

## ***Patel v Secretary of State for the Home Department; Secretary of State for the Home Department v Shah* [2019] UKSC 59**

### **The issues considered**

Article 20 of the Treaty on the Functioning of the European Union (TFEU) lays down the basis of Union Citizenship, including ‘the right to move and reside freely within the territory of the member states.’<sup>1</sup> Even though the article does not confer any rights directly to third-country (i.e. non-member state) nationals (TCNs),<sup>2</sup> they may acquire the derivative right to reside, where they are the primary carer of a British citizen who would be ‘unable to reside’<sup>3</sup> in the UK or EEA territory without them.

The key issue to both appeals was whether the TCNs Mr Shah and Mr Patel had such a right, derived from their British family members, Mr Shah’s wife and infant son and Mr Patel’s elderly parents. As part of this issue, the Supreme Court considered the scope of *Zambrano*,<sup>4</sup> where it was held that a TCN parent of a Union citizen child could stay within the EU where it could be proven that the parent’s departure would deprive the child of ‘genuine enjoyment’ of their right to reside, compelling them to also leave the EEA. The *Zambrano* principle extends to dependants who are not children [1][22], (as long as a ‘relationship of dependency’ [16] can be shown) and was therefore also raised in Mr Patel’s appeal.

### **The court’s decision**

The court unanimously upheld Mr Shah’s appeal and dismissed that of Mr Patel. Lady Arden’s judgement sets out the reasoning for this decision.

In its examination of the *Zambrano* principle, the court confirmed that it was up to the national court to decide whether the requirement to show compulsion to leave had been met,<sup>5</sup> and that the desirability of family reunification was not enough on its own [18].<sup>6</sup>

As a result, the court affirmed the conclusion of the First-tier Tribunal (FTT) that Mr Patel’s father would not follow him to India, [22] as he could still receive the necessary treatment in the UK in the absence of his son [20]. Conversely, Mr Shah’s appeal was upheld, partly because there had been no challenge to the FTT’s finding that the child had the required ‘relationship of dependency’ with Mr Shah for the *Zambrano* principle to be satisfied, and that he was the primary carer [28]. In overturning the Court of Appeal’s judgement, the court held that it had made an error in law when it ruled that the Shahs simply wished to keep the family together, and that Mrs Shah ultimately had a choice whether to leave or remain in the UK to look after their son [29]. The Supreme Court held that this choice had in fact been only theoretical, emphasising that the compulsion test was a practical one that should be based on the actual facts, especially when children are involved [30].

This brings up the issue of the distinction the court made between children and dependant adults. It based its reasoning on several CJEU cases, including *KA*<sup>7</sup> and *Chavez-Vilchez*.<sup>8</sup> Citing *KA*, the court felt

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<sup>1</sup> Article 20(2)(a) TFEU.

<sup>2</sup> *R (Agyarko) v Secretary of State for the Home Department* [2017] 1 WLR 823, para 62.

<sup>3</sup> 15A(4A) of the Immigration (European Economic Area) Regulations 2006.

<sup>4</sup> *Ruiz Zambrano v Office national de l’emploi* (Case C-34/09) [2012] QB 265.

<sup>5</sup> *O v Maahanmuuttovirasto* (Joined Cases C-356/11 and C-357/11) [2013] Fam 203.

<sup>6</sup> *Dereci v Bundesministerium für Inneres* (Case C-256/11) [2012] All ER (EC) 373.

<sup>7</sup> *KA v Belgium* (Case C-82/16) [2018] 3 CMLR 28

<sup>8</sup> *Chavez-Vilchez v Raad van Bestuur van de Sociale verzekeringsbank* (Case C-133/15) [2018] QB 103

that ‘where the Union citizen is an adult, a relationship of dependency, capable of justifying [...] a derived right of residence [...] is conceivable only in exceptional cases, where [...] any form of separation [...] is not possible’ [13].<sup>9</sup>

Where the case concerns children, the level of compulsion required is easier to meet, as the court must consider ‘all the specific circumstances, including the age of the child, the child’s physical and emotional development, the extent of his emotional ties [...], and the risks which separation [...] might entail for that child’s equilibrium’ [30].<sup>10</sup> It was not relevant that Mrs Shah could have looked after their son instead, as Mr Shah had already been established as the primary carer by the FTT, and the quality of that relationship was an important factor [25].<sup>11</sup> However, the fact that *Chavez-Vilchez* only relaxes the level of compulsion in relation to children meant that it was of no assistance to Mr Patel [27].

### **Comment**

This distinction between children and dependant adults is particularly significant due to the way it interrelates with human rights, as cases involving children require consideration of the ‘right to respect for family life, as stated in article 7’ of the Charter of Fundamental Rights of the European Union (‘the Charter’) along with the ‘best interests of the child, recognised in article 24(2) of the Charter’ [23].<sup>12</sup> These considerations played a part in the final decision to uphold Mr Shah’s appeal. By contrast, Mr Patel’s reliance on article 25 of the Charter, relating to rights of the elderly, did not have a bearing on the final outcome. Similarly, the court dismissed Mr Patel’s claim under article 8 of the European Convention of Human Rights (‘the Convention’), also relating to the respect for private and family life. This is because 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’ [27].

More broadly, this raises questions about the relationship between human rights and immigration law. The court confirmed, for example, that article 8 of the Convention does not give non-settled TCNs a general right to avoid the application of immigration control [19].<sup>13</sup> In addition, the court confirmed that Charter rights (unlike those under the Convention) will only apply where EU law is triggered [16], and that article 51(2) of the Charter prevents it from extending the application of EU law,<sup>14</sup> including its limitations on derivative residence rights [21]. Ultimately, the difference in outcome of the two appeals demonstrates the court’s acute awareness of the complexity of striking a balance between immigration policy and the rights of the individual.

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<sup>9</sup> *KA*, para 76.

<sup>10</sup> *Chavez-Vilchez*, para 71.

<sup>11</sup> See *Chavez-Vilchez*, para 71; *KA*, para 70.

<sup>12</sup> *Chavez-Vilchez*, para 70.

<sup>13</sup> see *R (Agyarko) v Secretary of State for the Home Department* [2017] 1 WLR 823.

<sup>14</sup> 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).