Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: UI-2021-001767
& UI-2021-001796
EA/04456/2020 & EA/00386/2021

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 25th August 2022	**On 14th October 2022**

Before

UPPER TRIBUNAL JUDGE KEITH

Between

'CB' (JAMAICA)
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, the appellant is granted anonymity. No-one shall publish or reveal any information, including the name or address of the appellant, likely to lead members of the public to identify the appellant. Failure to comply with this order could amount to a contempt of court. The anonymity direction is made as the decision discusses the personal health and welfare needs of minor children.

Representation:

For the appellant: The appellant represented himself.
For the respondent: Ms S Cunha, Senior Home Office Presenting Officer

DECISION AND REASONS

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Introduction

1. This is an appeal by the appellant against the decision of First-tier Tribunal Judge Traynor (the "FtT"), promulgated on 5th November 2021, by which he dismissed the appellant's appeals against two decisions. The first decision was a refusal on 18th September 2020 of the appellant's application for an EEA derivative residence card as the primary carer of a British citizen child living in the UK under the Immigration (EEA) Regulations 2016. The second decision was a refusal on 19th November 2020 of the appellant's application for leave to remain under the EU Settlement Scheme, under Appendix EU of the Immigration Rules.

2. In essence, in the first decision, the respondent accepted that the appellant was the primary caregiver for his British citizen child but that as he was not the sole carer. The child would not be compelled to leave the UK if the appellant were required to leave and return to his country of origin, Jamaica, indefinitely. The child's mother (who is also the appellant's partner) was also a joint carer with the appellant of their child, and she was a British citizen. There were no medical reasons why his partner would be unable to care for the child. In her first decision, the respondent invited the appellant to make an application by reference to his Article 8 ECHR rights, if he wished to do so. The second decision reiterated the same.

The FtT's decision

3. The FtT considered the appellant's evidence and submissions that due to the close family unit which he formed with his partner and child, his partner would feel compelled to join him in Jamaica, in the event of his leave to remain being refused. At §21 of his decision, the FtT identified and agreed with the appellant that the sole issue to be determined was whether refusal would result in the appellant's child being compelled to leave the UK. The FtT noted the appellant's evidence that he was unable to afford to pay the fee to make an application under Article 8, of approximately £2,000 and there was no guarantee that that application would be successful. The appellant submitted that it was unfair that he forced to make an application outside the Rules under Article 8, when he had "Zambrano" rights under the 2016 Regulations.

4. At §42, the FtT considered the appellant's reference to the case of Shah and Patel v SSHD [2019] UKSC 59. Nevertheless, at §46, the FtT analysed and rejected the appellant's assertion that in the event of refusal of his leave to remain, the whole family, including the British citizen child, would be compelled to leave the UK. The FtT concluded that if the appellant's partner and child left to be with the appellant in Jamaica, it would be out of choice and not compulsion (§49). Crucially, there remained the option for the appellant to make an application by reference to Article 8. The FtT concluded at §50 that it was unlikely that the appellant's spouse would disrupt her older child's support network (a child by a different father with special educational needs) without encouraging the appellant to apply by

reference to Article 8. The FtT was further convinced of this by the fact that the appellant's partner is pregnant with a third child. At §52, the FtT concluded that the relevant British citizen child would not be compelled to leave the UK. The application had been made with a view to avoiding the fees involved in making an article 8 application.

5. Having considered the evidence as a whole, the FtT dismissed the appeals.

The grounds of appeal and grant of permission

6. The appellant lodged grounds of appeal which are essentially that the FtT erred in law in focusing his potential rights under Article 8 ECHR, when that was beside the point as to whether, in the context of Shah and Patel, he was a Zambrano carer. Moreover, the barriers to the appellant applying under Article 8 ECHR had been ignored. The grounds of appeal further asserted that the FtT had been dismissive of the appellant, when considering the appellant's oral submissions. The FtT had also failed to consider the best interests of the appellant's child, or even consider the appellant's child interests as primary in his reasons.

7. First-tier Tribunal Judge Gibb granted permission on 18th December 2021. The grant of permission was not limited in its scope.

The hearing before me

8. At the outset, notwithstanding that the appellant is a litigant in person, I pay tribute to the quality of his oral submissions. His submissions were clear, relevant and engaged with complex legal issues. On attending the Tribunal, I provided to him copies of the Shah v Patel decision, as well as copies of the cases of SSHD v RM (Pakistan) [2021] EWCA Civ 1754; Velaj v SSHD [2022] EWCA Civ 767 and Akinsanya v SSHD [2022] EWCA Civ 37. In view of the fact that the appellant was a litigant in person, Ms Cunha agreed that she would make the respondent's submissions first, to which the appellant would have the opportunity to respond.

The respondent's submissions

9. The Secretary of State submitted that the FtT had not erred in law. Turning first to the case of Akinsanya, Ms Cunha relied in particular on §§54 to 56. I cite the relevant passages below:

> *"54. At first sight there is some force in Mr Cox's position that a right arising under the EU Treaty must exist independently of any domestic rights which purport to reproduce it or which are to substantially the same effect. However, that does not in my judgment correspond to the analysis of the nature of Zambrano rights adopted by the CJEU. It is clear from Iida and NA that the Court does not regard Zambrano rights as arising as long as domestic law accords to Zambrano carers the necessary right to reside (or to work or to receive social assistance). To put it another way, where those rights are accorded what I have called "the Zambrano circumstances" do not obtain.*

> 55. *That analysis is perfectly sustainable at the theoretical level. As the Court recognises (see para. 72 of the judgment in Iida) the right of third country nationals to reside in a member state is normally a matter for that state. Zambrano rights are for that reason exceptional. They are not typical Treaty rights, since they arise only indirectly and contingently in order to prevent a situation where EU citizen dependants are compelled to leave the EU. That being so, it makes sense to treat them as arising only in circumstances where the carer has no domestic (or other EU) right to reside (or to work, or to receive necessary social assistance).*
>
> 56. *I do not believe that that approach is inconsistent with Sanneh. In that case, unlike this, the claimant had no right to reside under domestic law, and the issue was whether her Zambrano right to reside arose prior to the point of imminent removal. It was to that issue that the observations of Elias LJ on which Mr Cox relies were addressed. His conclusion was, in effect, that the Zambrano circumstances arose as soon as the claimant had no leave to remain and was thus (as a matter of domestic law) under a duty to leave and liable to removal – see in particular para. 169. The Court was not considering a case where the claimant enjoyed leave to remain as a matter of domestic law. In such a case, on the CJEU's analysis, the Zambrano circumstances do not obtain, and Elias LJ's observations have no purchase.".*

10. Ms Cunha accepted that the appellant's role as a primary carer had never been disputed. However, as per the case of Akinsanya, Zambrano rights did not give the appellant the same rights as other EU rights. Ms Cunha accepted that the Zambrano child's primary interests had to be considered and although not expressly referred to, it was tolerably clear that the FtT had considered the child's best interests. The FtT had considered the evidence and had concluded that the child would not be compelled to leave the UK if the appellant left the UK for an indefinite period, as the FtT had found at §48. Crucially, there was a requirement of compulsion, as the case of RM (Pakistan) made clear. That was an objective test and was not merely one that could succeed based on the claim to that effect of a family member.

11. With regard to any allegation of impropriety in conduct of the hearing, the bar for bias or impropriety was high. There were no further details of this allegation and the sufficiency of the FtT's reasoning was clear. In the circumstances both of the grounds should fail.

The appellant's response

12. The appellant responded by pointing out that he was not in the same situation of Akinsanya. Akinsanya and Velaj concerned individuals who had the right under the Immigration Rules to remain in the UK. He did not and there was no way of knowing at the time whether he would have obtained his leave based on his Article 8 rights.

13. The appellant, to his credit, revealed that he had in fact subsequently made an application for leave to remain based on his Article 8 rights which had been granted and he had now had leave to remain in the UK, but he regarded it as unlawful that he should have been put to the effort of doing so and applying for a fee waiver in circumstances where he had rights as a Zambrano carer. The consequence of being forced down the Article 8 route was that he had been treated as an overstayer when this was not true. The respondent had been forced to reissue its guidance to Zambrano carers on 13th June 2022 following the Court of Appeal decision in Akinsanya. Even at the date of the respondent's decision in respect of the appellant, the respondent would have been aware of the High Court decision of Mostyn J. The upshot was that the appellant, in contrast to Akinsanya, did not have a right under an alternative route, merely the possibility based on an application outside the Rules by reference to Article 8 ECHR. His case clearly fell outside Akinsanya. The appellant believed that his Zambrano rights arose as a result of the case of Chavez-Vilchez v Raad van bestuur van de Sociale verzekeringsbank [Case C-133/15]. As per the authority of Patel, there was a difference between on the one hand those asserting rights as a Zambrano carer of adults, as distinct from children. The first question was whether there was dependency and then whether the Zambrano child would be compelled to leave. This depended on a whole host of factors including, critically, the child's best interests which the FtT had failed to consider. Where the appellant did not have the right to remain in the UK under a different route it was beside the point to say that he could apply and therefore dismiss his Zambrano rights almost out of hand. The post-Akinsanya policy already referred to confirmed that the respondent would continue to consider Zambrano applications.

Discussion and conclusions

14. I turn first to the case of Patel and Shah. This discussed the derivative residence right which arose under the then Immigration (EEA) Regulations 2006, where the relevant British citizen would be unable to reside in the UK or in another EEA state. The concept of being unable to reside was drawn broadly. The facts of Shah and Patel were distinct, as Mr Shah was a primary carer of his infant son who was a British citizen together with his wife who had British nationality and they all lived together. Mrs Shah worked full-time to earn an income and the son remained with Mr Shah. In contrast, Mr Patel was a carer for his parents, both of whom had significant health issues. At §16, the Court of Appeal discussed the limited nature of Zambrano rights. There must be a relationship of dependency where the citizen would be obliged in practice to leave the territory of the EU, as per the case of Chavez-Vilchez. The Court recognised at §17 the distinction between dependence in the case of an adult EU citizen and that of a child. Dependency with an adult would only arise in exceptional circumstances. The same was not true of a child. This was reinforced by the decision in KA v Belgium [Case C-82/16]. In that case cited by the court in Patel and Shah at §23, the fact that another EU parent was able and willing to assume sole responsibility for the primary day-to-day care of a child was a relevant factor, but that is not itself a sufficient ground for concluding that

there is not a relationship of dependency such that the child would be compelled to leave the territory of the EU. 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 EU parent and to the third country national parent and the risks which separation from the latter might entail for that child's equilibrium (Chavez-Vilchez, §71).

15. As the Court in Patel and Shah noted, a court may conclude, having regard to a child's best interests and the extent of a child's ties in the context of separation where the EU parent was not a primary carer, that a claim of dependency on third country national parents was made out. There was, however no direct analogy with Mr Shah's appeal, where the EU child was living with both parents, with the third country national parent as primary carer; there was a relevant relationship of dependency; and in order to keep the family together it was in the child's best interests to remain with both parents. Mr Shah therefore had a relationship of dependency. The quality of that relationship was relevant to whether the child would be compelled to leave the jurisdiction.

16. However, the Court was also careful to stress at §28 that the outcome of the appeal depended on findings of fact by the FtT in relation to compulsion. The FtT had found as a fact that Mr Shah was a primary carer of his infant son and that he, rather than the mother, had by far the greater role. The FtT concluded that if Mr Shah was not allowed to stay in the country, it accepted the mother's unchallenged evidence that they would move as a family. The FtT went on to conclude that it was the inescapable conclusion that the son would have to leave with his parents and accordingly the requirement for compulsion was met. Consequently, the Supreme Court concluded that the Court of Appeal had erred in introducing a question of whether the son was compelled to leave because it was one of choice and that the British citizen mother was perfectly capable of looking after the child. The overarching question was instead whether the son would be compelled to leave and it was a practical test and not a theoretical set of facts. Mr Shah therefore succeeded, in contrast to Mr Patel.

17. I turn next to consider the case of RM (Pakistan), a carer for somebody with significant disabilities more or less on a full-time basis. In RM, the Court stated:

> *"27. In MS (Malaysia) v Secretary of State for the Home Department [2019] EWCA Civ 580, this court made clear that the test for compulsion is an objective one. The evidence of the British citizen that he or she would feel compelled to leave if the third country national with whom a relationship of dependency exists left indefinitely, or that he or she would definitely leave in those circumstances, could not be conclusive of the issue of whether, on an objective basis, he or she would be compelled to leave".*

At §32, the Court went on to consider the Upper Tribunal's reasoning:

> *"32. Second, the Court underlined that the compulsion test ... must be applied in a practical way. The term 'unable' should not be interpreted to mean that it is physically impossible for the EEA national to remain in the country. It is a question of fact, of whether the individual concerned would in reality leave with his carer…".*

The Court concluded at §44 that the construction and application of the relevant test was now well established. There was a distinction between adults and children and nothing short of compulsion to leave was enough. The question to be answered was whether the relevant facts as a whole, viewed objectively, crossed the threshold between "choice" to leave and "compulsion" to leave. Whilst the British citizen's objective intentions were not irrelevant they need to be weighed as part of a global objective assessment and could not be determinative.

18. Returning to the FtT's findings which began at §44, the FtT correctly reminded himself that the sole issue was whether the appellant's child would be compelled to leave the UK. I accept that there was no express reference to the child's best interests although there had been express reference to Shah and Patel at §42. The FtT was acutely conscious at §45 of the appellant's assertion that he fundamentally disputed that it would be possible for the family unit to continue without them being together. At §§46 to 48, the FtT considered the appellant's ability to apply for leave to remain by reference to Article 8 ECHR, as a relevant factor in considering what the family would decide to do; and the appellant's partner's evidence. The FtT also considered that the appellant was not the only primary carer, but a joint one with his partner. At §50, the FtT concluded that fundamental to her circumstances was that her elder child had significant disabilities and that he required ongoing support and was settled in school. On the balance of probabilities, the FtT found that it was unlikely that the appellant's partner would disrupt her elder child's circumstances without encouraging the appellant to make a full application under Appendix FM of the Rules and at least if refused, he would have the right of appeal. The FtT went on to conclude that where both the appellant and his partner were caring and responsible parents it was unlikely they would jeopardise the care and welfare of the elder child by removing the family to a position of complete uncertainty. The consequence was that the FtT found as a fact that objectively, the younger British citizen child would not be compelled to leave the UK.

19. I accept that the FtT's analysis implicitly recognised the best interests of the family to remain together, as the appellant had submitted, while also recognising the facts holistically, including the elder sibling who had a different father and who had a need for ongoing support based in the UK. That was an analysis which was unarguably open to the FtT to make and is not flawed because of a reference to the appellant's ability to apply under Appendix FM. That was part of the factual analysis and one that is ultimately borne out by the fact that the appellant did so.

20. I accept the appellant's contention that merely because he had the possibility of applying for a right this should not deprive him of the right as a Zambrano carer. However, the question for the FtT was whether his son would be compelled to leave. Given the specific factual circumstances of this case, the FtT concluded that the British citizen child would not be compelled to leave. In the circumstances, the FtT concluded that the appellant was not a Zambrano carer and that was a finding that was open to the FtT to make. There was no error of law.

21. The ground in relation to the FtT being dismissive of the appellant's submissions was not developed before me. In any event, it is not consistent with the very detailed analysis of those submissions in the FtT's decision. That ground discloses no error of law.

22. Accordingly, the appellant's appeal fails and is dismissed.

Decision on error of law

23. I conclude that there are no errors of law in the FtT's decision. Therefore, the appellant's challenge fails and the FtT's decision shall stand.

Notice of Decision

The decision of the First-tier Tribunal did not involve the making of an error on a point of law.

The decision of the First-tier Tribunal stands.

The anonymity directions apply.

Signed J Keith Date: 9th September 2022

Upper Tribunal Judge Keith