Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: EA/05623/2016

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On the 3rd April 2018	**On the 6th April 2018**

Before

UPPER TRIBUNAL JUDGE REEDS

Between

JK
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Miss M. Atcha, instructed on behalf of the Appellant
For the Respondent: Mr I. Jarvis, Senior Presenting Officer

DECISION AND REASONS

1. The Appellant is a citizen of Pakistan. I make a direction regarding anonymity under Rule 14 of the Tribunal Procedure (Upper Tribunal Rules) Rules 2008. Unless and until a Tribunal or court directs otherwise the Appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or members of his family. This direction applies both to the Appellant and to the Respondent. Failure to comply with this direction could lead to contempt of court proceedings.

2. The Appellant with permission, appeals against the decision of the First-tier Tribunal (Judge Ripley), who in a determination promulgated on the 9th August 2017 dismissed his appeal against the decision of the Respondent to refuse his application for an EEA family permit under Regulations 12 and 16 of the Immigration (European Economic Area) Regulations 2006 (" the EEA Regulations").

3. Permission to appeal is listed before the Upper Tribunal, permission having been granted by First-tier Tribunal Judge Haria on the 31st January 2018.

4. The factual backgrounds is set out in the determination of the First-tier Tribunal at paragraphs 1-5.

5. The appellant arrived in the United Kingdom with a spouse Visa in April 2004 which was valid until April 2005. He was married in the UK to a British national in 2001. They lived together for 4 years and during that time two children were born, H born in 2003 and J born in 2005. The appellant overstayed his leave and applied for indefinite leave to remain in April 2006. The application was refused in July 2009. He exercised his right to appeal against the decision of the Secretary of State but his appeal was dismissed in a decision dated 7 October 2009.

6. There is a copy of that determination in the Tribunal papers. The judge heard the appellant and his wife give evidence in September 2009. It is plain from the judgement that it was not accepted that he was in a subsisting relationship/marriage with his wife. The judge had heard the evidence of both parties and considered their respective accounts that they were in a subsisting relationship in the light of the documentary evidence which demonstrated the use of different addresses and the lack of consistent evidence as to their home life. His relationship with two children was also considered to be "remote". The judge recorded that despite his account that he lived with his wife and children, he was unable to provide the correct colour of the children's uniform or give consistent evidence as to birthday presents (see paragraph 11). In summary the judge found that the parties had not demonstrated that they were in a subsisting marriage and that his relationship with the children was "so remote that it was not a relationship that necessitates living in the UK but one that could be maintained at an equivalent level by visits, telephone calls and letters" (see paragraph 14).

7. He was removed to Pakistan August 2010.

8. On 25 February 2016 the appellant applied for family permit on the basis that he was entitled to a derivative right of residence as a primary carer of two British children. In application he stated that "I have been married to my wife some time. I have two children of our marriage. Both children are British and settled. As I am their father I have share responsibility in my children upbringing and wish to carry them out "(see Q103).

9. On 5 April 2016 the Secretary of State refused his application. It was noted that the appellant's two children were residing in the care of their mother in the UK. The Secretary of State was not satisfied that, if the appellant's application was refused, the children would be unable to reside in the UK or in another EEA state, as they could remain with their mother. The respondent was not satisfied that the appellant was the primary carer of the children. The appellant therefore failed to meet the requirements of regulation 15(4A). The respondent considered that the appellant was therefore not entitled to a right of admission to the UK under the EEA regulations.

10. The appellant filed grounds of appeal out of time. However time was extended on 12 August 2016. In the grounds of appeal the appellant stated that the respondent had failed to consider he should have had regard to his children's welfare and their best interests. He claimed to be playing an active role in their lives and had shared responsibility for their upbringing with his wife. The appellant relied on the case of Ruiz Zambrano [2011] EUECJ C-34/09.

11. An Entry Clearance Manager (ECM) review took place. It was noted that the appellant had not submitted any evidence to demonstrate that he is the primary care of the children and that they would be unable to continue to reside in the UK in his absence. The children resided in the UK with their mother who was a British citizen and as the appellant was no longer in a relationship with the mother the children, the entry clearance manager was satisfied that the decision to refuse the application was correct. The ECM review also considered the Article 8 rights but found the decision to refuse entry was proportionate.

12. The appeal came before the First-tier Tribunal on the 25th July 2017. The judge heard evidence from the appellant's wife and a family relative. Their evidence was set out at paragraphs 10 – 15 of the determination. The judge's findings are set out at paragraphs 17-24 of the determination. The judge considered the relevant regulations in the light of the evidence. It had not been in dispute that the children had lived with their mother since their birth and without any physical contact with the appellant since he was removed in 2010, some seven years earlier. Prior to that the children had lived with her after the couple separated in approximately 2005. The judge found that he did not provide for the family financially nor did he arrange them to visit him in Pakistan, with or without their mother. The judge found on the evidence that the removal of the applicant in 2010 did not cause the children to leave the EU nor that there was any evidence to suggest that the family were now considering sending them to live with their father as they were unable to continue living in the EU without him. The judge took into account the decision of Chavez-Vilchez C-133/15 and cited the relevant part of that judgement when considering the best interests of the relevant children. At paragraph [23] the judge found that there was a "striking lack of evidence to show that it would be contrary to the children's best interests if the application was to be refused". Whilst the judge accepted that they spoke their father on the telephone at

weekends when at the grandparents, there was no evidence from the children themselves as to contact over the last seven years, the extent of the children's relationship with their father consisted of calls, cards and occasional gifts. The judge found that "there was no evidence to show that the children suffered as a consequence of his absence or that (as stated in Chavez-Vilchez) that their emotional development had been adversely affected or that their equilibrium would be disturbed if the appeal was rejected".

13. The judge concluded that she was not satisfied that the appellant was the children's primary carer or that they would be unable to reside in the UK if the appellant was refused the family permit and that he did not meet the regulations. The judge made reference again to the children's best interests which had been considered in the context of the regulations as set out in Chavez-Vilchez. The judge also cited the decision of Amirteymour and others (EEA appeals; human rights) [2015] UKUT 466(IAC), and that consequently Article 8 rights had not been considered independently of the EEA issues raised. The Judge dismissed the appeal under the EEA regulations.

14. The appellant sought permission to appeal that decision. The grounds state that the appellant disagreed with the decision and "believes that he is a primary carer of his British children and ought to be granted LTE under the EEA regulations and under his human rights (private and family life).

15. The grounds also assert that the decision was flawed as it failed to consider the human rights of appellant and his children and that he shared parental responsibility of his British children with his wife. It was stated that he was separated from his wife but not divorced and that they were "ready and willing to give another chance to the relationship the sake of their children". It was claimed that the appellant was actively involved in their lives and that they were of an age where they needed supervision and guidance. Their mother was unable to keep up with their needs and demands and that his wife and children could not visit and live with him in Pakistan due "to their serious commitments and specific circumstances".

16. Permission to appeal was granted by FTTJ Haria in the following terms:

> "… the grounds assert that the judge erred in failing to consider the human rights of the appellant and his children.
>
> The appellant is a Pakistani national. On 25 February 2016 the appellant applied for family permit on the basis that he was entitled to a derivative right of residence as a primary carer of two British citizen children. On 1 April 2016 the respondent refused the application and its refusal decision was confirmed by the ECM.…
>
> The appellant is entitled to appeal the decision under regulation 26 of the immigration (EEA) regulations 2006 on the ground that the decision breaches the appellant's rights under the EU treaties in relation to entry to, or residence in the United Kingdom. The appellant is out of country and has the right to appeal the refusal on human rights grounds.

There is an arguable material error of law."

17. Thus the appeal came before the Upper Tribunal. Miss Atcha, who appeared before the First-tier Tribunal appeared before the Upper Tribunal. She confirmed that the grounds of appeal had been drafted/submitted by the appellant. However she confirmed that she was now re-instructed on behalf of the appellant.

18. She submitted that the judge was required to take into account the best interests of the children and that the relevant decision (Chavez-Vilchez) made reference to looking at the overall picture including their age, physical needs and their emotional needs and also the overall picture of both parties. She submitted that the judge had not done that when reaching a decision. She referred the Tribunal to paragraph 23 of the determination in which it was said that the judge accepted the father's evidence that he spoke to his children on the telephone weekends. In addition at paragraph 10 judge set out the oral evidence of the appellant's wife who stated that the children maintained contact via telephone calls when they were at their grandmother's home which lasted for a period of 25 minutes. She further submitted that if entry was permitted he would have shared responsibility for the children and that would be in their best interests. The evidence given by his wife was they had been separated but not divorced.

19. She further submitted that the judge had not taken into account all of the children's needs when reaching a conclusion on their best interests. The judge did not say whether she assessed the grandfather's evidence as credible. The judge did accept the contact was taking place but the father had lived with the children only for a short while.

20. Miss Atcha was asked to confirm the basis upon which it was advanced that the judge had erred in law in the light of the grounds that had been submitted and her earlier submissions. She submitted that the human rights aspect of the appeal should be considered in the light of the decision of Chavez-Vilchez and this included the four people involved (both adults and two children). She then made reference to Article 8 on the basis that he had a family life with the children the children needed him in the United Kingdom. She submitted that it was difficult for him to obtain an order for contact in the UK. When asked to set out the jurisdiction to support her submissions, Miss Atcha stated that she could not provide any further submissions.

21. Mr Jarvis on behalf of the respondent made reference to the grant of permission. He submitted that there had been a fundamental misunderstanding set out in paragraph 5 and that the judge granting permission had failed to set out what the error of law was in the decision or why any such error was arguable. He submitted that paragraph 5 was wholly unclear and that if the judge was stating that regulation 26 is an automatic key to obtaining permission to appeal that was a complete misunderstanding.

22. He submitted that if paragraph 5 was referring to Article 8, there had been not been a refusal of a human rights claim and that the application made by the appellant was under the EEA regulations for a family permit on the basis of a derivative right of residence. The entry clearance officer who was the decision maker considered that application under the relevant EEA regulations and not under Article 8. Whilst the ECM made reference to this, it is the decision of the ECO that is relevant. There had been no section 120 notice filed and there for was no jurisdiction to consider human rights as the FTTJ stated at paragraph 24.

23. As to the decision made under the EEA regulations, he submitted that it was plain at paragraph [21] that the judge had applied the decision in Chavez-Vilchez and that the decision did not change the argument in Zambrano and whether the EU child was compelled to leave the UK. He submitted that the decision in Chavez-Vilchez added to that test and that an enquiry must be made by looking at the substance of the caring arrangements for the relevant children and also considering their best interests. At paragraph [21] the judge considered the nature of the relationship between the third country national (the appellant) and the relevant children and whether it led to any compulsion and therefore if there was no other choice for the child to leave the UK in reality. It was plain from reading the determination of paragraphs 21-24 that the judge did acknowledge that test and applied it on the factual basis that she had found.

24. In the light of the evidence, he submitted, it was difficult to see how the judge could have reached any other conclusion. The judge made reference to the earlier findings of the FTTJ in 2009 and also considered the mothers evidence, which was new evidence, at paragraph 12. That made it clear that she was the primary carer; she was responsible for their day-to-day care and made the decisions concerning the children including that relating to their education. She did not want the appellant to live with them if he was granted a family permit stating that they would have to build up any relationship and see how it went. The judge found at [20] that the appellant's removal to Pakistan did not cause children to have to leave the EU and that there had been "no evidence to suggest that the family are now considering sending them to live with their father as they are unable to continue living in the EU without him." At [19] the judge had found that the children live with their mother since birth without any physical contact with the appellant since his removal in 2010 and that his relationship in 2009 was described as "remote" and one that could be maintained at an equivalent level by visits, telephone calls and letters" which had been the position since 2010. He had not provided the family financially and had not arranged them to visit him in Pakistan with or without their mother. He had not visited the UK.

25. Mr Jarvis submitted that those findings were open to the judge to make and were inevitable on the evidence that was provided. She did apply the decision in Chavez-Vilchez and made an assessment of the best interests. The judge made reference to the "striking lack of evidence"; that there

was no evidence from the children themselves aged 14 and 12, and the contact consisted of calls, cards and gifts. There was no evidence that the children had suffered as a consequence of his absence but their emotional development had been adversely affected.

26. In conclusion he submitted the grounds amount to a disagreement with the findings of fact made by the judge. It is not said that the judge misunderstood any of the evidence that in essence disagreed with the conclusions. He further submitted that the case now put by Miss Atcha on behalf of the appellant was that the judge had not applied Chavez-Vilchez but that was not reflected in the determination.

Discussion:

27. The issue that the judge was required to resolve was whether the appellant was the primary carer of the two children and whether they would have to leave the UK if the appellant's application for a family permit under the regulations was unsuccessful. The judge noted that it was clear that the appellant had made an application for a family permit relying on EEA rights and his relationship with his British children.

28. The judge reminded herself of the 2006 regulations which set out the relevant criteria to be satisfied as confirmed in the case of Zambrano. The judge also found the children's mother was an "exempt" person under regulation 16 (7) and thus the appellant could not succeed with an argument under the regulations that he shared parental responsibility with the mother of the children. He must show that he is the primary carer. Further on in the determination the judge made reference to the decision of Chavez-Vilchez (as cited) at paragraphs 21 onwards, and the necessary assessment of whether there was a relationship of dependency between the third country national parent and the relevant child and so taking into account the best interests of the child concerned including the age, the children's physical and emotional development, the extent of their emotional ties to the EU parent and a third country national parent and the risks which separation from the latter might entail for the child's equilibrium.

29. It is submitted on behalf of the appellant the judge failed to make an assessment of the best interests of the children and the parents as referred to in the decision of Chavez-Vilchez. Miss Atcha did not refer the Tribunal to the decision itself or any part of that judgment but relied upon the generalised submissions in relation to the decision.

30. To consider those submissions it is necessary to set out the findings of fact made by the judge and the nature of the evidence that was before her.

31. The findings of fact can be summarised as follows:

1. It was undisputed that the children had lived with their mother since their birth and without any physical contact with the appellant since his removal in 2010 nearly 7 years ago.
2. The parties separated in 2005 and the children stayed with their mother.
3. In a decision dismissing the appellant's previous appeal in 2009 his relationship with the children was described as "so remote that it is not a relationship that necessitates his living in the UK but is one that could be maintained at an equivalent level by visits, telephone calls and letters."
4. The appellant does not provide for the family financially.
5. The appellant has not arranged for the children to visit him in Pakistan, with or without their mother.
6. It had not been argued that he had unsuccessfully applied for entry clearance to visit them in the UK.
7. It is clear that the children's mother is their primary carer.
8. When the appellant was removed in 2010 it did not cause the children to leave the EU.
9. There is no evidence to suggest that the family are now considering sending them to live with their father as they are unable to continue living in the EU without him.
10. It had been argued in the appeal that it would be in the children's best interests they were looked after by both their parents.
11. Applying the decision in Chavez-Vilchez C-133/15, the judge considered the best interests test, the burden being on the appellant to provide evidence. The judge found that there was a "striking lack of evidence in this appeal to show that it would be contrary to the children's best interests for the application to be refused. Although there was no documentary evidence of contact, save the witness statements, it is accepted that they talked their father on the telephone at weekends at their grandparents. There was no evidence from the children themselves regarding their relationship with their father despite them now being age 14 and 12."
12. The judge found that for the last seven years, the extent of the children's relationship with the father has consist of calls, cards and occasional gifts.
13. The appellant had not provided evidence to show that the children had suffered as a consequence of his absence or, as referred to in Chavez-Vilchez that their emotional development had been adversely affected or their equilibrium will be disturbed if the appeal was rejected.

14. The judge noted that if he were granted a family permit, he would not reside with the children and there is no indication that he would become their primary carer in place of their mother.

15. In conclusion, the judge was not satisfied that the appellant was the children's primary carer or that they would be unable to reside in the UK if the appellant was refused a family permit and that he did not meet the criteria of regulation 16 (4A).

16. The judge found that the children's best interests, applying section 55 of the 2007 Act, had been considered within the context of regulation 16 are set out in the decision of Chavez-Vilchez.

17. The judge noted that the appellant could apply for family permit seeking recognition of his EEA rights and thus in the light of the decision of Amirteymour and others (EEA appeals; human rights) [2015] UKUT 466 (IAC) article 8 rights had not been considered independently of the EA issues raised.

32. In the decision of Chavez-Vilchez and others v Raad van Bestuur van de Sociale verzekeringsbank and others (case C-133/15) the CJEU were considering the circumstances in which a Dutch national child would, in practice be forced to leave the Netherlands and hence the EU, if the right of residence was refused to their third country national mothers. The CJEU held that it was important to determine which parent was the primary carer of the child and whether there was in fact a relationship of dependency between the child and that parent. As part of that assessment the authorities would take into account the right to respect family life as per Article 7 of the Charter of Fundamental Rights to be read in conjunction with the obligation to take into consideration the best interests of the child. That the other parent, a union citizen, was actually able and willing to take responsibility for the child was a relevant factor, but it was not a sufficient ground for a conclusion that there was not, as between the child and the third-party national parent, such a relationship of dependency the child would indeed be compelled to leave the EU if the third-party national were refused the right of residence. Such an assessment must take into account 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 to both parents and the risks which separation from the third country parent might entail for the child equilibrium. Although the burden of proof was on the third country national to prove that a refusal of the right of residence and oblige the child to leave the EU, it is the competent national authorities to undertake on the basis of the evidence provided by the third country national the necessary enquiries in order to be to assess, in light of all the circumstances, whether the refusal would oblige the child to leave the EU.

33. In my judgment it is plain that the FTTJ properly applied the test set out in the decision of Chavez-Vilchez which she set out at paragraph [21] of the

determination. On the findings of fact made which were in accordance with the evidence, she found there to be no evidence of any relationship of dependency between the third country national parent (the appellant) and the relevant children. The earlier findings of fact set out in the decision of the judge in 2009 demonstrate that the parties had separated in or about 2005 (when the eldest child was approximately two and the other child had recently been born in 2005). At the time of the hearing in 2009 the judge found the relationship between the children and the appellant to be "remote". Following his removal in 2010, the children of had no physical contact with the appellant and the evidence before the judge demonstrated that the only contact that there had been was by way of telephone calls (see paragraph [23]). The judge accepted that he has sent cards and occasional gifts although no evidence had been presented of this during the appeal (see paragraph [10]). The appellant did not provide for the family financially and they had not visited him in Pakistan with or without their mother. Nor had the appellant visited them in the UK. There was no evidence of any financial or emotional dependency upon the appellant by the appellant's former partner or any of the children. Importantly, there was also no evidence that the appellant shared the care of the children as was asserted during the hearing. The evidence before the Tribunal was that the mother of the children was not only responsible for their day-to-day care but also decision-making relating to their upbringing (see paragraph [12]).

34. Contrary to the submission made by Miss Atcha the judge did consider the best interests of the children as set out in the determination of paragraphs [22-24] and made express reference to S55 of the 2007 Act. The judge had been provided with little evidence concerning the children themselves and as she observed at [23] there had been a striking lack of evidence in the appeal to show that it would be contrary to the children's best interests for the application to be refused. There had been no documentary evidence to support the level of contact provided by the appellant's ex-partner (see [23]) and importantly despite the children's ages there was no evidence the children. The judge took into account whether their mother may have wished to shield them from any disappointment but considered that it could have been properly addressed by her. There is no evidence to show that the children had suffered as a consequence of the absence of their father or that their emotional development had been adversely affected or the equilibrium would be disturbed if the appeal was refused. There was no extraneous evidence of any kind, not even school reports.

35. Against that evidential background I am satisfied that the judge did properly consider the children's best interests and the circumstances of the respective adults concerned in line with the decision of Chavez-Vilchez. As the decision in Patel v SSHD [2017] EWCA Civ 2028 sets out, the decision in Chavez-Vilchez represented no departure from the principles of EU law laid down in Zambrano. As Miss Atcha submitted, the decision referred to the right to respect for private and family life laid down in Article 7 of the EU Charter of Fundamental Rights and also the

obligation to take into consideration the child's best interests which is recognising Article 24 (2) the Charter. When the determination is read as a whole, I am satisfied the judge properly had regard to those matters when reaching her overall decision. I am not satisfied that the submissions made demonstrate any error of law in the determination of the First-tier Tribunal.

36. The generalised grounds submitted by the appellant are, as Mr Jarvis submits, are no more than a disagreement with the decision. They do not assert that the judge misunderstood the evidence but simply offers a different view. The grounds claim that the appellant was actively involved in their lives and that they were of an age where they needed supervision and guidance. Their mother was unable to keep up with their "needs and demands" and that his wife and children could not visit and live with him in Pakistan due "to their serious commitments and specific circumstances". None of those assertions were the subject of any evidence before the FTT and on the findings of fact, there had been no evidence to show they required the appellant's "supervision or guidance" indeed to the contrary, the evidence of their mother was that she not only carried out their day to day care but also took the decisions relating to their upbringing. Consequently the grounds do not demonstrate any error of law in the decision.

37. Miss Atcha did not advance any submissions relating to Article 8 save for those raised in relation to the decision of Chavez-Vilchez as set out above. However for the reasons set out by Mr Jarvis, it was open to the judge to reach the decision that the human rights aspects of the decision could be considered within the context of the EEA regulations (see paragraph [24] applying the decision of **Amirteymour v Secretary of State for the Home Department [2017] EWCA Civ 353**).

Decision:

38. The decision of the First-tier Tribunal did not involve the making of an error on a point of law. The appeal is dismissed and the decision shall stand.

Signed Date: 4/4/2018

Upper Tribunal Judge Reeds