



Neutral Citation Number: [2022] EWCA Civ 767

Case No: CA-2021-000066

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL
(IMMIGRATION AND ASYLUM CHAMBER)
UPPER TRIBUNAL JUDGE RINTOUL AND
UPPER TRIBUNAL JUDGE BLUNDELL
HU/12362/2017

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 31/05/2022

Before :

LADY JUSTICE KING
LADY JUSTICE ANDREWS
and
LADY JUSTICE WHIPPLE

Between :

MR ALBAN VELAJ **Appellant**
- and -
THE SECRETARY OF STATE FOR THE HOME **Respondent**
DEPARTMENT

Simon Cox and Pierre Georget (instructed by **Malik & Malik Solicitors**) for the **Appellant**
Colin Thomann (instructed by **The Treasury Solicitor**) for the **Respondent**

Hearing date: 17 May 2022

Approved Judgment *This judgment was handed down by the Judge remotely by circulation to the parties' representatives by email and release to The National Archives. The date and time for hand-down is deemed to be 2pm on Tuesday 31st May 2022.*

LADY JUSTICE ANDREWS:INTRODUCTION

1. This appeal concerns the correct interpretation of Regulation 16(5)(c) of the Immigration (European Economic Area) Regulations 2016 (“the 2016 Regulations”) which defines the circumstances in which a third country national who is the primary carer of a British Citizen (usually, though not invariably, a child) has a derivative right to reside in the UK. The 2016 Regulations ceased to have effect, save for certain transitional purposes, on 31 December 2020. Despite the fact that the 2016 Regulations and the principles of EU law reflected in them are no longer applicable, for convenience I will use the present tense in my analysis of them.
2. Regulation 16 is entitled “Derivative right to reside.” The criteria set out in paragraphs (2) to (6) of that Regulation reflect situations that were established by different lines of EU jurisprudence to give rise to rights of residence, in order to give effect to the fundamental freedoms conferred on EU citizens by the Treaty on Functioning of the European Union (“TFEU”). Whilst those rights may also be invoked by citizens of the European Economic Area (“EEA”), for simplicity I will refer only to EU citizenship.
3. Paragraph (5) is concerned with the rights established by the well-known decision of the Grand Chamber of the Court of Justice of the European Union (“CJEU”) in *Ruiz Zambrano v Office national de l’emploi* (Case C-34/09) [2012] QB 265, (“*Zambrano*”) as subsequently re-stated and developed in *Chavez-Vilchez v Raad van Bestuur van de Sociale Verzekeringsbank* (Case C-133/15) [2018] QB 103 (“*Chavez-Vilchez*”). For convenience, I will adopt the expressions “*Zambrano* rights” and “*Zambrano* carer” to denote, respectively, the derivative rights established under the *Zambrano* jurisprudence, and a primary carer who is entitled to such rights under EU law.
4. *Zambrano* concerned a family living in Belgium. The parents were third country nationals (of Colombia) who had unsuccessfully claimed asylum in Belgium, but, because of a non-refoulement order, could not be forcibly repatriated. Two of their children were Belgian citizens, and therefore citizens of the EU by virtue of Art 20 of the TFEU. The father had worked for a period but then lost his job. He was denied unemployment benefits on the basis that he had no work permit, and therefore no right to work in Belgium at the material time. He challenged the refusal before an employment tribunal, which sought a preliminary ruling from the CJEU on the question whether the rights of the EU citizen children under Art 20 and Art 21 TFEU conferred a right of residence on a third country national parent upon whom they were dependent, and thus exempted him from having to obtain a work permit.
5. The CJEU answered that question in the affirmative. It held that Art 20 of the TFEU precludes national measures which have the effect of depriving EU citizens of the genuine enjoyment of the substance of the rights conferred upon them by virtue of their status as EU citizens. Unless the father, who was the family breadwinner, enjoyed the right to live and work in Belgium, he and his wife would have to leave the EU, and the children would in practice have to leave with their parents, which would deprive them of the substance of their rights as EU citizens under Articles 20 and 21.

6. *Chavez-Vilchez* concerned EU citizen children who were living with their (third country national) mothers in the Netherlands. The fathers, from whom the mothers were separated, were Dutch nationals, who provided the children with varying degrees of support. The Dutch authorities had held that the mothers were not entitled to *Zambrano* rights (including, in this case, certain state benefits) unless they could show that the fathers were unable to care for the children.
7. The CJEU held that this approach was too simplistic. The fact that the other parent, who was an EU citizen, was willing to assume sole responsibility for the primary care of the EU citizen child was a relevant factor, but it was not sufficient, in and of itself, to conclude that there was not such a degree of dependency between the child and the third country national parent that the child would be compelled to leave the EU if that parent were denied a right of residence. In deciding whether the child would be compelled to leave, account had to be taken of all the specific circumstances, including the age of the child, their physical and emotional development, their emotional ties to each parent and the risks to the child's well-being that separation from the third country national parent would entail.
8. In *Patel v Secretary of State for the Home Department* [2020] 1 WLR 228 Lady Arden JSC (with whom all the other members of the Supreme Court agreed) succinctly described the reasoning underpinning the *Zambrano* jurisprudence at [22]:

“What lies at the heart of the *Zambrano* jurisprudence is the requirement that the Union citizen would be compelled to leave Union territory if the TCN [third country national], with whom the Union citizen has a relationship of dependency, is removed.”

Lady Arden also observed at [30] that:

“The test of compulsion is ... a practical test to be applied to the actual facts and not to a theoretical set of facts.”

9. So far as is material, Regulation 16 provides that:
 - (1) A person has a derivative right to reside during any period in which the person –
 - (a) is not an exempt person; and
 - (b) satisfies each of the criteria in one or more of paragraphs (2) to (6).
 - (5) The criteria in this paragraph are that –
 - (a) the person is the primary carer of a British Citizen (“BC”)
 - (b) BC is residing in the United Kingdom; and
 - (c) BC would be unable to reside in the United Kingdom or in another EEA State if the person left the United Kingdom for an indefinite period.

- (8) A person is the “primary carer” of another person (“AP”) if-
- (a) the person is a direct relative or a legal guardian of AP;
 - and
 - (b) either –
 - (i) the person has primary responsibility for AP’s care; or
 - (ii) shares equally the responsibility for AP’s care with one other person.
- (9) In paragraph ... 5(c), if the role of primary carer is shared with another person in accordance with paragraph 8(b)(ii) the words “the person” are to be read as “both primary carers.”
10. Thus if, as in the present case, the person claiming a right of residence under Regulation 16(5) is a primary carer sharing his caring responsibilities with another primary carer, the condition in Regulation 16(5)(c) that must be fulfilled is that:
- “BC would be unable to reside in the United Kingdom or in another EEA State *if both primary carers left the United Kingdom for an indefinite period.*” [Emphasis added.]
11. Regulation 16(7) defines an “exempt person” for the purposes of Regulation 16(1)(a). The categories of exempt persons include British Citizens, and persons with Indefinite Leave to Remain (“ILR”).
12. Finally, Regulation 16(12) provides that a derivative right to reside will not arise where (broadly speaking) decisions are made to remove or exclude the primary carer on grounds of public policy, public security or public health or misuse of rights. In the present case, the First-tier Tribunal held that the requirements of that provision were not satisfied, and that aspect of its decision is no longer in issue.
13. The issue which arises on this appeal is whether a person deciding whether the requirements of Regulation 16(5)(c) are fulfilled must consider whether the British Citizen dependant would be unable to reside in the UK on the *assumption* that the primary carer (or both primary carers, as the case may be) will leave the UK for an indefinite period (irrespective of whether the assumption is correct); or whether the decision-maker must consider what the impact on the British Citizen would be if *in fact* the primary carer (or both primary carers) *would* leave the UK for an indefinite period.
14. The *Zambrano* jurisprudence and the EEA Regulations, including Regulation 16, were recently considered by this Court in *R(Akinsanya) v Secretary of State for the Home Department* [2022] EWCA Civ 37, [2022] 2 WLR 681, (“*Akinsanya*”). The leading judgment in that case (with which Bean LJ and I agreed) was given by Underhill LJ. In the present case, Mr Cox, who appeared with Mr Georget on behalf of the appellant, Mr Velaj, relied heavily upon the decision in *Akinsanya*, which he submitted was determinative of the issue in this appeal. It will therefore be necessary

for me to consider *Akinsanya* in some detail, in order to explain what the case did (and more importantly what it did not) decide.

15. For the reasons more fully set out below, I am not persuaded that the language of Regulation 16(5)(c) compels the decision-maker to make a purely hypothetical (and counterfactual) assumption.

BACKGROUND

16. Mr Velaj is a national of Kosovo. He entered the UK in 1998, at the age of 21. His asylum claim was refused, but he was granted exceptional leave to remain. His wife and children are British citizens, but Mr Velaj was refused citizenship on account of his criminal record. Mr and Mrs Velaj are joint primary carers of their children, the youngest of whom, their son, is now 16.
17. On 17 May 2011 Mr Velaj was convicted of smuggling cocaine and sentenced to 12 years' imprisonment. He was released on licence on 26 February 2017 and has lived with his family ever since. On 12 July 2016, the Respondent ("the SSHD") made a deportation order against Mr Velaj under s.32(5) of the UK Borders Act 2007. On 2 October 2017, she remade a decision to refuse his human rights claim under Article 8 ECHR. Mr Velaj appealed to the First-tier Tribunal.
18. The FtT judge heard evidence from Mr Velaj, his wife and his two elder daughters. In her evidence, Mrs Velaj said that she would not go to Kosovo with her husband if he were deported, as she could not leave his mother and the children in the United Kingdom. Nevertheless, the appeal succeeded. The judge found that the couple's son would be unable to reside in the UK or another EEA state if both his parents left the UK for an indefinite period and consequently Mr Velaj had a derivative right of residence under Regulation 16(5). This brought him within the third of the exceptions set out in s.33 of the UK Borders Act 2007. The judge also held that there were "very compelling circumstances" sufficient to overcome the public interest in Mr Velaj's deportation for the purposes of Section 117C(6) of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act") and upheld his appeal on human rights grounds.
19. The SSHD appealed to the Upper Tribunal (UT Judge Rintoul and UT Judge Blundell). In a decision promulgated on 3 June 2021, the Upper Tribunal set aside the decision of the First-tier Tribunal for a material error of law. On the issue of construction of Regulation 16(5)(c), they accepted the SSHD's submission that a purposive construction should be adopted to legislation which was designed to implement EU law. They held that the question whether a child would be compelled to leave is a practical test to be applied to the actual facts; that is a necessary corollary of the use of the word "unable" in Regulation 16(5). Regulation 16(5) therefore cannot be construed as requiring an entirely theoretical assumption of both primary carers leaving the UK. The UT also held that the construction contended for by Mr Velaj's legal representatives would be contrary to the intent and effect of s.117B(6) and s.117C(5) of the 2002 Act.
20. Having concluded that Mr Velaj did not have a derivative right of residence, the UT re-made the decision on his appeal against the refusal of his human rights claim, following an oral hearing at which they too heard evidence from Mr Velaj, his wife, and their two daughters. In the course of a very careful and nuanced consideration of

all the relevant factors, they accepted that Mrs Velaj would not go to live in Kosovo and found that it would not be reasonable to expect her to do so. They concluded that, although the effects of Mr Velaj's deportation would be harsh on the family and indeed distressing, given the gravity of Mr Velaj's offending it was nonetheless proportionate. They therefore dismissed Mr Velaj's appeal.

21. On 26 January 2022, I granted Mr Velaj permission to appeal solely on the issue of construction of Regulation 16(5)(c).

HISTORY OF THE REGULATIONS

22. The language of Regulation 16(5)(c) has been consistent (though not identical) in its different iterations. The predecessor to Regulation 16(5) was Regulation 15A(4A) of the Immigration (European Economic Area) Regulations 2006 (SI 2006/1003) ("the 2006 Regulations") which was introduced, with effect from 8 November 2012, by the Immigration (European Economic Area) (Amendment) (No 2) Regulations 2012 (SI 2012/2560) ("the Amendment Regulations").
23. Regulation 15A had itself been enacted only a few months earlier, to make provision for the derivative rights recognized in *Chen v Secretary of State for the Home Department* (Case C-200/02) [2005] QB 325, *Ibrahim v Harrow London Borough Council* (Case C-310/08) and *Teixeira v Lambeth London Borough Council* (Case C-480/08) [2010] PTSR 1913. *Chen* concerned the situation where an EU citizen under the age of 18 would be unable to exercise their right to move to and live in a different EU member state unless their primary carer (a third country national) were also granted a right to reside in that state. *Ibrahim* and *Teixeira* concerned the situation where a child of an EU citizen who worked (or had worked) in the relevant member state would be unable to continue to be educated in that state unless their (third country national) primary carer were granted a right to reside there. Those rights were provided for by, respectively, Paragraphs (2), (3) and (4) of Regulation 15A of the 2006 Regulations, which became Paragraphs (2), (3) and (4) of Regulation 16 of the 2016 Regulations.
24. The qualifying criteria under Regulation 15A(2) (which addresses *Chen*) include, in Regulation 15A(2)(b)(iii) that the EU citizen child for whom P is the primary carer "would be unable to remain in the UK *if P were required to leave*" (my emphasis). Similar language is also used in Regulation 15A(4)(b) (which addresses *Ibrahim/Teixeira*): "the relevant person would be unable to continue to be educated in the United Kingdom *if P were required to leave*".
25. Regulation 15A(1) of the 2006 Regulations originally provided that the derivative rights under that Regulation could only be claimed by a person ("P") "who is not entitled to reside in the United Kingdom as a result of any other provision of these Regulations." However, the Amendment Regulations introduced the concept of "an exempt person" and amended Regulation 15A(1) so that derivative rights could only be claimed by a person "who is not an exempt person" (as defined in what then became Regulation 15A(6)(2)(c)). That definition is the same as appears in the 2016 Regulations.
26. Paragraph (4A), introduced by the Amendment Regulations, provided that:

“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.*”

The draftsman therefore chose to repeat the phrase already adopted in the provisions of the Regulations concerned with other derivative rights.

27. Both the Explanatory Note to the Amendment Regulations, and the Explanatory Memorandum which was laid before Parliament together with those Regulations, state that the amendment which introduced Regulation 15A(4A) was to give effect to the judgment in *Zambrano*. The Explanatory Memorandum states that:

“7.2 ... In the United Kingdom the judgment enables the primary carer of a British citizen to acquire a right to enter and reside in the UK whilst they remain the primary carer of that British citizen and where the refusal of such a right would force the British citizen to leave the EEA.

7.3 The amendment regulations give effect to the decision in *Zambrano* by inserting a new paragraph 4A into regulation 15A of the 2006 Regulations in order to confer a derivative right of residence in the circumstances set out in paragraph 7.2 above.”

28. In its original form, Regulation 15A(7)(b)(ii) precluded P from qualifying as a “primary carer” if the person with whom he or she shared equal responsibility for the care of the British citizen “was entitled to reside in the UK as a result of any other provision of the 2006 Regulations, or who had leave to enter or remain”. The Amendment Regulations made the following substitution:

“[P] shares equally the responsibility for that person’s care with one other person who is not an exempt person.”

The assumption underlying that exclusion was the same as the assumption of the Netherlands authorities which the CJEU regarded as too simplistic in *Chavez-Vilchez*, namely, that if one primary carer has a settled immigration status in the state of residence, the removal or indefinite departure of the other (third country national) primary carer from that state would not compel the child to leave the EU.

29. The Amendment Regulations introduced a new Paragraph 7A and 7B in these terms:

“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 responsibilities are shared *would be required to leave the United Kingdom.*”

7B. Paragraph 7A does not apply if the person with whom care responsibilities are shared acquired a derivative right to reside in the United Kingdom as a result of this regulation prior to P assuming equal care responsibility.”

[Emphasis added].

30. When the 2016 Regulations were enacted, wherever it had appeared in Regulation 15A of the 2006 Regulations the phrase “*if P were required to leave*” was replaced by the phrase “*if the person left the United Kingdom for an indefinite period*”. The replacement removes an element of ambiguity about the word “required”, which might have been understood as referring solely to leaving under legal compulsion, whereas, as the facts of *Zambrano* itself demonstrate, economic compulsion to leave the host state if the derivative right were not granted would suffice. The new wording also makes it clear that this criterion would not be fulfilled if the primary carer only had to leave the UK temporarily. Apart from clarifying those two aspects, it seems clear that the legislator intended that there should be no substantive difference in the meaning of the original and substitute phrases.

31. Regulation 16(8) of the 2016 Regulations as originally enacted defined “primary carer” in similar terms to its predecessor:

“A person is the “primary carer” of another person (“AP”) if-

(a) the person is a direct relative or a legal guardian of AP;

and

(b) either –

(i) the person has primary responsibility for AP’s care; or

(ii) shares equally the responsibility for AP’s care with one other person *who is not an exempt person.*”

[Emphasis added].

32. The words “who is not an exempt person” were removed from paragraph 8(b)(ii) in 2018 by the Immigration (European Economic Area) (Amendment) Regulations 2018 (SI 2018/801) (“the 2018 Regulations”). The Explanatory Note to the 2018 Regulations states that this is to give effect to the decision in *Chavez-Vilchez*. Consistently with this, the Explanatory Memorandum laid before Parliament gives the following explanation:

7.6 The CJEU Judgment in Case-133/15 *Chavez-Vilchez and others* ... builds on the approach in Case C-34/09 *Ruiz Zambrano* which concerned the derivative right to enter and reside for the primary carer of an EU citizen who is living in their own country, where a refusal to confer such a right would compel the EU citizen to leave the territory of the EU. In the UK, the *Ruiz Zambrano* judgment therefore enables

the primary carer of a British citizen (usually a child) to acquire a right to enter and reside in the UK whilst they remain the primary carer of that British citizen, where refusal of such a right would compel the British citizen to leave the EU.

7.7 The judgment in *Chavez-Vilchez* held that, where there is another person who is able and willing to assume or continue primary care, this is a relevant factor in whether or not a relevant person would be compelled to leave their own country or the territory of the EU, but it is not determinative of that. In the UK therefore, a case-by-case consideration should be given to determine whether a British citizen's dependence on a third country national carer is such that refusing the third country national a right of residence in the UK would compel the British citizen to leave the territory of the EU, even if there is another person who could care for them.

7.8 In line with *Chavez-Vilchez*, paragraph 10 of the Schedule amends regulation 16(8)(b) of the 2016 Regulations to allow a person to be recognised as a "primary carer" if they are the sole carer or if they share equally the care with another person, regardless of whether that person is an "exempt person" within the meaning of regulation 16(7)(c). This will ensure that the British citizen's best interests and individual circumstances are properly considered."

33. The history which I have set out above illustrates that the premise upon which the impact on the British Citizen dependant's rights is considered is, and always has been, expressed in exactly the same terms for a *Zambrano* carer as it is for a *Chen* or *Ibrahim/Teixeira* carer, and that this was a matter of deliberate choice. The interpretation must therefore be the same irrespective of which of these derivative rights is being claimed. Moreover, the phrase must bear the same meaning irrespective of whether the applicant for derivative rights is a sole primary carer, or shares caring responsibilities equally with another person.
34. It was common ground that Mr Velaj would not qualify for a *Zambrano* right under the European jurisprudence because as a matter of fact, his son would not be compelled to leave the EU if Mr Velaj were denied a derivative right of residence. He would be able to stay in the UK with his British Citizen mother, who shared primary caring responsibilities with his father and who would not leave the UK if he were returned to Kosovo. It was also common ground that until the amendments were made by the 2018 Regulations, Mr Velaj would not have qualified as a "primary carer" because his wife, being a British Citizen, was an exempt person.
35. Mr Velaj's case turns on the proposition that, on the true construction of Regulation 16(5) of the 2016 Regulations, he acquired rights under domestic law which go further than the minimum rights guaranteed to *Zambrano* carers under EU law.

SUBMISSIONS

36. Mr Cox submitted that Regulation 16(5)(c) as modified by Regulation 16(9) admits of only one interpretation, namely, that which was adopted by the FtT judge. Its literal, natural and ordinary meaning is that the decision-maker must determine whether the

British citizen would be unable to reside in the UK on the purely hypothetical premise that their primary carer (or both primary carers) will leave the UK for an indefinite period. That approach was also required under Regulation 15A(4A) of the 2006 Regulations, and reflected a deliberate policy choice to remove from the decision-maker any factual inquiry as to whether the primary carer would in reality have to leave the UK.

37. Mr Cox submitted that all that the 2018 Regulations did was to “extend the SSHD’s long-standing regulatory premise that two shared carers would leave the UK together, to the case where care is shared with an exempt person.” He characterised this as “a legitimate policy choice”. By granting the right of residence to both primary carers even where one remaining would suffice to protect the child’s fundamental rights under Article 20 TFEU, it avoided the need to decide the difficult question of whether, and if so which, of the two primary carers would stay behind to look after the child if the other were to leave the UK for an indefinite period.
38. The question whether the British citizen would be unable to reside in the UK would still require a factual inquiry (as required by *Chavez-Vilchez* and *Patel*) but it is a limited one, based on the hypothetical premise that both carers would leave. Mr Cox acknowledged that this construction would lead to a positive answer unless there was someone else who could care for the child in the absence of both the primary carers. He also acknowledged that this expansion of derivative rights would not just affect *Zambrano* carers but would extend to the *Chen* and *Ibrahim/Teixeira* situations too.
39. Mr Cox also accepted that on this interpretation, Regulation 16(5)(c) goes further than the *Zambrano* jurisprudence and Article 20 TFEU requires. It would grant a right of residence to two joint primary carers (neither of whom is exempt) irrespective of whether the enforced departure of only one of them would enable the British citizen child to continue to reside in the UK/EEA. Likewise, it would grant a right of residence to a joint primary carer who is a third country national where the other primary carer is a British citizen or has ILR, irrespective of whether the removal of the third country national would have meant that the British citizen child would be unable to reside in the UK/EEA. However, he submitted that it was open to the UK Government to grant rights to carers of EU Citizen children that go beyond their entitlement in EU law, and it had not been suggested by Mr Thomann, on behalf of the Secretary of State, that the interpretation contended for would make the provision ultra vires section 2 of the European Communities Act 1972.
40. Mr Cox relied upon what Underhill LJ said in *Akinsanya* at [64]:

“ ... I do not accept that there is any general presumption against “gold-plating”. The correct position is as stated by Lord Mance JSC in *United States of America v Nolan* [2016] AC 463 at paragraph 14:

“where a Directive allows a member state to go further than the Directive requires, there is ... no imperative to achieve a ‘conforming’ interpretation. It may in a particular case be possible to infer that the domestic legislature did not, by a domestic formulation or reformulation, intend to go further in substance than the European requirement or minimum.”

Although Lord Mance JSC is there referring to the requirements of a Directive, the same principle must apply to any provision of EU law; and in the present case articles 20 and 21 of the TFEU would certainly not prevent a member state from granting further rights to third country national carers of EU citizen children than *Zambrano* requires... In short, whilst it may well be relevant in construing implementing legislation of this kind to consider whether in the particular case the legislator is likely to have intended to go beyond the minimum required in order to achieve compliance with EU law, that is no more than a consideration forming part of the overall exercise of statutory construction.”

41. Mr Cox submitted that the decision in *Akinsanya* presented an insuperable obstacle to the SSHD’s case. If the construction for which Mr Thomann contended were correct, *Akinsanya* would have had a different outcome.
42. Mr Thomann accepted that the phrase “if both primary carers left the UK for an indefinite period” *could* be interpreted in the manner suggested by Mr Cox, but he submitted that any right thereby created would not be derived from the TFEU, but from domestic law, and that was plainly not what the draftsman intended. He submitted that it was clear from the context and in particular from the Explanatory Notes and Explanatory Memoranda that the amendment effected by the 2018 Regulations was designed to do no more than implement *Chavez-Vilchez*, and not to confer derivative rights upon someone like Mr Velaj, who could not claim them as a matter of EU law and did not previously qualify under the 2016 Regulations. Mr Thomann disagreed with Mr Cox’s proposition that it had been a “long-standing regulatory premise” since the Amendment Regulations in 2012 that where there were two primary carers both would leave the UK.
43. Mr Thomann pointed out that whenever there were two carers for a UK citizen child, there would always be a factual inquiry as to whether the person applying for rights under Regulation 16(5) was the (or a) primary carer. Likewise the question whether the dependant child would “be unable to reside” in the UK if one or both of their primary carers left, must be determined on the actual facts, as *Patel* made clear. Therefore the issue between the parties was really concerned with the scope of the factual inquiry to be carried out.
44. The inquiry envisaged by the CJEU in *Chavez-Vilchez* would not be a meaningful inquiry if it were based on a purely hypothetical premise which was never going to materialise. If both carers had equal responsibilities for the child, the ultimate question would still be whether the denial of derivative rights to one of them – the applicant - would mean that the child would be compelled to leave the UK. If each primary carer was entitled to and did apply for derivative rights, it is possible that one might qualify whilst the other would not.
45. Mr Thomann submitted that the legislation should be given a purposive construction, which is what the Upper Tribunal did. It was plain that there had been no intention on the part of the legislature to create rights that were wider than *Zambrano* rights. If necessary, he submitted, the language of Regulation 16(5)(c) should be modified or words read into it to make it consistent with *Zambrano*. There was nothing in *Akinsanya* which precluded this approach; the issues in that case were very different,

and the language of Regulation 16(5)(c) and 16(8) and (9) was not so clear that it could only be interpreted as requiring an assumption to be made that was purely hypothetical.

46. Whilst he accepted in oral argument that sections 117B(6) and 117C(5) of the 2002 Act could not be used as aids to the construction of the 2006 or 2016 Regulations, Mr Thomann submitted that the interpretation contended for by Mr Cox was undesirable for the further reason that it risked undermining the nuanced considerations identified by Parliament as bearing upon the public interest in deportation in cases involving serious foreign offenders such as Mr Velaj. I am not persuaded that this took matters any further; if the correct construction were to have unfortunate and unforeseen repercussions, that would be a matter for the legislator to address in due course. It would not be a reason to refuse to adopt that construction.

DISCUSSION

47. I do not accept that Regulation 16(5)(c), as modified by Regulation 16(8) and (9), admits of only one interpretation. Nor do I accept that the construction contended for by Mr Cox is the natural and obvious one. The focus is on whether the British Citizen dependant would be “unable” to remain in the UK “if” something happens – i.e. on what will happen to the child if the primary carer leaves (or both primary carers leave). In that context the word “if” requires the decision maker to consider the position of the child on the basis that something is (actually) going to happen. It does not require that premise to be purely hypothetical, let alone counterfactual. Given that the person asking themselves the question has to decide what *in practice* would happen to the child if that event occurred, it would make little sense to require them to make an assumption that the event will happen if it plainly will not.
48. “If the person left the UK for an indefinite period” could either mean “in the event that the person [in fact] left the UK for an indefinite period” or “on the hypothesis that the person will leave the UK for an indefinite period (regardless of whether in fact he would do so)”. The former seems to me to be the more natural interpretation, and carries with it the necessary implication that the postulated event (here, leaving the UK) is realistic, and not just theoretical. At the risk of stating the obvious, a purely hypothetical event could have no impact, in practice, on the ability of the child or other British Citizen dependant to remain in the UK.
49. It is clear from *Chavez-Vilchez* and *Patel* that the question whether the dependant EU citizen would be “unable to reside in the UK” depends on a fact-specific inquiry. I agree with the Upper Tribunal that it requires a nuanced analysis of inability, and not a simple analysis of a hypothetical question, and that must mean that the decision-maker is looking at what is likely to happen in reality. As they put it at [48] of the determination, “the key issue of inability to reside in the United Kingdom requires detailed consideration and a causal link with the departure of both carers.”
50. That interpretation is also consistent with the stated intention to give effect to *Zambrano* rights, whereas the rival interpretation would confer a new species of purely domestic derivative rights on someone who would never meet the *Zambrano* test (or the test in *Chen* or *Ibrahim* or *Teixeira*), in circumstances where the departure of that person from the UK would in practice have no effect at all upon the ability of the British Citizen dependant to remain in the UK. The question whether the legislator

is likely to have intended this consequence admits of only one answer in the present case, and that is no. Requiring the decision maker to assume that both primary carers will leave the UK when one of them will undoubtedly stay behind also precludes the type of nuanced inquiry that was envisaged in *Chavez-Vilchez* and therefore, if Mr Cox were right, the 2018 amendment, far from implementing *Chavez-Vilchez*, would have the opposite effect.

51. I am fortified in my view of the correct construction by the phrase used in the predecessor provision, Regulation 15A(4A): “if P were required to leave the UK” which seems to me to be even clearer. Assuming that “required to leave” is given a wider meaning than “legally compelled” in line with *Zambrano* itself (as I consider it must be), that means “in the event that P will be forced to leave the UK”. The decision-maker is looking at the likely impact upon the child of the primary carer being forced by law or by economic pressure to leave the UK. It presupposes that on the facts of the specific case, this is a realistic hypothesis.
52. The meaning of the phrase does not change when there are two primary carers. In the previous Regulations the decision-maker was required to consider the question whether the child would be unable to remain in the UK “on the basis that both P and the person with whom care responsibilities are shared would be required to leave the United Kingdom.” “On the basis that” cannot be interpreted as requiring a counterfactual assumption. It must mean that the decision maker is required to look at matters on a factual basis, i.e. from the perspective of what would happen to the child if in fact, in the circumstances of that specific case, both primary carers would leave the UK. The words read into Regulation 16(5)(c) by Regulation 16(9) make no material difference to the approach to be taken.
53. In my judgment there is nothing in the decision in *Akinsanya* which precludes this court from adopting that construction of Regulation 16(5)(c).
54. The claimant in *Akinsanya* was a national of Nigeria who was the sole primary carer for a British Citizen child. She was initially issued with a 5 year residence card as a *Zambrano* carer, but she was subsequently granted 30 months’ leave to remain in the UK under Appendix FM to the Immigration Rules. She then made an application for ILR under the EU Settlement Scheme (“EUSS”). She contended that she met the criteria for ILR set out in Appendix EU to the Immigration Rules because she was a person who had a *Zambrano* right to reside and she had completed the requisite continuous qualifying period of five years.
55. The SSHD argued that Ms Akinsanya did not qualify under the EUSS because Annex 1 to Appendix EU defined “a person with a *Zambrano* right to reside” as *excluding* persons who had leave to enter or remain in the UK unless it had been granted under Appendix EU itself. In answer to this, Mr Cox (who appeared on behalf of Ms Akinsanya) contended that the definition in limb (b) of Annex 1 to Appendix EU did not properly reflect the *Zambrano* jurisprudence (Ground 1) and/or it did not properly reflect the language of Regulation 16 of the 2016 Regulations (Ground 2). There was nothing in Regulation 16 which precluded someone with limited leave to enter or remain in the UK from acquiring (or keeping) derivative rights under that Regulation.
56. As Underhill LJ explained at [33] to [36] the issue, as formulated by counsel for the SSHD (Mr David Blundell QC) was whether the SSHD had, in formulating the Annex

1 definition, erred in her understanding of (a) the *Zambrano* jurisprudence and (b) Regulation 16 of the EEA Regulations, by proceeding on the basis that a *Zambrano* right did not arise in circumstances where the carer had any form of leave to enter or remain. If the Secretary of State was wrong about that, it was agreed that the impugned decision would have to be quashed.

57. This Court found for the SSHD on the first issue. After analysing the *Zambrano* jurisprudence, including *Iida v Stadt Ulm* (Case C-40/11) [2011] Fam 121 and *Secretary of State for the Home Department v A* (Case C-115/15) [2017] QB 109, Underhill LJ concluded that as a matter of EU law, a *Zambrano* right is a right of last resort which does not arise if the third-country national carer otherwise enjoys a right under domestic law to reside in the member state in question.
58. However, the conclusion that the definition in Annex 1 to Appendix EU *did* accurately reflect the *Zambrano* jurisprudence was not the end of the matter. As Underhill LJ explained at [57] it was unclear whether in framing that definition the SSHD intended to restrict rights under the EUSS to people whose rights to reside at the relevant dates directly depended on *Zambrano*, or whether her intention was to extend those rights to “all those carers whose removal would result in an EU citizen dependant having to leave the UK”. The Court could not, and was not required to, explore the SSHD’s purpose in framing the definition because it accepted Ms Akinsanya’s case on the construction of Regulation 16.
59. It is important to understand what that case was. It is set out at [59] of the judgment in *Akinsanya*:
- “the claimant’s case is that limb (b) of the Annex 1 definition is inconsistent with the definition of “exempt person” in regulation 16 (7). Head (iv) of that definition covers a person “who has *indefinite* leave to enter or remain in the United Kingdom”; but it says nothing about persons with only limited leave. The claimant contends that persons with limited leave are accordingly *not exempt persons* and by virtue of paragraph 1(b) are entitled to a derivative right to reside, alongside their leave to remain, *so long as they satisfy the criteria under one of paragraphs (2)–(6).*” [Emphasis added].
60. Thus Ms Akinsanya’s case on Regulation 16 was entirely focused upon Regulation 16(7). She accepted that if she was not exempt, her entitlement to a derivative right to reside would depend on her being able to satisfy the criteria in Regulation 16(5). However the question whether she could or could not do so if she had leave to remain under some other provision of domestic law did not directly arise, and it was not something which this Court considered on her appeal.
61. Ms Akinsanya had already satisfied those criteria and obtained her derivative rights of residence as a *Zambrano* carer *before* she was granted limited leave to remain. She met the requirements of Regulation 16(5)(c) or its predecessor, Regulation 15A(4A), at the time when she was granted her derivative right of residence. The only question in her case would be whether the grant of limited leave to remain somehow superseded her *Zambrano* right or meant that she was no longer entitled to it – she was contending that it did not because the two rights could co-exist. It was common ground that if she won on either of her grounds of appeal, the impugned decision to

refuse her claim under the EUSS (on the basis that she did not qualify) would have to be reconsidered by the SSHD.

62. As Underhill LJ pointed out at [60] the claimant's case was clearly right on any natural reading of Regulation 16(7), and it also reflected the understanding of the Home Office at the time when the Amendment Regulations, which introduced the concept of "exempt persons" were made. Guidance issued to UK Border Agency staff in 2012 stated that: "where someone has limited leave (and so is not listed as one of the exempt categories above) and can demonstrate that they meet all other requirements of regulation 15A, then they can acquire a derivative right of residence."
63. The focus of the argument thereafter was on whether Regulation 16(7) should be given a construction that was different from its ordinary and natural meaning. Mr Blundell submitted that the SSHD in making the Regulations had not intended to accord rights to carers of EU citizen children that went beyond their entitlement in EU law and that Regulation 16(7) should therefore be construed in such a way as to avoid that result. That submission was rejected.
64. Whilst accepting the likelihood that in making the relevant parts of Regulation 16 the SSHD intended, in a broad sense, to do no more than to implement the minimum requirements of *Zambrano*, Underhill LJ said that this begged further questions. The SSHD may have misunderstood what those requirements were, since *Iida* and *A* had not been decided when the Amendment Regulations were made in 2012. Alternatively,

"it may be that the Secretary of State took the view that allowing a *Zambrano* right to reside to those who already had limited leave to remain was more straightforward than having to consider whether particular forms of leave to remain, and in particular the conditions about working to which they might be subject, were fully consistent with *Zambrano* rights."

In the end, however, he said that the short answer was that the language of Regulation 16(7)(c)(iv) [which referred specifically to persons with ILR] was simply too clear to allow it to be construed as covering persons with limited leave to remain. That was the *ratio* of the decision in *Akinsanya*.

65. In *Akinsanya* this court was not required to consider, and did not consider, the requirements of Regulation 16(5) and how 16(5)(c) might be satisfied in practice by a primary carer who had limited leave to remain. The only issue it had to determine was whether Regulation 16(7) acted as a threshold barrier precluding someone like Ms Akinsanya from asserting that she had a derivative right of residence under Regulation 16(5) (or its predecessor) which had survived the subsequent grant to her of limited leave to remain.
66. The Court in *Akinsanya* did not have the benefit of hearing the arguments that were advanced in the present case. Those arguments would have had no bearing on the point of construction of Regulation 16(7) which determined the outcome. In those circumstances, even if I had not been a member of the constitution in that case, and able to gainsay the suggestion from my own personal knowledge of what was and was not considered, it would have been impossible to draw the inference that the Court

must have interpreted Regulation 16(5)(c) in a particular way in order to reach the conclusion that it did.

67. Mr Cox submitted that the criteria for the grant of the derivative right could not be met by a sole primary carer with limited leave to remain if the words “if the person left the UK for an indefinite period” in Regulation 16(5)(c) were not construed in the manner for which he contended, i.e. as a purely hypothetical premise. If a carer already had limited leave to remain they would not, in fact, leave the UK for an indefinite period and the child would not be compelled to leave with them.
68. Although I see the force of that argument, the immigration status of a person with limited leave to remain is precarious; leave is likely to be subject to conditions and it is liable to be withdrawn or truncated. It is possible to conceive of situations in which the conditions attached to a limited leave to remain are such as to make it impossible in practice for the primary carer to remain in the UK and look after the child.
69. I can also envisage a *Zambrano* carer whose limited leave to remain is due to expire making an application under Regulation 16(5)(c) and succeeding on the basis that they would have to leave the UK as soon as their limited leave expired and the child would have to go with them. In such a case if the decision-maker asks “what will happen to the child in the event that the primary carer leaves the UK for an indefinite period?” they will not be positing a completely unrealistic scenario. In any event, the practical difficulties of someone with limited leave to remain being able to satisfy the requirements of Regulation 16(5)(c) would not be a justification for construing those requirements in a manner which was clearly unintended.
70. Accordingly there is nothing in the decision in *Akinsanya* that precludes Regulation 16(5)(c) from being construed as I consider it should be construed.

CONCLUSION

71. For all the above reasons, I would dismiss this appeal.

LADY JUSTICE WHIPPLE:

72. I agree.

LADY JUSTICE KING:

73. I also agree.