Michaelmas Term
[2020] UKSC 53
On appeal from: [2018] EWCA Civ 85

JUDGMENT

Robinson (Jamaica) (Appellant) *v* Secretary of State for the Home Department (Respondent)

before

Lady Black
Lord Lloyd-Jones
Lord Sales
Lord Burrows
Lord Stephens

JUDGMENT GIVEN ON

16 December 2020

Heard on 16 November 2020

Appellant	*Respondent*
Hugh Southey QC Iain Palmer (Instructed by Barnes Harrild & Dyer (Croydon))	David Blundell QC Julia Smyth (Instructed by The Government Legal Department)

LORD STEPHENS: (with whom Lady Black, Lord Lloyd-Jones, Lord Sales and Lord Burrows agree)

I Introduction

1. This appeal raises the issue as to whether a third-country (ie non-member state) national ("TCN") otherwise benefiting from the derivative right to reside within the territory of the European Union pursuant to the principle in *Ruiz Zambrano v Office national de l'emploi* (Case C-34/09) EU:C:2011:124; [2012] QB 265 ("*Zambrano*") enjoys enhanced protection against deportation, such that she can be deported in "exceptional circumstances" only. In *Zambrano*, the Court of Justice of the European Union ("the CJEU") held that a TCN parent of a Union citizen child resident in Union territory who was dependent on the TCN parent, was entitled to a right of residence if expulsion of the TCN parent would require the child to leave the territory of the Union, thereby depriving the child of the genuine enjoyment of the substance of the child's Union citizenship rights. The principle extends to dependants who are not children, and applies even though the Union citizen has not exercised their right of free movement. The right of residence of the TCN is a derivative right, that is, one derived from the dependent Union citizen. It flows from article 20 of the Treaty on the Functioning of the European Union ("article 20FEU") and was expressed in unqualified terms in *Zambrano* so as to be thought to prevent expulsion of the TCN parent in all circumstances.

2. The Upper Tribunal ("the UT") in its decision promulgated on 23 August 2013 proceeded on the basis that the *Zambrano* right of residence was unqualified, so that there was an absolute prohibition preventing deportation of the TCN parent without any consideration of proportionality even if that parent had committed serious crimes.

3. The Secretary of State for the Home Department ("the Secretary of State") appealed to the Court of Appeal against the determination of the UT which appeal was stayed to await the judgments of the CJEU in *S v Secretary of State for the Home Department* (Case C-304/14) EU:C:2016:674; [2017] QB 558 ("*CS*") and *Rendón Marín v Administración del Estado* (Case C-165/14) EU:C:2016:675; [2017] QB 495 ("*Marín*"). These judgments were delivered on 13 September 2016.

4. By its judgments in *CS* and *Marín* the CJEU held that there was a limitation on the *Zambrano* derivative right of residence so that the right was not absolute. In *CS* at para 36 it stated that "article 20FEU does not affect the possibility of member states relying on an exception linked, in particular, to upholding the requirements of

public policy and safeguarding public security." In the same judgment at para 50 it stated "However, in *exceptional circumstances* a member state may adopt an expulsion measure provided that it is founded on the personal conduct of that third-country national, which must constitute a genuine, present and sufficiently serious threat adversely affecting one of the fundamental interests of the society of that member state, and that it is based on consideration of the various interests involved, matters which are for the national court to determine" (emphasis added).

5. Following the delivery of the judgments in *CS* and *Marín* the issues on appeal narrowed. The appellant accepted that the UT had erred in law in that it had wrongly concluded that protection against removal was absolute and there was no need to consider proportionality if it concluded that the deportation of a TCN parent would require a child who was a Union citizen to depart from the territory of the Union with the person being deported. On behalf of the Secretary of State it was submitted and the Court of Appeal [2018] EWCA Civ 85; [2018] WLR 81 held at para 67, that "exceptional circumstances" in para 50 of *CS* "simply means that it is an exception to the general rule" which general rule was "that a person who enjoys the fundamental rights of an EU citizen cannot be compelled to leave the EU". The Court of Appeal added that "It does not mean that, where the criteria set out in the proviso are satisfied, there is an additional hurdle that there must also be exceptional circumstances." The Court of Appeal remitted the case to the UT in order to carry out the proportionality exercise required by the decisions of the CJEU in *CS* and *Marín*.

6. The appellant applied for permission to appeal to the Supreme Court on three grounds:

a. Ground one: Whether the Court of Appeal was wrong to conclude that there was no need for exceptional circumstances to be established before a person relying on *Zambrano* could be deported.

b. Ground two: Whether there was a sufficient evidential basis for finding that the deportation of the appellant was potentially lawful.

c. Ground three: Whether the Court of Appeal erred by remitting rather than determining proportionality directly.

On 4 July 2019 permission to appeal was granted on ground one only (whether exceptional circumstances need to be established before a *Zambrano* carer could be deported). That is the only question to be determined in this appeal.

7. After the Court of Appeal delivered its judgment on 2 February 2018 the CJEU on 8 May 2018 delivered judgment in *KA v Belgische Staat* (Case C-82/16) EU:C:2018:308; [2018] 3 CMLR 28 ("*KA*") which again addressed the test that should be applied as an exception to the *Zambrano* principle. This means that there are now three CJEU decisions addressing the sole issue in this appeal.

8. It is a feature of this appeal that the decisions in *Zambrano*, *Marín*, *CS* and *KA* were all decisions of the CJEU (Grand Chamber). In this judgment I will refer to these decisions as the decisions of the CJEU to avoid repeating Grand Chamber on each occasion.

II Factual background

9. The appellant is a national of Jamaica who was born on 13 March 1975. She is now aged 45. Initially she entered the United Kingdom as a visitor on 2 August 2002 and was granted leave to enter until 23 August 2002. Further extensions were made permitting her to remain as a student until 28 February 2004.

10. On 11 November 2003 the appellant married Marlon MacPherson, a person present and settled in the United Kingdom. Following her marriage and on 24 February 2004, she applied for leave to remain as the spouse of a person present and settled in the United Kingdom. She was granted leave until 2 March 2006. On 28 February 2006 she applied for indefinite leave to remain which was granted on 22 March 2006.

11. The appellant committed a serious criminal offence, of supplying a class A drug (cocaine). On 5 October 2006, at Wood Green Crown Court the appellant was convicted of this offence and was sentenced to a period of imprisonment of two years and six months. The appellant's evidence to the First-tier Tribunal was that she decided to sell drugs as she needed additional funds because her grandmother had fallen seriously ill in Jamaica with heart failure, arthritis, and high blood pressure.

12. On 20 November 2007 a deportation order in respect of the appellant was signed by the Secretary of State.

13. On 24 September 2008 the appellant was detained, pending removal but her removal was subsequently deferred as she was pregnant.

14. On 29 December 2008, the appellant gave birth to a boy, whom I will call D, who is now almost 12 years old. His father is Mr MacPherson. D is a British national and a citizen of the Union. The appellant's evidence is that D has lived in the United Kingdom with her throughout his life.

15. There was a history of unsuccessful challenges to the deportation order culminating on 7 January 2009 with an unsuccessful judicial review application following which the appellant failed to co-operate with the authorities between 2009 and 2012, being listed as an absconder on 6 May 2009.

16. On 20 February 2012, the appellant submitted an application for leave to remain outside the Immigration Rules. This was treated by the Secretary of State as an application to revoke her deportation order. On 29 August 2012, the Secretary of State refused the application. It is that decision which gave rise to a further right of appeal to the First-tier Tribunal and is the subject of these proceedings.

III The judgments of the Tribunals and the Court of Appeal

(a) The First-tier Tribunal

17. On appeal to the First-tier Tribunal before Judge Mitchell the appellant contended that her deportation would violate rights under article 8 of the European Convention on Human Rights ("ECHR"). The judgment of the CJEU in *Zambrano* which had been delivered on 8 March 2011 was referred to in the determination of Judge Mitchell promulgated on 7 December 2012. However, the appeal before Judge Mitchell proceeded purely on the basis that deportation would violate the article 8 ECHR rights of the appellant, D and of Mr MacPherson. In summary the evidence before Judge Mitchell was that by 22 February 2012 the appellant and her husband were living separately but had prior to the hearing reconciled so that they were back together again. The appellant stated that her husband played an important role in D's life and that the deportation order requiring the appellant to leave the United Kingdom would also require D to leave with her so as to separate the appellant and her son from her husband who would remain in the United Kingdom. Judge Mitchell carried out an article 8 ECHR proportionality exercise stating at para 74 that

> "the appellant was convicted of extremely serious offences. She is a foreign criminal. The scourge of drugs on society has been held many times to be utterly reprehensible. … The decision of the Secretary of State to deport a foreign criminal who has received such a significant sentence for drugs offences is proportionate even taking into account the circumstances of the appellant's family and herself."

The judge dismissed the appellant's appeal finding that deportation would not violate article 8 ECHR.

(b) The Upper Tribunal

18. The appeal before the UT proceeded not only on the basis that deportation would violate article 8 ECHR but also on the basis of the appellant's derived right of residence under the *Zambrano* principle. The UT (which comprised UT Judges Jordan and Pitt) allowed the appeal with the determination being given by UT Judge Jordan. He held that the effective care of D was in the hands of the appellant so it followed that the appellant's removal would be the effective cause of D's removal to Jamaica. At para 19 he stated that

> "… the rights of Union citizens arising from *Ruiz Zambrano* are not derived from rights arising under the Citizens [Parliament and Council Directive 2004/38/EC] or the Immigration (European Economic Area) Regulations 2006 (2006 No 1003) transposing them into domestic law. They are a principle of European Union citizenship law developed by the Court of Justice in [Luxembourg]. Importantly, they are not a principle of European human rights law operated on principles of proportionality. In other words, the court or tribunal is not deciding whether it [is] proportionate to remove the British child so that his best interests (as a primary consideration) are weighed against the public interest in favour of removing those who commit serious crimes. *The prohibition against removal is absolute and prevents removal, notwithstanding the seriousness of the offence*." (Emphasis added)

On this basis the UT held that no question of proportionality arose as a matter of EU law and that the removal of the appellant was not permitted under the *Zambrano* principle. The UT then remade the decision and allowed the appeal against the Secretary of State. This meant that it was not necessary to consider proportionality, but "for the sake of completeness" the judge proceeded to do so in the context of article 8 ECHR. He stated at para 28

> "The appellant was sentenced to 30 months imprisonment. Whilst this is at the low end of sentences for supplying cocaine, this was nevertheless serious offending and the canker caused by the spread of drugs - particularly those recognised as Class A - creates a substantial public interest in removing those who are involved, if their removal is permissible. D's best interests

> (those of a single individual) have to be weighed against the interests of society in its entirety."

That interest includes, UT Judge Jordan held, following Wilson LJ in *OH (Serbia) v Secretary of State for the Home Department* [2008] EWCA Civ 694 "the role of a deportation order as an expression of society's revulsion at serious crimes and in building public confidence in the treatment of foreign citizens who have committed serious crimes". On this basis UT Judge Jordan held that he was not persuaded that the appellant's removal together with D would be disproportionate, notwithstanding that the best interests of D was a primary consideration.

19. I would add as a footnote to the quotation from *OH (Serbia) v Secretary of State for the Home Department* that in *Ali v Secretary of State for the Home Department* [2016] UKSC 60; [2016] 1 WLR 4799, at para 70 Lord Wilson regretted his reference to society's revulsion at serious crimes as being "too emotive a concept to figure in this analysis". However, he maintained the substance of the point made by stating that "Laws serve society more effectively if they carry public support." He continued that "Unless it lacks rational foundation (in which case the courts should not pander to it), the very fact of public concern about an area of the law, subjective though that is, can in my view add to a court's objective analysis of where the public interest lies: in this context it can strengthen the case for concluding that interference with a person's rights under article 8 by reason of his deportation is justified by a pressing social need."

(c) The Court of Appeal

20. The issues before the Court of Appeal (which comprised Underhill, Lindblom, Singh LJJ) had become narrower because of the CJEU's determination in *CS* and *Marín* that the prohibition against removal was not absolute so that it was conceded by the appellant that there were errors of law made by the UT. The Secretary of State submitted that the case should be remitted to the UT for redetermination, after considering any further evidence that might be necessary. The appellant submitted that the errors of law were not material as the decision of the UT would inevitably have been the same so that the appeal should be dismissed. The appellant's submission raised the issue as to whether the test that should be applied in the light of the decisions of the CJEU in *Marín* and *CS* included a requirement of "exceptional circumstances" to justify the appellant's deportation.

21. At para 47 Singh LJ giving the judgment of the court, identified all the remaining issues before the Court of Appeal as being:

> "(1) Should this court perform the proportionality exercise itself or should it remit the case to the UT?
>
> (2) What is the correct test that should be applied in the light of the decisions of the CJEU in *Rendón Marín* and (*CS)*?
>
> (3) What is the current status and effect of the decision in *R v Bouchereau* (Case C-30/77) EU:C:1977:172; [1978] QB 732?
>
> (4) What is the relevance, if any, of the Rehabilitation of Offenders Act 1974?"

22. Singh LJ having referred to *In re B (A Child) (Care Proceedings: Threshold Criteria)* [2013] UKSC 33; [2013] 1 WLR 1911, rejected the appellant's submission that the Court of Appeal should perform the proportionality exercise itself. At paras 50-52 Singh LJ identified three difficulties with the appellant's submission, none of which could be subject to any sensible challenge particularly given that at no previous stage had the threat which the appellant posed to the United Kingdom's public policy or public security been considered in accordance with the proportionality test set out by the CJEU in *Marín* and *CS*. It is sufficient to refer solely to the third difficulty which Singh LJ identified. At para 52 he stated

> "This leads me to my third point. It is that the question of proportionality should be addressed in the present case only after full consideration has been given to the issues of fact and, in particular, up-to-date information should be placed before the UT. One reason for this in the present case is that it concerns the potential impact of deportation on a young child, D. Since the best interests of a child must always be a primary consideration for the court, it is important that the UT should have available to it the most up-to-date information about the likely impact of D's mother's deportation on him."

Singh LJ held that the case should be remitted to the UT for redetermination, but proceeded to address the remaining issues to provide guidance to the UT as to how it should approach the case on remittal.

23. In relation to the correct test which should be applied in the light of the decisions of the CJEU in *Marín* and *CS* Singh LJ conducted a careful and comprehensive analysis of both of those judgments together with the joint opinion

of the Advocate General (M Szpunar) in *CS* and *Marín* (p 500). The Advocate General made the following recommendation to the CJEU in the case of *CS* (at point 177 of his opinion):

> "…, I propose that the court's answer should be that it is, in principle, contrary to article 20FEU for a member state to expel from its territory to a non-member state a third country national who is the parent of a child who is a national of that member state and of whom the parent has sole care and custody, when to do so would deprive the child who is a citizen of the Union of genuine enjoyment of a substance of his or her rights as a citizen of the Union. Nevertheless, in *exceptional circumstances*, a member state may adopt such a measure, provided that it: observes the principle of proportionality and is based on the personal conduct of the foreign national, which must constitute a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society, and *is based on an imperative reason relating to public security*." (Emphasis added)

As is apparent from the words to which I have added emphasis, the Advocate General's recommendation included the phrase "exceptional circumstances" and a requirement of "an imperative reason" confined solely "to public security" so as to exclude an imperative reason relating "to public policy".

24. Relying on that recommendation and the CJEU's reference to exceptional circumstances in para 50 of its judgment in *CS*, Mr Southey QC on behalf of the appellant sought to establish an enhanced level of protection for carers by restricting the exception to the *Zambrano* principle. Singh LJ's conclusions at paras 66-67 were as follows:

> "66. Mr Blundell [on behalf of the Secretary of State] invites this court to attach significance to the fact that the last phrase in that passage ('and is based on an imperative reason relating to public security') did not find its way into the judgments of the CJEU. He submits that the CJEU did not adopt that part of the recommendation made by the Advocate General. He also points out that the language used by the Advocate General is the language of (Directive 2004/38/EC), in particular article 28(3). He submits that it imposes a higher test than the test that was eventually adopted by the CJEU in the context of articles 20-21FEU. I agree with those submissions by Mr Blundell.

> 67. Mr Southey emphasises the use of the phrase 'exceptional circumstances' in the opinion of the Advocate General, at para 177, and in the judgment of the CJEU in (*CS*), at para 50. I do not attach the significance to that phrase which Mr Southey submits it has. In my view, it does not import an *additional* requirement which the state must satisfy on top of what follows; rather the phrase is a helpful *summary* of what follows ('provided ...'). In other words 'exceptional circumstances' simply means that it is an exception to the general rule, which is that a person who enjoys the fundamental rights of an EU citizen cannot be compelled to leave the EU. It does not mean that, where the criteria set out in the proviso are satisfied, there is an additional hurdle that there must also be exceptional circumstances."

Accordingly, the Court of Appeal held that the correct test that should be applied did not require "exceptional circumstances" to be established before someone in the appellant's position could be deported. Rather the reference to "exceptional circumstances" in the relevant case law of the CJEU was merely a reference to the fact that deportation of someone in the appellant's position is a departure from the general rule that a person who enjoys the fundamental rights of an EU citizen cannot be compelled to leave the territory of the EU.

25. Singh LJ then addressed at paras 68-86 the current status and effect of the decision of the European Court of Justice in *R v Bouchereau*. That decision envisages that past conduct alone which has caused public revulsion and is therefore a threat to the requirements of public policy may be sufficient to justify deportation without there necessarily being any clear propensity on behalf of the individual to act in the same way in the future. Singh LJ concluded that, subject to various limitations this remained "good law". That conclusion has not been appealed to this court.

26. In relation to the final issue as to the relevance of the Rehabilitation of Offenders Act 1974 Mr Southey conceded, and for the reasons set out at paras 87-90 Singh LJ held, that the Act had no direct application in the present context.

27. The outcome in the Court of Appeal was that the Secretary of State's appeal was allowed and the case was remitted to the UT for redetermination on the merits.

IV The impact on this appeal of the United Kingdom's withdrawal from the EU

28. Section 2(1) of the European Communities Act 1972 ("the 1972 Act") provides:

> "All such rights, powers, liabilities, obligations and restrictions from time to time created or arising by or under the Treaties, and all such remedies and procedures from time to time provided for by or under the Treaties, as in accordance with the Treaties are without further enactment to be given legal effect or used in the United Kingdom shall be recognised and available in law, and be enforced, allowed and followed accordingly; and the expression 'enforceable EU right' and similar expressions shall be read as referring to one to which this subsection applies."

Section 1 of the European Union (Withdrawal) Act 2018 ("the 2018 Act") repealed the 1972 Act on "exit day" which is defined by section 20 as 11pm on 31 January 2020. However, exit day is followed by an implementation period ("IP") which ends on the "IP completion day" defined in section 39 of the European Union (Withdrawal Agreement) Act 2020 ("the 2020 Act") as 31 December 2020 at 11pm. During this period the 1972 Act continues to have effect pursuant to section 1A of the 2018 Act, as amended by the 2020 Act. The Charter of Fundamental Rights of the European Union ("the Charter") also continues to have effect during this period: see Part Four of the Agreement on the Withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community (OJ 2019, C384 l, p 1) and section 1A(3) of the 2018 Act.

29. As to the position after "IP completion day" the current position is that the Immigration (European Economic Area) Regulation 2016, and relevant provisions of the FEU Treaty to the extent that they are not implemented in domestic law, would continue to have effect as retained EU law pursuant to sections 2 and 4 of the 2018 Act. However, this is subject to the Immigration and Social Security Co-ordination (EU Withdrawal) Act 2020 as well as secondary legislation made under it. This Act provides for repeal of the main retained EU law relating to free movement.

30. The present position is that the United Kingdom's withdrawal from the EU has no impact on this appeal but the legal principles to be applied may change after 31 December 2020 at 11pm.

V Legal landscape

(a) Union citizenship and the right to move and reside freely

31. Article 20(1)FEU establishes Union citizenship and provides that "Every person holding the nationality of a member state" is a citizen of the Union. Under article 20(2)(a)FEU, citizens of the Union have "the right to move and reside freely within the territory of the member states". Article 21(1)FEU also provides that "Every citizen of the Union shall have the right to move and reside freely within the territory of the member states". This right is not absolute but is "subject to the limitations and conditions laid down in the Treaties and by the measures adopted to give them effect". The significance of citizenship of the Union is apparent from *Zambrano* at para 41 and *KA* at para 47 in that "citizenship of the European Union is intended to be the fundamental status of nationals of the member states". The CJEU confirmed at para 48 of *KA* that Union citizenship conferred "a primary and individual right to move and reside freely within the territory of the member states" but continued that this was not absolute as it was "subject to the limitations and restrictions laid down by the Treaty and the measures adopted for their implementation".

(b) Parliament and Council Directive 2004/38/EC

32. On 29 April 2004 the Parliament and Council of the European Union adopted Parliament and Council Directive 2004/38/EC of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of member states (OJ 2004 L158, p 77) ("the Directive"). The Directive lays down the conditions surrounding the exercise of the right of free movement and residence within EU territory, the right of permanent residence and the limits placed on those rights. Under the rubric of "Beneficiaries" article 3(1) provides that the Directive applies to all Union citizens who move to or reside in a member state (the host member state) other than that of which they are a national and to their family members who accompany or join them. Accordingly, the Directive does not apply in this case as the only Union citizen is D and he has not moved to or resided in a member state other than that of which he is a national, see *Zambrano* at para 39, *CS* at para 22 and *Marín* at para 40. In so far as D is not covered by the concept of "beneficiary" for the purposes of article 3(1) of the Directive, a member of his family is not covered by that concept either, given that the rights conferred by that Directive on the family members of a beneficiary of the Directive are not autonomous rights of those family members, but derived rights, acquired through their status as members of the beneficiary's family: see *McCarthy v Secretary of State for the Home Department* (Case C-434/09) EU:C:2011:277; [2011] ECR I-3375; [2011] All ER (EC) 729, para 42. However, both articles 27 and 28 of the Directive are relevant as the CJEU has used some but not all of the language in those articles in

relation to the limitation on the *Zambrano* derived right of residence under article 20FEU.

33. Articles 27 and 28 are in Chapter VI of the Directive under the rubric "Restrictions on the right of entry and the right of residence on grounds of public policy, public security or public health".

34. Article 27 of the Directive under the rubric "General principles" and in so far as relevant provides:

> "1. Subject to the provisions of this Chapter, member states may restrict the freedom of movement and residence of Union citizens and their family members, irrespective of nationality, *on grounds of public policy, public security* or public health. These grounds shall not be invoked to serve economic ends.
>
> 2. Measures taken on grounds of public policy or public security shall comply with *the principle of proportionality* and shall be based exclusively on the personal conduct of the individual concerned. Previous criminal convictions shall not in themselves constitute grounds for taking such measures.
>
> The personal conduct of the individual concerned must represent *a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society*. Justifications that are isolated from the particulars of the case or that rely on considerations of general prevention shall not be accepted." (Emphasis added)

The CJEU has incorporated into the limitation on the *Zambrano* derived right of residence many parts of article 27, including those parts to which I have added emphasis. In relation to the grounds of "public policy" and "public security" see *Marín* at para 81, *CS* at para 36 and *KA* at para 90. In relation to the requirement to comply with the principle of proportionality see *Marín* at para 85, *CS* at para 41 and *KA* at paras 93 and 97. In relation to the requirement that the conduct must represent "a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society" see *Marín* at para 84, *CS* at para 40 and *KA* at para 92.

35. Article 28(1) of the Directive under the rubric "Protection against expulsion" provides

> "Before taking an expulsion decision on grounds of public policy or public security, the host member state shall take account of considerations such as how long the individual concerned has resided on its territory, his/her age, state of health, family and economic situation, social and cultural integration into the host member state and the extent of his/her links with the country of origin."

Again, the CJEU has incorporated into the limitation on the *Zambrano* derived right of residence the language of article 28(1). In relation to the requirement to take into account "considerations such as how long the individual concerned has resided on its territory, his/her age, state of health" (etc) see *Marín* at para 86, *CS* at para 42 and *KA* at para 94. As expected given the context of both a crime committed by the TCN parent and the interests of children, the list of factors identified by the CJEU as "in particular" to be taken into account include factors not mentioned in article 28(1), such as the nature and gravity of the offence committed, the extent to which the person concerned is currently a danger to society, the age of the children at issue and their state of health, as well as their economic and family situation. The CJEU also referred to the legality of the residence of the TCN parent as a relevant factor, which is not specifically mentioned in article 28(1).

36. Article 28(2) and (3) provides:

> "2. The host member state may not take an expulsion decision against Union citizens or their family members, irrespective of nationality, who have the right of permanent residence on its territory, except on *serious grounds* of public policy or public security.
>
> 3. An expulsion decision may not be taken against Union citizens, except if the decision is based *on imperative grounds of public security*, as defined by member states, if they:
>
> (a) have resided in the host member state for the previous ten years; or
>
> (b) are a minor, except if the expulsion is necessary for the best interests of the child, as provided for in the United Nations Convention on the Rights of the Child of 20 November 1989 ['the UNCRC']."

The CJEU has not incorporated into the limitation on the *Zambrano* derived right of residence the parts of article 28(2) and (3) to which I have added emphasis. However, in relation to the UNCRC the *Zambrano* derived right of residence is within the ambit of EU law so that article 24(2) of the Charter applies which provides that "In all actions relating to children, whether taken by public authorities or private institutions, the child's best interests must be a primary consideration". Furthermore, article 7 of the Charter which provides for the right to respect for private and family life must be read in conjunction with the obligation to take into consideration the child's best interests, recognised in article 24(2) of the Charter, see *Marín* at paras 66 and 81.

37. In considering article 28(3) it should be recalled that the Directive does not apply in this case. However even if the Directive did apply D is not the individual subject to the expulsion decision so that article 28(3) would not be engaged. It is correct that the effective result of the expulsion of D's *Zambrano* carer is that D also is expelled. However, the consequences are different as between D and a minor expelled under article 28(3). D is entitled to return to the territory of the Union at any time whilst a minor expelled under article 28(3) is restricted to submitting an application under article 32 after a reasonable period, depending on the circumstances, and in any event after three years from enforcement of the final exclusion order by putting forward arguments to establish that there has been a material change in the circumstances which justified the decision ordering their exclusion. It is then for the member state concerned to reach a decision on this application. Furthermore, a minor expelled under article 28(3) has no right of entry to the territory of the member state concerned while their application under article 32 is being considered.

(c) Implementation of the Directive into domestic law

38. The Directive was implemented into domestic law by the Immigration (European Economic Area) Regulations 2006 (SI 2006/1003) ("the 2006 Regulations"). Those Regulations were amended on 16 July 2012 to give effect to a number of derivative rights of residence in EU law and to include an associated power of removal for persons enjoying such rights, where removal would be "conducive to the public good". The 2006 Regulations were further amended on 8 November 2012 to make wider provision reflecting CJEU case law, as then embodied in the *Zambrano* decision, based, as it was, on article 20FEU and to apply the "conducive to the public good" removal provision to such persons. The 2006 Regulations have since been replaced by new Regulations made in 2016 ("the 2016 Regulations"). However, it was the 2006 Regulations that applied at the time of the impugned decision (see paragraph 5 of Schedule 6 to the 2016 Regulations). The 2006 Regulations must, to the extent possible, be interpreted to ensure conformity with article 20FEU. If, in its case law since the *Zambrano* decision, the CJEU has interpreted article 20FEU as requiring "exceptional circumstances" as an additional

requirement, then national courts must strive to interpret the 2006 Regulations on that basis in accordance with the *Marleasing* principle, see *Marleasing SA v La Comercial Internacional de Alimentación SA* (Case C-106/89) EU:C:1990:395; [1990] ECR I-4135; [1992] 1 CMLR 305, para 13 and *Pfeiffer v Deutsches Rotes Kreuz Kreisverband Waldshut eV* (Joined Cases C-397/01 and C-403/01) EU:C:2004:584; [2005] ICR 1307; [2004] ECR I-8835; [2005] 1 CMLR 44, para 115. So, the focus of this appeal returns to the decisions of the CJEU in order to determine what test is to be applied in order to accord with CJEU's case law.

(d) The Zambrano right of residence

39. The CJEU's ruling in *Zambrano* is the landmark decision. Mr Ruiz Zambrano and his wife, Mrs Moreno Lopez, were both nationals of Colombia. While they were living in Belgium Mrs Moreno Lopez gave birth to two children, who acquired Belgian nationality by operation of Belgian law. Accordingly, both children were also citizens of the EU and their parents were TCN parents. The two children did not at any stage exercise their right to move freely within the EU but remained in Belgium with their parents. Mr Zambrano applied for unemployment benefit. That application was rejected on the ground that, since he had never held a work permit in Belgium, he did not have the requisite qualifying period as required by national legislation governing the residence and employment of foreign workers. The Employment Tribunal in Belgium made a reference to the CJEU which held that article 20FEU is to be interpreted as precluding a member state from refusing a TCN on whom his minor children, who are European Union citizens, are dependent, a right of residence in the member state of residence and nationality of those children, and from refusing to grant a work permit to that TCN, in so far as such decisions deprive those children of the genuine enjoyment of the substance of the rights attaching to the status of European Union citizen.

(e) The Zambrano right of residence is a derivative right

40. As is apparent from para 50 of *KA* the Treaty provisions on citizenship do "not confer any autonomous right on third-country nationals. Any rights conferred on third-country nationals are not autonomous rights of those nationals but rights derived from those enjoyed by a Union citizen. The purpose and justification of those derived rights are based on the fact that a refusal to allow them would be such as to interfere, in particular, with a Union citizen's freedom of movement": see also *CS* at para 28.

(f) The consideration of a Zambrano right of residence falls within the ambit of European Union law

41. Consideration of whether there is a *Zambrano* derived right of residence falls within the ambit of EU law. Accordingly, account must be taken of the right to respect for private and family life, as laid down in article 7 of the Charter, an article which, must be read in conjunction with the obligation to take into consideration the child's best interests, recognised in article 24(2) of the Charter, see *Marín* at para 81.

(g) The very specific situations giving rise to the Zambrano derived right of residence

42. The "very specific situations" giving rise to this derived right of residence are set out in *Zambrano* at paras 43 and 44, in *Chavez-Vilchez v Raad van bestuur van de Sociale verzekeringsbank* (Case C-133/15) EU:C:2017:354; [2018] QB 103; [2017] 3 CMLR 35 at para 63 and most recently in *KA* at paras 51 and 52 as follows:

> "51. …, a right of residence must nevertheless be granted to a third-country national who is a family member of that Union citizen, since the effectiveness of Union citizenship would otherwise be undermined, if, as a consequence of refusal of such a right, that citizen would be obliged in practice to leave the territory of the EU as a whole, thus depriving him of the genuine enjoyment of the substance of the rights conferred by that status …
>
> 52. However, a refusal to grant a right of residence to a third-country national is liable to undermine the effectiveness of Union citizenship only if there exists, between that third-country national and the Union citizen who is a family member, a relationship of dependency of such a nature that it would lead to the Union citizen being compelled to accompany the third-country national concerned and to leave the territory of the EU as a whole …"

43. The requirement of being compelled to leave the territory of the EU as a whole as opposed to being compelled to leave the territory of the member state was specifically referred to in the decision of the CJEU in *Dereci v Bundesministerium für Inneres* (Case C-256/11) EU:C:2011:734; [2011] ECR I-11315; [2012] All ER (EC) 373; [2012] 1 CMLR 45. The CJEU stated at para 66 of its judgment that the criterion "refers to situations in which the Union citizen has, in fact to leave not only

the territory of the member state of which he is a national but also the territory of the Union as a whole".

(h) The first question to be addressed by the national court

44. On this basis the first question to be addressed in determining whether there is a *Zambrano* derived right of residence is whether there is a relationship of dependency of such a nature that it would lead to the Union citizen being compelled to accompany the TCN concerned and to leave the territory of the Union as a whole. In determining that question the CJEU set out at para 71 of *KA* the factors to be taken into account. The CJEU stated:

> "More particularly, in order to assess the risk that a particular child, who is a Union citizen, might be compelled to leave the territory of the EU and thereby be deprived of the genuine enjoyment of the substance of the rights conferred on him by article 20 TFEU if the child's third-country national parent were to be refused a right of residence in the member state concerned, it is important to determine, in each case at issue in the main proceedings, which parent is the primary carer of the child and whether there is in fact a relationship of dependency between the child and the third-country national parent. As part of that assessment, the competent authorities must take account of the right to respect for family life, as stated in article 7 of the Charter, that article requiring to be read in conjunction with the obligation to take into consideration the best interests of the child, recognised in article 24(2) of the Charter (*Chavez-Vilchez* [2017] 3 CMLR 35, para 70)."

(i) The second question to be addressed by the national court

45. In *CS* at para 40 the CJEU stated that an expulsion decision founded on the existence of a genuine, present and sufficiently serious threat to the requirements of public policy or of public security, in view of the criminal offences committed by a TCN who is the sole carer of children who are Union citizens, could be consistent with EU law. At para 46 it stated that the national court has the task of examining what, in the TCN's conduct or in the offence that she committed, "constitutes a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society or of the host member state, which may justify, on the ground of protecting the requirements of public policy or public security, an order deporting her from the United Kingdom". Accordingly, the second question to be addressed is whether there is such a threat. It is clear from *CS* at para 41 and *Marín* at para 85 that the existence of such a threat cannot be drawn automatically on the basis solely

of the criminal record of the person concerned. Furthermore, article 20FEU must be interpreted as precluding national legislation which requires a TCN parent of minor children who are Union citizens in his sole care to be automatically refused the grant of a residence permit on the sole ground that he has a criminal record, where that refusal has the consequence of requiring those children to leave the territory of the European Union. Rather it "is incumbent" upon the national court to assess (i) the extent to which the TCN parent's criminal conducts is a danger to society and (ii) any consequences which such conduct might have for the requirements of public policy or public security of the member state concerned, see *Marín* at para 87 and *CS* at para 47.

(j) The third question to be addressed by the national court

46. If there is such a threat then the national court carries out an exercise balancing, on the one hand, the nature and degree of that threat which leads to the legitimate aim of safeguarding public order or public security. On the other hand, the national court has to take account of the fundamental rights whose observance the CJEU ensures, in particular the right to respect for private and family life, as laid down in article 7 of the Charter and to ensure that the principle of proportionality is observed. In a case involving children account is to be taken of the child's best interests when weighing up the interests involved. Particular attention must be paid to his age, his situation in the member state concerned and the extent to which he is dependent on the parent: see *CS* at paras 48-49.

VI Whether exceptional circumstances need to be established before a *Zambrano* carer can be deported

(a) The parties' submissions

47. On behalf of the appellant Mr Southey submitted that "the use of the phrase 'exceptional circumstances' demonstrates the weight to be attached to the interests of the *Zambrano* child when conducting a proportionality balancing exercise." He also submitted that "the use of the phrase 'exceptional circumstances' in *CS* at para 50 cannot merely connote a departure from the norm" but rather that "it implies that the interests of the *Zambrano* child must carry great weight that can only be outweighed by particularly compelling reasons."

48. On behalf of the Secretary of State Mr Blundell relied on the CJEU decisions in *CS*, *Marín* and *KA* in order to submit that the "imperative grounds" test does not apply, and nor does any broader "exceptional circumstances" test. He submitted that on a proper textual analysis of the judgment in *CS* the single use of the phrase

"exceptional circumstances" was to be read as an exception to the usual application of the *Zambrano* principle.

(b) Rejection by the CJEU of "imperative grounds of public security"

49. Advocate General M Szpunar in his opinion in *CS* proposed the adoption of enhanced protection based on "imperative grounds relating to public security". At point 168 he stated that

> "In the present case, given that the minor child who is a citizen of the Union might, as a consequence of the expulsion of his mother, temporarily have to leave the territory of the European Union altogether, it is appropriate, to my mind, that he should be accorded the *enhanced protection implied by the term 'imperative grounds of public security'*. Accordingly, *only imperative grounds of public security are capable of justifying the adoption of an expulsion order against (CS) if, as a consequence, her child would have to follow her*." (Emphasis added)

In this paragraph he did not propose the adoption of the phrase "exceptional circumstances".

50. At point 177 Advocate General M Szpunar proposed that the court's answer in *CS* should be

> "that it is, in principle, contrary to article 20FEU for a member state to expel from its territory to a non-member state a third-country national who is the parent of a child who is a national of that member state and of whom the parent has sole care and custody, when to do so would deprive the child who is a citizen of the Union of genuine enjoyment of the substance of his or her rights as a citizen of the Union."

He went on to define a proposed limitation on the derived right of residence in terms that used the phrases "exceptional circumstances" and "based on an imperative reason relating to public security". He proposed that

> "Nevertheless, in *exceptional circumstances*, a member state may adopt such a measure, provided that it: observes the

> principle of proportionality and is based on the personal conduct of the foreign national, which must constitute a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society, and is *based on an imperative reason relating to public security*." (Emphasis added)

51. At para 36 of the judgment in *CS* the CJEU recognised "an exception" to the *Zambrano* principle "linked, in particular, to upholding the requirements of public policy and safeguarding public security". That is entirely inconsistent with the test of imperative grounds in article 28(3) of the Directive which is only linked to public security. The rejection of the test of imperative grounds is also apparent from para 40 which requires the expulsion decision to be "founded on the existence of a genuine, present and sufficiently serious threat". That is not a test of "imperative grounds". Again, in that paragraph it is made clear that this is a threat to either "the requirements of public policy or of public security". I consider that it is clear that the CJEU rejected the proposal of enhanced protection based on imperative grounds of public security. Two questions remain. The first is whether by using the phrase "exceptional circumstances" Advocate General M Szpunar was proposing that a *Zambrano* carer should enjoy enhanced protection against deportation, such that she can be deported in "exceptional circumstances" only. In view of his associated proposal that there should be "an imperative reason relating to public security" I am prepared to proceed, without deciding the point, on the basis that he was proposing an additional requirement of "exceptional circumstances". On the basis of that assumed answer to the first question the second remaining question is whether the CJEU adopted Advocate General M Szpunar's proposal of "exceptional circumstances".

(c) Textual analysis of the judgment in CS

52. I consider that a textual analysis of the judgment in CS makes it clear that the CJEU did not adopt the proposal in relation to "exceptional circumstances".

53. In *CS* the applicant, a TCN, married a British national and was granted indefinite leave to remain in the United Kingdom where she had a child for whom she was the sole carer. She was convicted of a criminal offence in the United Kingdom and sentenced to a term of imprisonment whilst her child was still very young. The Secretary of State rejected the applicant's asylum application and ordered her deportation after she had been released from prison, in reliance on, inter alia, section 32(5) of the UK Borders Act 2007 under which deportation would always be ordered in respect of a TCN who was convicted of an offence of a certain gravity, unless that order breached the offender's rights under, inter alia, the European Union treaties. The applicant's appeal was allowed by the First-tier

Tribunal on the ground that her deportation would lead to, inter alia, a breach of her child's right as a Union citizen to move and reside within the European Union under article 20FEU in that, if the applicant were deported, her child would also have to leave the European Union. On the Secretary of State's appeal, the UT referred to the CJEU for a preliminary ruling the question whether article 20FEU precluded the national legislation. The CJEU held that a decision to expel a TCN who was the sole carer of a Union citizen child on the ground of public policy or public security could not be made automatically on the sole basis of the criminal record of the person concerned. The CJEU went on to consider the basis upon which such an expulsion decision could be made.

54. In paras 34-50 of the judgment and under the heading "The possibility of limiting a derived right of residence flowing from article 20FEU" the CJEU set out its analysis of the limitation on the *Zambrano* right of residence.

55. At para 36 the CJEU stated as follows:

> "It should be pointed out that article 20FEU does not affect the possibility of member states relying on *an exception* linked, in particular, to upholding the requirements of public policy and safeguarding public security." (Emphasis added)

In other words, conduct which is potentially contrary to the interests of public policy and public security - in most cases, the commission of a criminal offence - was capable, in principle, of justifying an "exception" to the ordinary general rule (namely, that a *Zambrano* carer cannot be expelled where to do so would lead to the departure of the dependent EU citizen from the territory of the Union). As I have emphasised the CJEU specifically referred to reliance on "an exception", rather than the existence of "exceptional circumstances".

56. At para 37 in relation to the exception the CJEU relying on its case law stated that the concepts of "public policy" and "public security" must be "interpreted strictly". At para 38 the CJEU considered the exception as linked to upholding the requirements of "public policy" identifying that in addition to "the disturbance of the social order which any infringement of the law involves" there must exist "a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society". At para 39 the CJEU analysed its case law in relation to the public security exception. At para 40 the CJEU set out the test as being whether the expulsion decision is founded on the existence of "a genuine, present and sufficiently serious threat to the requirements of public policy or of public security". Then at paras 41-42 and 46-49, the CJEU set out in detail the particular factors which have to be considered when deciding whether that test was satisfied.

57. I consider that para 50 provides a summary of what is contained in the preceding paragraphs so that the reference to "exceptional circumstances" can only sensibly be read in the context of what comes before. When seen against the background of the analysis beginning at para 34, it is clear that the CJEU did not add any additional criterion through the use of the words "exceptional circumstances". On the contrary, and as the Court of Appeal correctly decided, it was simply explaining that, in the prescribed circumstances, an exception could be made to the general rule that a *Zambrano* carer could not be compelled to leave the territory of the Union. It was not stating that certain undefined "exceptional circumstances" had first to be demonstrated.

(d) The judgments in Marín and KA

58. In *Marín* under the same heading as used in *CS* ("The possibility of limiting a derived right of residence flowing from article 20FEU") the CJEU at paras 81-88 carried out the same analysis as in *CS* as to the exception to the *Zambrano* derived right of residence, specifying the test to be applied and the factors to be taken into account. In that respect the analysis of the CJEU in *Marín* is identical to the analysis in *CS*. Furthermore, the test in para 84 of *Marín* is in the same terms as the test in para 40 of *CS*. In paras 85 and 86 in *Marín* the CJEU set out the matters to be taken into account. There is no reference in *Marín* to the phrase "exceptional circumstances".

59. The CJEU also took the same approach in *KA*, at paras 85-97. In that case, the Belgian authorities refused to consider applications for residence permits from the TCN parents of Belgian children on the grounds that the applicant was subject to an entry ban. Having dealt with the circumstances in which a *Zambrano* right could come into being at paras 63-76, the CJEU repeated at para 90 that article 20 TFEU did "not affect the possibility of member states relying on an exception linked … to upholding the requirements of public policy and safeguarding public security". The CJEU went on, at paras 90-97, to repeat the factors set out in *CS* and *Marín* which should be taken into account when that test is being applied. At para 92 it stated:

> "…, it must be held that, where the refusal of a right of residence is founded on the existence of a genuine, present and sufficiently serious threat to the requirements of public policy or public security, in view of, inter alia, criminal offences committed by a third-country national, such a refusal is compatible with EU law even if its effect is that the Union citizen who is a family member of that third-country national is compelled to leave the territory of the EU …"

Again, this is a repetition of the test in para 84 of *Marín* and in para 40 of *CS*. Nowhere in its detailed analysis in *KA* does the CJEU state or even imply that there is an additional hurdle that there must also be exceptional circumstances.

60. On three occasions, the CJEU has set out what must be taken into account when the deportation of a *Zambrano* carer is being considered. Not once has it stated that an imperative grounds test applies, nor has it stated that there is an additional hurdle that there must also be exceptional circumstances. I consider that it is inconceivable that the CJEU would have omitted to mention this on three occasions if such a test applied.

VII Disposal of the appeal

61. For my part I consider that the Court of Appeal's clearly reasoned conclusion cannot be faulted and was plainly right. The phrase "exceptional circumstances" simply means that it is an exception to the general rule that a person who enjoys the fundamental rights of an EU citizen cannot be compelled to leave the territory of the EU. The phrase does not import an additional hurdle. I would dismiss the appeal and would, as a consequence maintain the order of the Court of Appeal remitting the case to the UT for redetermination on the merits.