2) "Family member" means:
>
> (a) the spouse;
>
> …
>
> (c) the direct descendants who are under the age of 21 or are dependants and those of the spouse or partner as defined in point (b);
>
> (d) the dependent direct relatives in the ascending line and those of the spouse or partner as defined in point (b);
>
> 3) "Host Member State" means the Member State to which a Union citizen moves in order to exercise his/her right of free movement and residence.
>
> *Article 3*
>
> **Beneficiaries**

> 1. This Directive shall apply to all Union citizens who move to or reside in a Member State other than that of which they are a national, and to their family members as defined in point 2 of Article 2 who accompany or join them.
>
> 2. Without prejudice to any right to free movement and residence the persons concerned may have in their own right, the host Member State shall, in accordance with its national legislation, facilitate entry and residence for the following persons:
>
> > (a) any other family members, irrespective of their nationality, not falling under the definition in point 2 or Article 2 who, in the country from which they have come, are dependants or members of the household of the Union citizen having the primary right of residence, or where serious health grounds strictly require the personal care of the family member by the Union citizen.
> >
> > …
>
> The host Member State shall undertake an extensive examination of the personal circumstances and shall justify any denial of entry or residence to these people."

4. In the Charter of the Fundamental Rights of the European Union the Member States have recognised the following rights:

> "*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.
>
> 3. Every child shall have the right to maintain on a regular basis a personal relationship and direct contact with both his or her parents, unless that is contrary to his or her interests.

> *Article 25*
>
> **The Right of the Elderly**
>
> 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."

The Decision in *Ruiz Zambrano v Office National de l'Emploi* (C-34/09) 8 March 2011 [2012] QB 265

5. Mr Zambrano was a Columbian national, as was his wife. They were failed asylum seekers living in Belgium. They had three children. The eldest child held Colombian nationality, but the younger children, born in Belgium in 2003 and 2005, acquired Belgian nationality by birth there. Mr Zambrano's efforts to acquire Belgian nationality failed, following the birth of the younger children. Following further litigation in Belgium, the Belgian Tribunal referred to the CJEU a series of questions which the Court addressed together, and which the Grand Chamber characterised as asking:

> "…essentially, whether the provisions of the TFEU … are to be interpreted as meaning that they confer on a relative in the ascending line who is a third country national, upon whom his minor children who are European Union citizens are dependant, a right of residence in the Member State of which they are nationals and in which they reside …" (Judgment, paragraph 36)

6. The Court found that the younger children were "undeniably" Belgian nationals (paragraph 40), that citizenship of the Union is intended to be the fundamental status of nationals of the Member States (paragraph 41) and as a consequence:

> "42. In those circumstances, Article 20 TFEU precludes national measures which have the effect of depriving citizens of the Union of the genuine enjoyment of the substance of the rights conferred by virtue of their status as citizens of the Union (see, to that effect, *Rottmann*, paragraph 42).
>
> 43. A refusal to grant a right of residence to a third country national with dependent minor children in the Member State where those children are nationals and reside, and also a refusal to grant such a person a work permit, has such an effect.
>
> 44. It must be assumed that such a refusal would lead to a situation where those children, citizens of the Union, would have to leave the territory of the Union in order to accompany their parents. Similarly, if a work permit were not granted to such a person, he would risk not having sufficient resources to provide for himself and his family, which would also result in the children, citizens of the Union, having to leave the territory of the Union. In those circumstances, those citizens of the

> Union would, in fact, be unable to exercise the substance of the rights conferred on them by virtue of their status as citizens of the Union.
>
> 45. Accordingly, the answer to the questions referred is that Article 20 TFEU is to be interpreted as meaning that it precludes a Member State from refusing a third country national upon whom his minor children, who are European Union citizens, are dependent, a right of residence in the Member State of residence and nationality of those children, and from refusing to grant a work permit to that third country national, in so far as such decisions deprive those children of the genuine enjoyment of the substance of the rights attaching to the status of European Union citizen."

7. The decision in *Zambrano* was shortly followed by the decision in *Dereci and Others v Bundesministerium fűr Inneres* (C-256/11) 15 November 2011 [2012] All ER (EC) 373, with the like effect. I return to *Dereci* below.

8. Mr Pennington-Benton for the Appellant Patel points out that, although *Zambrano* is treated as the *locus classicus* for the principles to be applied, the ECJ had in fact considered the problem in the earlier case of *Chen v SSHD* [2005] QB 325 (C-200/02). The Court there held, on the facts of that case, that a mother could derive a right of residence parasitic upon the child's rights as an EU citizen. The Court said:

> "45. On the other hand, a refusal to allow the parent, whether a national of a member state or a national of a non-member country, who is the carer of a child to whom article 18 EC and Directive 90/364 grant a right of residence, to reside with that child in the host member state, would deprive the child's right of residence of any useful effect. It is clear that enjoyment by a young child of a right of residence necessarily implies that the child is entitled to be accompanied by the person who is his or her primary carer and accordingly that the carer must be in a position to reside with the child in the host member state for the duration of such residence: see, mutatis mutandis, in relation to article 12 of Regulation No 1612/68, Baumbast v Secretary of State for the Home Department (Case C-413/99) [2003] ICR 1347 , 1390-1391, paras 71-75."

United Kingdom Regulations

9. In the Immigration (European Economic Area) Regulations 2006 ("the 2006 Regulations") the United Kingdom gave effect to the 2004 Directive. Following the decision in *Zambrano* (supra) the Regulations were amended so that the relevant provisions for our purposes read as follows:

> **"[15A. Derivative right of residence]**
>
> (1) A person ("P") who is not [an exempt person] and who satisfies the criteria in paragraph (2), (3), (4) [(4A)] or (5) of

this regulation is entitled to a derivative right to reside in the United Kingdom for as long as P satisfies the relevant criteria.

…

[(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.

(5) P satisfies the criteria in this paragraph if–

(a) P is under the age of 18;

(b) P's primary carer is entitled to a derivative right to reside in the United Kingdom by virtue of paragraph (2) or (4);

(c) P does not have leave to enter, or remain in, the United Kingdom; and

(d) requiring P to leave the United Kingdom would prevent P's primary carer from residing in the United Kingdom.

(6) For the purpose of this regulation–

(a) "education" excludes nursery education;…

(b) "worker" does not include a jobseeker or a person who falls to be regarded as a worker by virtue of [regulation 6(2); and]

[(c) "an exempt person" is a person–

(i) who has a right to reside in the United Kingdom as a result of any other provision of these Regulations;

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

(iii) to whom section 8 of the 1971 Act, or any order made under subsection (2) of that provision, applies; or

(iv) who has indefinite leave to enter or remain in the United Kingdom.]

(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.]
>
> [(7A) Where P is to be regarded as a primary carer of another person by virtue of paragraph (7)(b)(ii) the criteria in paragraphs (2)(b)(iii), (4)(b) and (4A)(c) shall be considered on the basis that both P and the person with whom care responsibility is shared would be required to leave the United Kingdom.
>
> (7B) Paragraph (7A) does not apply if the person with whom care responsibility is shared acquired a derivative right to reside in the United Kingdom as a result of this regulation prior to P assuming equal care responsibility.]
>
> (8) P will not be regarded as having responsibility for a person's care for the purpose of paragraph (7) on the sole basis of a financial contribution towards that person's care.
>
> (9) A person who otherwise satisfies the criteria in paragraph (2), (3), (4)2, (4A) or (5) will not be entitled to a derivative right to reside in the United Kingdom where the Secretary of State [or an immigration officer] has made a decision under [–
>
> (a) regulation 19(3)(b), 20(1)[,20A(1) or 23A]; or
>
> (b) regulation 21B(2) where that decision was taken in the preceding twelve months.]"

10. The 2006 Regulations, as amended, have been replaced (for the most part with effect from 1 February 2017) by the Immigration (European Economic Area) Regulations 2016. Regulation 16 of the latter is of similar effect to Regulation 15A of the 2006 Regulations.

European Authority after *Zambrano* and before *Chavez-Vilchez*

11. In a number of cases during this period, the CJEU addressed problems of a similar nature to those giving rise to these appeals. Repeatedly, the CJEU made the distinction between "choice" and "compulsion", as the Secretary of State characterises the matter. In *Dereci* (supra) the Court held

> "… 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 the Union, if such a right is not granted."

12. In *O and Another v Maahanmuuttovivasto* Cases C-356/11 and C-357/11, [2013] All ER (EC) 563, the Advocate General made the following observations subsequently approved by the Court:

> "41. Admittedly, it is possible that S and L might choose to follow their respective spouses to their countries of origin in order to preserve the unity of their family life. The fact that their children have Union citizenship cannot amount to putting them "under house arrest" in the territory of the European Union, when they have been invested with full parental authority by the judicial authorities of the Union itself.
>
> 42. In any event, if they chose to leave—which in my view seems unlikely, particularly in Case C-357/11, for reasons set out below—the young children who are Union citizens would indeed have no other choice but to leave the territory of the Union and, consequently, lose the enjoyment of the rights conferred on them as citizens of the Union. However, in my view, departure from the territory of the Union would be freely decided by their mother for a reason linked to the preservation of family life and would not be imposed under the implementation of national legislation.
>
> …
>
> 44. The reasons linked to the departure of the citizen of the Union from its territory are therefore particularly limited in the case law of the court. They concern situations in which the Union citizen has no other choice but to follow the person concerned, whose right of residence has been refused, because he is in that person's care and thus entirely dependent on that person to ensure his maintenance and provide for his own needs."

13. Putting the matter broadly, the European authority in the period before *Chavez-Vilchez* distinguished between cases where both parents, or the single parent with care of a child or children, were leaving the EU, and those where one parent in a family could remain. In *Zambrano*, the departure of both parents from Belgium would in practice compel the departure of their very young children, and thus deprive them perforce of their EU citizenship rights. In *Dereci*, the mother of the children had Austrian citizenship, and if she chose to remain in Austria, the children could remain. If they left Austria, it was an exercise of choice to keep the family together, not a deprivation of rights by compulsion. That distinction stood despite the consideration of family life enshrined in Article 7 of the Charter and the rights of the child enshrined in Article 24. These decisions are not capable of any other explanation.

English Authority after *Zambrano*

14. The English cases have followed a similar line, in construing European authority and the 2006 Regulations. In *Harrison v Secretary of State for the Home Department* [2012] EWCA Civ 1736 [2013] 2 CMLR 23, this Court was concerned with the application of the *Zambrano* principle in a deportation case. There was no claim by the Appellants in that case that the *Zambrano* principle necessarily applied to their cases: they sought a reference to the CJEU to establish that fact. Nevertheless, this Court had to consider the principle and its scope, as the foundation for the ruling on that application. Elias LJ gave the principal judgment, with which Ward and Pitchford LJJ agreed. He began by observing that *Zambrano* had "removed the requirement for even an exiguous cross-border link" before the principle applied (paragraph 12). He went on to consider *Dereci*, observing that Advocate General Mengozzi in that case had concluded that "the substance of the rights attaching to the status of European Union citizens" within the meaning of *Zambrano* "does not include the right to respect for family life enshrined in Article 7 of the Charter and Article 8 of the Convention" (paragraph 24). Elias LJ went on to stress the extent of the conclusion of the CJEU as follows:

> "29. It is to be noted that in answering the question the Court did not adopt the answer suggested by the Advocate General, reproduced in [25] above. It did not accept that some impediment of the right short of denial might fall within the scope of the principle. That is consistent with its observation in [68] that it is not enough that family life is jeopardised or that the family remaining behind will be adversely economically affected. The Court's answer also shows that it considered that it is for the national courts to determine whether, as a matter of fact, an EU citizen would be compelled to join an ascendant family member denied the right to remain in EU territory."

15. Elias LJ observed (paragraph 55) that in the cases before him, there was a measure of agreement. The application of the *Zambrano* test "requires a Court to focus on the question whether as a matter of reality the EU citizen would be obliged to give up residence in the EU if the non-EU national were to be removed from the EU". The question which divided the parties was:

> "…whether the *Zambrano* principle can apply where an EU citizen is not forced, as a matter of substance, to follow the non-EU national out of the European Union, but where their continuing residence in the European Union is affected in some sense because, for example, the quality of life is diminished. The appellants submit that it is at least arguable and not *acte clair* that the principle can apply in those circumstances. The Secretary of State submits that the case law is clear and consistent and is inconsistent with the appellant's submissions." (paragraph 55)

16. In his discussion, Elias LJ agreed with the Secretary of State that:

> "… there is really no basis for asserting that it is arguable in the light of the authorities that the *Zambrano* principle extends to cover anything short of a situation where the EU citizen is forced to leave the territory of the European Union. If the EU citizen, be it child or wife, would not in practice be compelled to leave the country if the non-EU family member were to be refused the right of residence, there is in my view nothing in these authorities to suggest that EU law is engaged. Article 8 Convention rights may then come into the picture to protect family life as the Court recognised in *Dereci [2012] 1 C.M.L.R. 45*, but that is an entirely distinct area of protection." (paragraph 63)

17. In the ensuing paragraphs of his judgment, Elias LJ noted that the approach of the CJEU fully took into account the considerable impact on the family life of those affected by decisions, whether financial, emotional or psychological (paragraph 60). The quality of life might be significantly diminished, whilst the substance of the right of residence was preserved (paragraphs 67-70). For those reasons, the Court rejected the EU grounds of appeal.[1]

18. A similar position was stated in this Court in *Sanneh v Secretary of State for Work and Pensions* [2016] QB 445. Elias LJ once more gave the principal judgment. The Court held that the *Zambrano* principle did not "guarantee any particular quality of life".

The decision in *Chavez-Vilchez and Others v Raad van Bestuur van de Sociale Verbekeringsbank and Others* (10 May 2017) (Case C-133/15) (Grand Chamber), [2017] 3 WLR 1326, [2017] 3 CMLR 35

19. This case concerned a request for a preliminary ruling from the CJEU from eight mothers of minor children with Netherlands nationality "for whose primary day to day care they are responsible", and the refusal of benefits by the Dutch authorities on the ground that the mothers did not have a right of residence in the Netherlands.

20. The Court considered the relevant provisions of the TFEU and Article 2 of the 2004 Directive. The circumstances of the various children and their families were considered. The circumstances varied, but in many instances the fathers of the children gave no, or very limited, care to the children, and the non-resident mothers were the only carers, or provided the great majority of the parenting.

21. The referring Court did not describe themselves as seeking to develop new principle, but rather as seeking guidance as to the application of *Zambrano*:

> "33. In the opinion of the referring court, it is apparent from the judgments of 8 March 2011, *Ruiz Zambrano* (C-34/09, EU:C:2011:124), and of 15 November 2011, *Dereci and Others* (C-256/11, EU:C:2011:734), that the applicants in the main

[1] As this judgment was in a final state of preparation, our attention was 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 is consistent with my analysis. The judgment of Elias LJ in *Harrison* was explicitly approved by Lord Carnwath, see paragraph 15.

> proceedings would acquire under Article 20 TFEU a right of residence in the Netherlands, derived from the right of residence of their children, who are Union citizens, provided that those children are in a situation such as that described in those judgments. It is necessary, in each of the disputes in the main proceedings, to determine whether the circumstances are such that those children would be obliged, in practice, to leave the territory of the European Union if the right of residence was refused to their mothers."

22. The CJEU noted that the circumstances of the relevant parents and children were varied:

> "43. First, as regards the relationships between the parents and the children, it is apparent from the order for reference that contact between the children and their fathers was, variously, frequent, seldom or even non-existent. Thus, in one case, the father could not be traced, and in another the father was in a supported accommodation scheme. In three cases, the father was contributing to maintenance costs for the child, while, in five other cases, no contribution was made. Whereas in two out of the eight cases the parents shared custody, in the six other cases the primary day-to-day care of the child was the responsibility of the mother alone. Last, in half of the cases, the child was living with the mother in an emergency refuge."

Some but not all of the children had exercised their freedom of movement between Member States.

23. The Court confirmed that the relevant question was whether the children would, in practice, be compelled to leave the EU if their mothers were obliged to leave the territory of the EU (paragraph 65). That is a question of fact in each case, and the Court touched on a number of factors relevant to that question:

> "68. In that regard, it must be recalled that, in the judgment of 6 December 2012, *O and Others* (C-356/11 and C-357/11, EU:C:2012:776, paragraphs 51 and 56), the Court held that factors of relevance, for the purposes of determining whether a refusal to grant a 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, 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.
>
> 69. As regards the second factor, the Court has stated that it is the relationship of dependency between the Union citizen who is a minor and the third country national who is refused a right of residence that is liable to jeopardise the effectiveness of Union citizenship, since it is that dependency that would lead to

the Union citizen being obliged, in practice, to leave not only the territory of the Member State of which he is a national but also that of the European Union as a whole, as a consequence of such a refusal (see, to that effect, judgments of 8 March 2011, *Ruiz Zambrano*, C-34/09, EU:C:2011:124, paragraphs 43 and 45; of 15 November 2011, *Dereci and Others*, C-256/11, EU:C:2011:734, paragraphs 65 to 67; and of 6 December 2012, *O and Others*, C-356/11 and C-357/11, EU:C:2012:776, paragraph 56).

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 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 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.

72. In the light of the foregoing, the answer to the first and second questions is that Article 20 TFEU must be interpreted as meaning that for the purposes of assessing whether a child who is a Union citizen 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."

24. The third question submitted to the CJEU centred on whether the third-country national parent in such circumstances had the obligation of establishing that the national parent was "not in a position to provide the primary day-to-day care of the child" (paragraph 73). The Court's answer was to the effect that the third-country national had the burden of showing that a decision to refuse residence to them would deprive the child of the genuine enjoyment of the substance of their rights as citizens: thus the evidential burden lies on the third-country national parent (paragraphs 73-75), whilst the Member State must ensure a system to protect those rights (paragraph 76). The practical or evidential question was re-stated as follows:

> "77. Accordingly, the application of such national legislation on the burden of proof does not relieve the authorities of the Member State concerned of the obligation to undertake, on the basis of the evidence provided by the third-country national, the necessary inquiries to determine where the parent who is a national of that Member State resides and to examine, first, whether that parent is, or is not, actually able and willing to assume sole responsibility for the primary day-to-day care of the child, and, second, whether there is, or is not, such a relationship of dependency between the child and the third-country national parent that a decision to refuse the right of residence to the latter would deprive the child of the genuine enjoyment of the substance of the rights attached to his or her status as a Union citizen by obliging the child to leave the territory of the European Union, as a whole.
>
> 78. In the light of the foregoing, the answer to the third question is that Article 20 TFEU must be interpreted as not precluding a Member State from providing that the right of residence in its territory of a third-country national, who is a parent of a minor child that is a national of that Member State and who is responsible for the primary day-to-day care of that child, is subject to the requirement that the third-country

> national must provide evidence to prove that a refusal of a right of residence to the third-country national parent would deprive the child of the genuine enjoyment of the substance of the rights pertaining to the child's status as a Union citizen, by obliging the child to leave the territory of the European Union, as a whole. It is however for the competent authorities of the Member State concerned to undertake, on the basis of the evidence provided by the third-country national, the necessary enquiries in order to be able to assess, in the light of all the specific circumstances, whether a refusal would have such consequences."

25. It seems clear therefore that the underlying principle in *Zambrano* is undisturbed by *Chavez-Vilchez*, albeit that in the case of a child dependent on one parent who is a third country national with no right of residence, the State must ensure a careful process of enquiry. However, the third-country national bears the evidential burden of establishing that the child citizen will, in practice, be compelled to leave the EU, unless rights of residence are granted to the (principal) carer parent.

26. As always with CJEU authority, the context must be borne in mind when looking at the conclusions of the Court. In *Chavez-Vilchez*, the reference came before any final decision by the referring court. The Dutch court was looking for guidance. There were no crisp findings of fact in respect of the eight different cases. However, the assumption which runs through the cases, whether the EU citizen father assisted with child care or not, was that the EU citizen parent would remain in the Netherlands whatever the outcome of the case. None of these cases were family units with parents living together. In each case the context was: if the non-EU citizen mother leaves and the EU citizen father remains, will the EU citizen child be compelled, in practice, to leave?

27. I address below the specific arguments advanced by the parties, in the context of each case. However, putting the matter broadly, the Respondents Shah and Bourouisa argue that *Chavez-Vilchez* represents a softening of the *Zambrano* principle, sufficient for them to succeed. The Appellant Patel argues likewise, applied to a dependent adult. The Secretary of State argues, whether as Appellant or Respondent and whether the argument is advanced by Ms Smyth in Shah and Bourouisa, or Mr Blundell in Patel, that the case of *Chavez-Vilchez* adds nothing to these cases, none of which concern children whose sole effective carer will be forced to leave the country.

The Individual Cases: Shah

28. The facts in this case are set out in the judgment of the First-tier Tribunal ["F-tT"], Judge Hussain of 31 December 2014. The Respondent, Mr Shah, was born on 2 September 1986 and is a Pakistani national. He came to the United Kingdom in August 2008 as a student but his leave to remain was revoked in 2012. After making an unsuccessful claim on human rights grounds, he applied for a Derivative Residence Card on 2 December 2013, which was refused on 28 March 2014. He appealed to the F-tT against that decision. Mr Shah's appeal was based on the claim that he was the primary carer of Aaryan Shah, a British citizen. The child was born on 20 June 2013, his parents having undergone a civil marriage on 10 October 2012. The Appellant's wife, Sanya Ahmad, is a UK citizen. The F-tT accepted the evidence that Mr Shah

was the primary carer of the child. He does not work and she does. The evidence was that Ms Ahmed works during the day, during which time the Appellant cares for the child. The mother also cares for the child when not at work, and there was no suggestion she was incapable of caring for the child in any way whatsoever. The matter was put to the F-tT that Ms Ahmed "cannot assume full responsibility for him because she works full time. If the Appellant is not allowed to stay in this country, they will have to move the family" [emphasis added]. The core reasoning of the F-tT was as follows:

> "17. The next question I have to determine is whether if the appellant was not permitted to remain in the United Kingdom, the British citizen child would have to leave this country. In this regard I take into account that the appellant appears to be in a happily married relationship with his wife. She appears to be willing to take on the mantle of providing the family's financial needs, forsaking her duties as a mother to nurse her young child. When she was asked what would happen if the appellant was not allowed to stay in this country, she replied that they would have to move as a family. I have no reason to doubt the sincerity of that statement.
>
> 18. If, as I find it to be the case, that the appellant's wife will wish to move with him to Pakistan, then the question remains whether the child would have to leave also. Bearing in mind that the child is only one and a half years old and bearing in mind that the best interest of children is to remain with both their parents, it seems to me the conclusion inescapable that the child would have to leave with his parents.
>
> 19. For all the reasons given above, I find that the appellant satisfied the requirements of regulation 15A of the 2006 regulations."

29. The matter was appealed to the Upper Tribunal ["UT"] by the Home Secretary. Deputy Upper Tribunal Judge K Drabu CBE upheld the findings below in a decision of 27 August 2015. He noted that the factual findings of the F-tT were not challenged. He noted that Judge Hussain:

> "Correctly identified the issues before him. He found that the appellant was indeed the primary carer of the infant child. Quite properly taking account of the "happily married relationship" the judge noted that when the sponsor was asked what would happen if the appellant was not allowed to stay in this country, she said "they would have to move the family". The judge accepted the sincerity of that statement."

Judge Drabu went on to conclude that if the family moved, then of course the child would move.

30. Judge Drabu considered the decision in *Zambrano* and went on to say:

> "I unhesitatingly reject the submission made by Ms Fujiwala that in determining this appeal Judge Hussain applied the incorrect legal test. Of course the child would leave the United Kingdom because the parents would have no option but to take him with them. He is of a very tender age and needs constant care and attention. The removal of the appellant would make it impossible for the mother to take care of the infant without recourse to public funds. That cannot and is not in the public interest nor is in the best interests of the child to be separated from his father in the circumstances of this case." (paragraph 10)

31. The Secretary of State submits that both the F-tT and the UT took the wrong approach in law. Each recorded that it was the mother's evidence she would choose to go to Pakistan if her husband were required to leave the European Union. Ms Smyth submits that:

> "Both the F-tT and the UT thus failed to address the essential prior question of whether, if [Shah] were required to leave [Ms Ahmad] would be "compelled" to leave or whether she would merely choose to do so."

32. It is submitted there is no evidence whatever that either mother or child would be compelled to leave: that was clearly a matter of choice, in order to keep the family together. Moreover, Ms Smyth submits that in focussing on the assumption (unsupported by the evidence) that Ms Ahmed would be required to give up work and claim benefits if Mr Shah were required to leave the EU, the UT diverted itself from the essential question as to whether the departure of Mr Shah would force his wife and child to leave.

33. In effect, the Secretary of State submits that the F-tT and UT elided the question emerging from *Zambrano* with an unarticulated consideration of the Article 8 rights of the family members involved. Having considered that it was in the interests of the family to remain together, there was, in effect, an automatic conclusion to the *Zambrano* question without more. The conclusion on the evidence should have been that Ms Ahmed was perfectly capable of caring for the young child and therefore there was no compulsion established in the case.

34. Mr Malik in reply emphasises the formulation of the CJEU in paragraph 71 of *Chavez-Vilchez* set out above. He argues that the fact that the parent who is a Union citizen is able to assume responsibility for the primary day-to-day care of the child, while relevant, "is not in itself a sufficient ground for conclusion that there is not, between the third-country national parent and the child, such a relationship of dependency that the child will be compelled to leave … the European Union". As the CJEU specified, the court must go on to take account of the other factors set out in paragraphs 71 and 72 and, critically, in the terms of paragraph 77 of *Chavez-Vilchez*, to examine whether there is or there is not "such a relationship of dependency between the child and the third country national parent" that refusal of residence to the latter would compel the departure of the child. Mr Malik goes on to emphasise the language used by Ms Ahmed in her evidence, more than once, that if her husband was compelled to leave then she, too, "would have to leave".

35. I should note that for the sake of clarity, the Secretary of State has not sought to challenge the finding of the F-tT in this case that the Respondent Mr Shah was the primary carer of the child. Hence, I need not address Mr Malik's arguments bearing on that ground.

36. I give my conclusions on this case below.

The Individual Cases: Bourouisa

37. In this case the facts are set out in the judgment of First-tier Judge Veloso, promulgated on 11 February 2015. This Respondent is an Algerian citizen, born in 1983. He entered the United Kingdom illegally in December 2004 and he married in 2008. His wife is a British citizen. Their son was born in June 2009. On 7 April 2014, the Respondent applied for a Derivative Residence Card as the primary carer of his son Adam, who is of course a British citizen. The Secretary of State refused the card on 9 May 2014 on the ground that Adam would not be compelled to leave the United Kingdom.

38. That decision was appealed by the Respondent on the ground that he is the full time carer for their son and his wife would not be able to be the carer "because she works" (F-tT judgment, paragraph 5).

39. Judge Veloso directed himself as to the contents of Regulation 15A of the EEA Regulations and proceeded to find that the Respondent and his wife were credible witnesses and the substance of their evidence was accepted. The Respondent's wife has worked in a care home since 2008 and works long hours. She is on call outside those hours. She had discussed the matter with her mother, but she (the grandmother) is unable to become the carer. If the Appellant were returned to Algeria that "would mean she would have to quit her job and go on benefits. She would probably also lose her flat. If he left the United Kingdom she would follow him to Algeria" (paragraph 25).

40. The Judge's conclusions are then expressed as follows:

> "28. I find that if the appellant were required to leave the United Kingdom this would impact on Adam to the extent that he would be unable to reside in the United Kingdom. In her evidence the appellant's wife stated that she would follow the appellant to Algeria because the alternative would be for her to quit her job and go on benefits. This would furthermore mean she would probably lose her flat. Whilst Adam would have a right to reside in the United Kingdom on account of his British citizenship he would not actually be able to do so as his mother would be removing him from this country to go and live in Algeria.
>
> 29. On balance, considering all the evidence in the round including all the contents of the appeal bundles, oral evidence and submissions given at the hearing I find that the appellant has shown that he is Adam's Primary Carer and that Adam would be unable to reside in the United Kingdom or in another

> EEA State if the appellant was required to leave. The appellant therefore complies with Regulation 15A of the 2006 EEA Regulations."

41. The decision was upheld by Deputy UTJ Harris on 6 August 2015. The critical findings of the Upper Tribunal were as follows:

> "10. The First-tier Tribunal decision allowing the appeal was based on the Appellant's family circumstances namely that the Appellant's wife was working full-time and that his son Adam was 5 years old and had learning difficulties. I am satisfied that the First-tier Tribunal Judge carefully considered all the available evidence and that her reasons for allowing the appeal were balanced and well explained particularly within paragraphs 26 to 29 of her decision. Furthermore the grant of permission to appeal contends that the employment of the Appellant's wife would enable the Appellant to bring him within the Regulation. I agree with the contention made by Mr Lamb in his Rule 24 response that such an argument is perverse for two reasons. Firstly the Appellant's wife has been working for seven years and this is not a matter when she suddenly found a job deliberately in order to make herself unavailable to care for Adam and secondly it is totally unreasonable to expect her to give up her job and rely on benefit in order to fit into the Secretary of State's argument that she could look after Adam."

42. In her submissions in relation to this case, Ms Smyth for the Secretary of State began by emphasising that Mr Bourouisa has never made an application for leave to remain in the United Kingdom on family life grounds. I pause to remark that such an application might well be open to him. We have seen material in the course of the case which might well be relevant to such an application, although it cannot bear upon the decision we must take.

43. Ms Smyth emphasises, in similar terms to the submissions in the *Shah* case, that both the F-tT and the UT misdirected themselves. The F-tT concluded there would be compulsion on the child in this case to leave the United Kingdom because the alternative would be for his mother "to quit her job and go on benefits". That was a misdirection. The evidence actually meant that Mrs Bourouisa would be left with a choice, albeit a hard choice. She was perfectly capable of caring for her son and continuing to live with him in the United Kingdom, if her husband was to leave. Ms Smyth submitted that "the real basis" for Mr Bourouisa's appeal through the tribunal system was to maintain the family unit, and here she relies particularly on a passage from Mrs Bourouisa's witness statement which was before the F-tT and was explicitly accepted:

> "I do not feel that my son should grow up without his dad and I should not be left without a husband who I love, who I have chosen to marry and have a son with, we are a family unit and a very strong one at that. Without my husband's support and the care and devotion he gives me and our son Adam, I would be unable to work and life comfortably and would have to live off

> benefits. I do not see any logic and sense to remove my husband. He is not a burden on the State financially and he speaks perfect English and he is well-integrated into the community."

Therefore, here too the substance of the attack by the Secretary of State was to the effect that both the F-tT and UT had substituted a consideration of maintaining family life for a proper consideration of the test set out in *Zambrano*.

44. Mr Bourouisa appeared before us unrepresented. He made a moving plea to us as to the strength and closeness of his family life, his love for his son and his close engagement with the child, who has a number of problems. He was not in a position to address the legal issues.

45. Here too, I give my conclusions below.

Individual Cases: Patel

46. The primary findings of fact in this case were set down in the decision of F-tT Judge Miles, promulgated on 24 June 2015. The Appellant Patel was born on 11 September 1986. He entered the United Kingdom in February 2010 as a Tier 4 (general) student migrant with leave to remain until 13 June 2012. On 8 June 2012, he sought indefinite leave to remain outside the rules, which was refused in January 2013. His appeal against that decision was dismissed in October 2013 and permission for further appeal was refused. On 27 June 2014, the Appellant sought leave to remain on the basis of his family and private life, and on 29 August that application was refused. On 4 December 2014, the Appellant applied for a Derivative Residence Card, claiming to be the primary carer of a British citizen, his father. Both his parents are UK citizens.

47. The Secretary of State refused that application on 28 January 2015 and the matter was then appealed as I have said.

48. Judge Miles noted the Appellant's evidence that since his arrival in the United Kingdom he had always lived with his parents and:

> "…is the primary carer for them both as they are both in poor health. His father has final stage kidney disease and … suffers from high blood pressure while his mother suffered a heart attack in July 2012 and has a very poor knee function which makes her relatively immobile".

He states:

> "All I wish to do is to ensure that my parents do not suffer, they will simply not be at ease under the care of anyone apart from me. The fact that they are my parents means that I will provide emotional and physical support above and beyond any potential carer. I am doing everything in my power and ability to ensure that they feel safe and secure, whether that be by taking them to hospital or taking care of any other physical and mental health

> needs. To separate me from my parents in this difficult period in their life is unnecessarily cruel and punishing to them." (paragraph 12)

49. Before the F-tT, the Secretary of State accepted the Appellant was caring for his father, although did not accept that there were no other alternative care provisions available. On that basis, the F-tT concluded that the Appellant was indeed his father's primary carer for the purposes of Regulation 15A(4)(B) of the Regulations. Judge Miles went on to say:

> "The area of dispute therefore is whether the appellant has also established to the requisite standard that the relevant British citizen, i.e. his father, would be unable to reside in the United Kingdom or in another EEA State if the appellant was required to leave, see Reg 15A(4A)(c)." (paragraph 14)

50. The Appellant submitted to the Tribunal that there were no other relatives or guardians in the UK to care for the Appellant's father, and that "there are no alternative care provisions available in the United Kingdom".

51. The Respondent rejected those assertions and pointed out that as a British citizen the Appellant's father was entitled to state support. Preference and convenience were not a sufficient basis to demonstrate that his return to India would compel his parents to leave.

52. Judge Miles accepted from the Appellant that the care provided to his father from Social Services would "not be at the same level as that provided by the Appellant". He also accepted that there was no existing family home in India, nor were there siblings or other immediate family in India able to offer accommodation and support. The Appellant's case was that if he had to return to India, his father "would feel compelled to join him". There was no evidence before the tribunal as to what level of medical care, if any, would be available in India, nor any evidence as to the timescale over which it might be provided. The Judge went on as follows:

> "19. … If the appellant's father remains in the United Kingdom there is no question, in my judgment, but that he would be provided with a social services package together with medical treatment appropriate for a person in his situation who does not have a full-time primary carer. Those circumstances might well result in the appellant's father having to be admitted to hospital for his dialysis treatment which would clearly not be as good as the current arrangement where his treatment is provided essentially by his son at home, but that treatment would continue to be provided given his father's status as a British citizen. His father would also be eligible for any additional welfare benefits appropriate to his condition and taking account of the severe mobility difficulties of his wife, which I also accept. In those circumstances the comparison between the situation of the appellant's father if he went to India with the appellant, as opposed to remaining in the United Kingdom with his wife but without the appellant can only be

> resolved in my judgment by concluding that the notion of the appellant's father choosing or feeling obliged to leave the United Kingdom is simply untenable, despite the detrimental impact on both his parents, which I accept if he were to be required to leave. The fact of the matter is that the medical needs of the appellant's father can only be secured with any confidence by remaining in the United Kingdom rather than going to India and I am simply unable to accept his father (and mother) would not see that as the reality of his situation. In all those circumstances therefore I am not satisfied the appellant has proved that his father would be unable to reside in the United Kingdom for the purposes of regulation 15 A(4A)(c) of the 2006 regulations if the appellant was required to leave. Accordingly therefore his appeal fails."

53. The Appellant's case came before the UT in December 2015 and UTJ Hanson promulgated his decision on 23 February 2016. UTJ Hanson set out a reasonably full analysis of the decision in *Zambrano* and other authority, including the following helpful analysis:

> "21. In *Ayinde and Thinjom (carers- Reg 15A - Zambrano)* [2015] UKUT 00560 it was held that (i) The deprivation of the genuine enjoyment of the substance of the rights attaching to the status of European Union citizens identified in the decision in *Zambrano* [2011] EUECJ C-34/09 is limited to safeguarding a British citizen's EU rights as defined in Article 20; (ii) The provisions of reg. 15A of the Immigration (European Economic Area) Regulations 2006 as amended apply when the effect of removal of the carer of a British citizen renders the British citizen no longer able to reside in the United Kingdom or in another EEA state. This requires the carer to establish as a fact that the British citizen will be forced to leave the territory of the Union; (iii) The requirement is not met by an assumption that the citizen will leave and does not involve a consideration of whether it would be reasonable for the carer to leave the United Kingdom. A comparison of the British citizen's standard of living or care if the appellant remains or departs is material only in the context of whether the British citizen will leave the United Kingdom' (iv) The Tribunal is required to examine critically a claim that a British citizen will leave the Union if the benefits he currently receives by remaining in the United Kingdom are unlikely to be matched in the country in which he claims he will be forced to settle."

54. UTJ Hanson accepted that the *Zambrano* principle is not restricted to children (paragraph 22): the question is whether the relevant individual satisfies the criteria (a) as primary carer of the British citizen, (b) who resides in the United Kingdom, and (c) where the British citizen would be unable to continue to reside in the EEA if the carer were required to leave.

55. The judgment goes on to set out a clear and full analysis of the evidence that was before the F-tT and to look closely at the medical evidence which was before the judge below. Judge Hanson noted in particular the following passage from the care report:

> "28. The report also contains the following observation:
>
> "Psychologically and emotionally Mr and Mrs Patel would not be able to cope with strangers caring for them. Culturally, this is very difficult and in any case to date, their son has provided for their care. Mrs Patel becomes distressed and tearful with the prospect of not having their son living with them and Nilay says that if he is unable to stay in this country, he will take his parents back to India and care for them, even though his father would be unable to continue with his present treatment of Peritoneal Dialysis as the equipment and consumables are not available in India."

56. Judge Hanson then went on to reject the submission from Mr Pennington-Benton, made at the first hearing, that the judge "should have applied a subjective test", as not being in accordance with the case law or the *Zambrano* principle (paragraph 30).

57. Judge Hanson concluded that the F-tT had applied the correct legal test, had given the evidence "the required degree of anxious scrutiny" and given adequate reasons. Judge Hanson accepted that the F-tT had not been referred explicitly to the *Zambrano* principle, observed that it cannot be a legal error for the F-tT to fail to consider an authority that had not been referred to, but concluded that the F-tT had adopted the correct approach to the law in any event, based on the reading of the relevant regulation. Judge Hanson then concluded that the finding below that the case was not exceptional and that there was no compulsion for the Appellant's parents to leave the United Kingdom has not been shown to be infected by any arguable legal error. He therefore dismissed the appeal.

58. Ground 1 for Mr Patel is a broad challenge to the application of the *Zambrano* principle to this case of a dependent adult. In his written submissions Mr Pennington-Benton argues that, as he puts it, that "the test of 'unable' sets the bar too high". Given the quality and extent of the care provided by the Appellant to his father "the only alternative for the father would be to go to a residential care home". Making the analogy with cared-for children, the Appellant suggests that it is always "theoretically possible for children to remain" if primary carers are removed, by being put into care or being fostered out. This cannot be the intention of Parliament and is not the consequence of the *Zambrano* principle. The test must be more nuanced when considering elderly and infirm parents. Accepting that there is State responsibility to meet the needs, medical and/or social, of the frail elderly, Mr Pennington-Benton suggests the approach adopted below would mean in effect that no derivative residence claim could succeed in relation to a cared-for elderly adult. Hence, he argues that the legal approach taken below was in error.

59. In oral submissions to us, Mr Roe QC for this Appellant argued that the decision in *Chavez-Vilchez* supported the arguments previously made for the Appellant, and meant that the approach must be more nuanced than hitherto. The fact that the

Zambrano principle had in effect been enshrined by Parliament in regulation meant that, whilst the legal principles developed by Strasbourg applied consistently *mutatis mutandis* to adult carer cases, this did not mean that the position of children and cared for adult dependants were in fact identical. Mr Roe asks the rhetorical questions: "would it not always be the case that the cared for person could be placed in a home or hospitalised? Can Parliament have intended for this to be the answer in all such cases?"

60. Mr Roe focuses on the decision in *Ayinde and Thinjom*, upon which UTJ Hanson relied in his judgment. Quoting from the principles set out in the headnote to that case, Mr Roe submits that the approach identified there gives a narrow and literalist approach to the test of "unable" in the Regulation, which cannot reflect the intention of Parliament when applying the *Zambrano* principle to the position of cared-for adults. Particularly in the light of *Chavez-Vilchez*, the approach should be more nuanced and should involve consideration of a range of factors, "including the subjective bonds and feelings of dependency between the cared for person and the carer". Even the case of *Chavez-Vilchez*, says Mr Roe, does not delineate "what is the nature and degree of compulsion, as a minimum, that must be evidenced so as to constitute impermissible interference with … the right to reside". Certainly in the context of the children, compulsion cannot be negatived by the child being put into care or adopted (see *Harrison v SSHD*). Citing a series of European authorities culminating in *Zambrano* and in *Rottmann v Freistaat Bayern* (Case C-135/08) [2010] QB 761, the Appellant:

> "31. … submits that the analysis in these cases readily explains why it is that putting the child up for adoption in a *Zambrano* type case is not an acceptable option. The Union citizen's right to reside implicitly includes the right to being tended for and protected by his or her primary carer. The reason for this, it is submitted, is that the right to reside does not stand alone. It includes the right to live with basic dignity/protection of loved ones. In the context of children or cared-for adult dependants that will often translate into an implied right to be cared for by a loved one, where that person is the primary carer."

61. Mr Roe supplements this submission by arguing that, as part of a more nuanced or broader approach to the problem, the Court must take into account the right to respect for family life as stated in Article 7 of the Charter, and indeed Article 25 of the Charter enshrining a right to respect and dignity for the elderly.

62. This Appellant accepts that in "broad terms" the question to be decided is whether the British citizen would be compelled to leave the UK. The Appellant, however, submits that when that assessment is undertaken, all relevant circumstances must be considered, including "the subjective feelings of motivations of the parties. The focus should be on the nature and degree of dependencies". In the instant case the assessment should have been more nuanced and multi-factorial when assessing whether the parents would be "compelled to leave".

63. The second ground of appeal on behalf of this Appellant is a challenge to the finding by the F-tT that in point of fact this Appellant's parents would not leave, given the disparity in medical and care facilities available between India and the United

Kingdom. The Appellant accepts this is a challenge to a finding of fact, but submits that a review in this appeal may properly comprise a review of fact in a case involving a "multi-factorial decision … dependent on inferences and analysis of documentary material" (see the judgment of May LJ in *Dupont de Nemours (EI) & Co v ST Dupont (Note)* [2006] 1 WLR 2793). The Appellant submits that had the approach of the F-tT reflected the more nuanced test he advances, the outcome of the decision here would have been different.

64. In responding to this appeal, Mr Blundell for the Secretary of State began by emphasising that the relevant regulation was drafted to embody the principle in *Zambrano*, not to extend it. He emphasises the words of the CJEU in *Dereci and others* at paragraph 68 that "the mere fact that it might appear desirable to a national of a member state for economic reasons or in order to keep the family together in the territory of the Union" is not sufficient "in itself" to make out a claim for derivative rights under the regulation. Mr Blundell also emphasises the rigour of the approach approved by this Court in *Harrison* and in particular emphasises the passage from the judgment of Elias LJ quoted in paragraph 16 above. On this basis, Mr Blundell submits that Article 7 of the Charter is not engaged.

65. Mr Blundell relies upon the application of the principle in *Harrison* in *Hines v Lambeth LBC* [2014] EWCA Civ 660. The non-resident mother in that case claimed that her British child would be compelled to leave the EU if her right to reside were not recognised. This Court rejected the argument and applied *Harrison*. In the course of his judgment, Vos LJ (as he then was) concluded that it could not be compulsion where a child, if he did leave, would still have the care of one of his two previous joint carers.

66. Mr Blundell relies on the consistent application of the *Zambrano* principle in such cases as *FZ (China) v SSHD* [2015] EWCA Civ 550 and *Sanneh v Secretary of State for Work and Pensions* [2016] QB 445. Mr Blundell emphasises the high threshold for engagement of the *Zambrano* principle, relying, *inter alia*, on the statement of the CJEU in *Dereci*, paragraph 67, that a right of residence pursuant to Article 20 is "exceptional". The mere fact that it might appear desirable for economic reasons or to keep a family together for the grant of such a derivative right of residence does not amount to compulsion (*Dereci*, paragraph 68). Such a formulation of the right as meaning that it arises only where the EU citizen will be "forced to leave" does not put the matter too high, since that was precisely the phrase used by the Court of Appeal in *Harrison* at paragraphs 19 and 63.

67. Mr Blundell also distinguishes between the position of a dependent child and that of elderly British parents cared for by an adult third country national. The ordinary position of an adult child with parents who are not particularly dependent "would not justify a finding of Article 8 family life" (see *Singh v SSHD* [2015] EWCA Civ 630, Sir Stanley Burnton at paragraph 24). Even if there is a degree of dependency – "something more" than ordinary family life – that will, or will not, give rise to a claim under Article 8, because departure would amount to a disproportionate interference with Article 8. If there is no such disproportionate interference, then the individual can lawfully be required to leave. The nature of the relationship and the nature of dependency is, says Mr Blundell, rather obviously different when considering children and even clearly dependent elderly adults.

68. In Patel's case, the Appellant has already failed in an Article 8 claim. Had he succeeded, the result would have been a grant of leave to remain which would obviate the need for leave under the *Zambrano* principle.

69. Mr Blundell shortly rejects the submissions of the Appellant on Ground 2. This is nothing more than "a thinly veiled attack" on the factual finding, revealing no error of law. Mr Blundell says it is plain from the content of the judgment that Judge Miles had properly considered and gave proper regard to the report of the occupational therapist, accepted that the level of care provided by Social Services would not be at the same level as that provided by the Appellant, and reached a perfectly rational assessment of the impact and outcome on the parents' decision of the nature and degree of their medical problems.

70. In considering the impact of the decision in *Chavez-Vilchez*, Mr Blundell emphasised that the Court recognised the treaty provisions on citizenship do not confer autonomous rights on third country nationals, see paragraph 62. Mr Blundell emphasises that the *Chavez-Vilchez* decision is about the derivative rights of children, does not purport to deal with the position of adult carers, and in any event in no way represents a departure from the earlier case law on Article 20 and the *Zambrano* principle. Mr Blundell argues that the *Chavez-Vilchez* decision is not directed to the situation arising in this appeal and in any event does not depart in any way from the earlier case law.

71. Mr Blundell also emphasises that children and adults hold at least to some degree a different legal position in EU law, since children benefit from the application of the "best interests" principle in Article 24(2) of the Charter, in situations where EU law is engaged: see *Chavez-Vilchez* at paragraph 70. Custody and dependence, combined with the best interests principle, create a different legal order in relation to children where derivative residence claims are made. Hence the primary position adopted by the Secretary of State in this appeal is that *Chavez-Vilchez* is irrelevant. The secondary position advanced is that, even if *Chavez-Vilchez* could be applied by way of analogy, it would not assist this Appellant. Custody is completely irrelevant to this case. In relation to the notion of dependence, the only implication of the decision is that a Court must take account of all the relevant circumstances when deciding the question whether a relevant EU citizen will be compelled to leave. That is already a requirement of domestic public law.

Conclusions

72. In my judgment, the decision in *Chavez-Vilchez* represents no departure from the principle of EU law laid down in *Zambrano*, although it does constitute a reminder that the principle must be applied with careful enquiry, paying attention to the relevant criteria and considerations, and focussing not on whether the EU citizen child (or dependant) can remain in legal theory, but whether they can do so in practice. There is no alteration in the test of compulsion.

73. The case must also be kept in context: there was no question in these cases that both parents would choose to remain together abroad. That was not the situation the CJEU was addressing.

74. It follows in my view that *Chavez-Vilchez* does not represent any kind of sea-change to the fundamental approach to be taken. It does not mean that English reported cases implementing *Zambrano* but pre-dating *Chavez-Vilchez* (such as *Harrison*, and *Sanneh*) hold diminished authority.

75. In both Shah and Bourouisa there is impressive evidence of the strength of family life, and of the determination of the British citizen mother (in each case) to stay with the family unit and move abroad, if the husband and father must leave. Every sensible person would wish to honour such an impulse. However, recognition of that does not alter the fact that however hard such a choice may be, it is a choice, not a necessity, not compulsion. In my judgment the evidence in each of these two cases is clear that were the British parent to remain, they would be able to care for the children concerned perfectly well. The child citizen would be under no compulsion to leave the EU.

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.

80. I turn to the case of Patel. Here, it seems to me that a number of the arguments advanced by the Appellant, with great respect to Mr Roe and Mr Pennington-Benton, were misconceived. I agree that the approach to such a case must be "nuanced", if by that it is meant that there must be a full enquiry into the facts, and full consideration of the detail. But if the implication is that the test for a dependent adult must be weaker than for a dependent child, I reject that. It must be obvious, as Mr Blundell submits, that the combination of the legal enshrinement of the best interests of the child and the legal, as well as moral, obligation of parents to care for their children, mean that such a distinction cannot be right.

81. I recognise the force of the submission that, if State provision in terms of medical or social services care is both a right of the dependent adult and in fact available, then the class of dependent adults who can demonstrate "compulsion" to follow a non-British carer abroad may be limited. I also recognise that devotion to and care of elderly, frail parents is to be applauded and praised, not condemned. It is clear that Mr Patel is to be praised for his admirable care of his parents. But I do not see any error in the legal approach taken by either the F-tT or the UT in this case. The question remains compulsion.

82. And it further seems to me that the evidence in this case was too equivocal to amount to compulsion, however one looked at the matter. There was absolutely no doubt as to the parents' devotion to their son, or his to them. Were he to leave to India, there was no doubt that the parents said they would follow, despite the findings below, but that really represented their cultural and individual commitment to each other. That, again, is choice not compulsion.

83. Objectively, the choice was, and presumably still is, a difficult choice. The evidence was there was no house existing and no extended family in India. Therefore that would mean, presumably, selling up in Britain and a transfer of resources to India. Part of the Appellant's case was that medical facilities would be more limited in India, as I have indicated above. However, if remaining in England, the parents will be faced with medical and social care support that is likely to be lesser in quality (and certainly more impersonal) than the care currently provided by their son. UTJ Hanson considered, on the evidence he heard, it was inevitable the parents would in fact remain. But even if that were wrong, this situation can in no way be regarded as one of compulsion to leave.

84. During the hearing, we asked the Secretary of State to consider in what circumstances compulsion might arise in respect of adult dependents of those without residence: if there were none, might the regulation so interpreted be a dead letter, forcing a different interpretation to preclude redundancy? Mr Blundell's response accepts that this category of cases might be very narrow. However, he did proffer examples. Where the family share a rare blood group, and blood transfusion or bone marrow transplants might be required, it might be arguable that the carer should remain. He also instanced a British adult citizen with severe autism, dependent for all his care on a third country national relative, where it would be intolerable for the identity of the carer to change. It is clear Mr Blundell was intending to give examples rather than an exhaustive survey. For myself, I would instance significant psychological dependence derived from any well-documented and recognised psychological condition, as a possible example. There may be more. The point is that the category

exists, and there can be no argument that the regulation must have an expanded reading in order to avoid redundancy.

85. For those reasons, I would reject Ground 1 in the case of Patel.

86. As to Ground 2, it seems to me that the conclusion of UTJ Hanson that the Appellant's parents would remain may have been somewhat over-definite. It may have underestimated their strength of feeling about being cared for by their son, as opposed to being cared for by people who are as yet strangers to them. However, if there was an error, it was not material to his conclusions in the case. At the very least, the case represented a very difficult choice for the Appellant's parents. They were not obliged to leave in any sense. Hence, I would dismiss the appeal in Patel.

Lady Justice Thirlwall:

87. I agree.

Lord Justice Lindblom:

88. I also agree.