Upper Tribunal
(Immigration and Asylum Chamber)

Younas (section 117B(6)(b); Chikwamba; Zambrano) [2020] UKUT 00129 (IAC)

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 14 February 2020	
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Before

THE HON. MR JUSTICE LANE, PRESIDENT
UPPER TRIBUNAL JUDGE HANSON
UPPER TRIBUNAL JUDGE SHERIDAN

Between

UZMA YOUNAS
(NO ANONYMITY DIRECTION MADE)

Appellant

And

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr M Sarwar, Legal representative, Lexton Law Solicitors
For the Respondent: Mr T Lindsay, Senior Home Office Presenting Officer

(1) An appellant in an Article 8 human rights appeal who argues that there is no public interest in removal because after leaving the UK he or she will be granted entry clearance must, in all cases, address the relevant considerations in Part 5A of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act") including section 117B(1), which stipulates that "the maintenance of effective immigration controls is in the public interest". Reliance on Chikwamba v SSHD [2008] UKHL 40 does not obviate the need to do this.

(2) Section 117B(6)(b) of the 2002 Act requires a court or tribunal to assume that the child in question will leave the UK: Secretary of State for the Home Department v AB (Jamaica) & Anor [2019] EWCA Civ 661 and JG (s 117B(6): "reasonable to leave" UK) Turkey [2019] UKUT 00072 (IAC). However, once that assumption has been made, the court or tribunal must move from the hypothetical to the real: paragraph 19 of KO (Nigeria) & Ors v Secretary of State for the Home Department [2018] UKSC 53. The length of time a child is likely to be outside the UK is part of the real world factual circumstances in which a child will find herself and is relevant to deciding, for the purpose of section 117B(6)(b), whether it would be unreasonable to expect the child to leave the UK.

(3) The assessment of whether a child, as a result of being compelled to leave the territory of the European Union, will be a deprived of his or her genuine enjoyment of the rights conferred by Article 20 TFEU in accordance with Ruiz Zambrano v Office national de l'emploi (Case C-34/09) falls to be assessed by considering the actual facts (including how long a child is likely to be outside the territory of the Union), rather than theoretical possibilities.

DECISION AND REASONS

1. By a decision promulgated on 25 November 2019 (a copy of which is attached) the Upper Tribunal set aside a decision of the First-tier Tribunal promulgated on 14 May 2019. We now re-make that decision.

A. Background

2. The appellant is a citizen of Pakistan who was born, and has spent nearly all of her life, in the United Arab Emirates. On 2 May 2016, whilst pregnant with her first (and only) child, she travelled to the UK from Dubai as a visitor with leave until 6 July 2016.

3. On 4 July 2016 she applied for leave to remain in the UK on the basis that she was 30 weeks pregnant and had been advised that it was not safe for her to travel because of previous miscarriages ("the 2016 application"). In the 2016 application she requested six months leave.

4. On 6 September 2016 the appellant gave birth to her daughter, who is a British citizen.

5. The appellant's partner (who is her child's father) is a British citizen who has two teenage sons (born in February 2003 and September 2004) from a previous relationship.

6. In January 2018 the appellant varied her application in order to apply for leave to remain on the basis of her family life with her partner and child ("the 2018 application").

7. On 19 March 2018 the respondent refused the application on the basis that:

    a. the appellant did not qualify for leave as a partner under Appendix FM of the Immigration Rules because (i) she had not provided evidence to show she had been living with her partner for at least two years and therefore she was not a "partner" as defined in GEN.1.2. of Appendix FM of the Immigration Rules; and (ii) she was in the UK as a visitor and therefore by operation of E-LTRP.2.1 of Appendix FM was not eligible to be granted leave as a partner even if (which was accepted) there would be insurmountable obstacles to family life with her partner continuing outside the UK;

    b. she did not meet any of the private life routes to leave under paragraph 276ADE(1); and

    c. refusing leave would not result in an unjustifiably harsh consequence that would breach Article 8 because, having entered the UK as a visitor, she had no legitimate expectation of being able to remain permanently; and her daughter's rights as a British citizen would not be denied by her removal because the child could remain in the UK with her father.

B. Scope of the Appeal and Issues in Dispute

8. Mr Lindsay, in his skeleton argument, accepted that:

    a. there are insurmountable obstacles to the appellant's family life continuing outside of the UK; and

    b. it would not be reasonable or proportionate for the family unit to be indefinitely separated.

9. He stated that, on the facts of the case, the appellant is expected to leave the UK for only a limited period of time in order to apply for entry clearance to join her partner and that the "narrow issue" in the appeal is whether her temporary removal from the UK is proportionate. In his submissions, Mr Lindsay clarified that it is the respondent's case that the appellant will be able to travel to Pakistan in order to apply for entry clearance and that it is not contended that she would be able to return to the United Arab Emirates.

10. The appellant's primary case is that respondent's assumption that she would be able to re-enter the UK from Pakistan is mistaken as she would be unable to satisfy the financial eligibility requirements for entry as a partner. Accordingly, she contends that her appeal should be allowed because the consequence of her removal will be permanent, or at least long-term,

exclusion from the UK which the respondent has conceded is not reasonable or proportionate.

11. In the alternative, the appellant argues that if (which she does not accept) she would be able to re-enter the UK after only a limited period of time, her removal wound be disproportionate under article 8 ECHR for three reasons.

12. First, she argues that her removal would be disproportionate because she meets the requirements of the Immigration Rules (both under para. 276ADE(1)(vi) and Appendix FM) and satisfying the Rules is determinative of an article 8 appeal, as explained by the Senior President of Tribunals (Sir Ernest Ryder) in *TZ (Pakistan) and PG (India) v The Secretary of State for the Home Department* [2018] EWCA Civ 1109 at paragraph 34:

> [W]here a person satisfies the Rules, whether or not by reference to an article 8 informed requirement, then this will be positively determinative of that person's article 8 appeal, provided their case engages article 8(1), for the very reason that it would then be disproportionate for that person to be removed.

13. Second, she submits that there is a principle, derived from the House of Lords' judgment in *Chikwamba v SSHD* [2008] UKHL 40, that there is no public interest in removing a person from the UK in order to make an entry clearance from abroad that would be certain to succeed (referred to by Mr Sarwar as the "*Chikwamba* principle"). The appellant's case is that as she would succeed in her application from outside the UK it follows that she falls squarely within the *Chikwamba* principle and her appeal should be allowed on that basis.

14. Third, she argues that it would not be reasonable to expect her daughter to leave the UK (even for a temporary period, whilst her application for entry clearance is pending) and therefore, in accordance with s117B(6) of the Nationality Immigration and Asylum Act 2002 ("the 2002 Act"), the public interest does not require her removal.

15. The appellant has advanced a further argument as to why it would be unlawful to remove her from the UK. This contention is that she is entitled to a right of residence in order to avoid her daughter being deprived of the genuine enjoyment of the substance of her European Union Citizenship rights in accordance with *Ruiz Zambrano v Office national de l'emploi* (Case C-34/09) and *Patel v Secretary of State for the Home Department* [2019] UKSC 59.

C. Evidence

Evidence of the appellant

16. The appellant adopted her witness statement dated 15 April 2019.

17. In the statement she stated that she lives with her partner, who is her fiancé.

18. She also stated that she is the main carer for their daughter and that her partner finds it difficult to undertake day-to-day care for the child. She stated that if she were to leave the UK she would bring her daughter with her as her partner would not be able to combine caring for her with his work commitments as well as the care he provides for his two sons (from a previous relationship) on weekends and during school holidays. In oral evidence, she explained that her daughter started nursery in November 2019 and commented that this is going well.

19. The appellant also stated in her statement that she was born in Dubai where she has lived most of her life. In oral evidence, she stated that her mother died in 2012, she has three siblings in Dubai, and her brother and father live in the UK.

20. Both in her statement and orally the appellant stated that she has only ever been to Pakistan on short visits (staying in hotels, rather than with family or friends) and that she does not have any family members in Pakistan upon whom she could rely for support. She stated that she had not even visited Pakistan until she was 15 years old and that she would find it very difficult to settle and integrate into Pakistan.

21. She stated that she cannot return to Dubai as she does not have a valid visa.

22. She also stated that her partner "will not allow" her to take their daughter abroad.

23. The appellant was asked by Mr Lindsay whether, when she stated in the 2016 application that she only wished to remain in the UK for a further 6 months her intention, at that time, was to return to Dubai or relocate to Pakistan. The appellant's response was that she would have tried to return to Dubai but following the expiry of her visa at the end of 2016 this was no longer an option. She also stated that because her father was now living in the UK she was unable to renew her visa to live in Dubai. She stated that she did not remember when her father moved to the UK.

24. When asked by Mr Lindsay why she did not leave the UK as she said she would in the 2016 application, she responded that she did not receive a response to her application from the Secretary of State. She also stated that her daughter had asthma, flu and respiratory problems and because of this her partner did not allow her to take the child out of the UK. She acknowledged that no evidence about her daughter's health had been submitted but said it must be in hospital records.

25. In cross-examination, she said she could not take her daughter to Pakistan, even for a short time, because they would have nowhere to stay. She also stated that her daughter is well settled at nursery and is too young to go to Pakistan with her. She added that whenever the appellant had been to Pakistan she had fallen ill.

26. She emphasised in her oral evidence that she would be alone in Pakistan. In response to questions posed by Mr Lindsay about extended family, she stated that she did not know anyone and that any connection to wider family she had in the past was via her mother who is deceased and she has no knowledge about any extended family.

27. Mr Lindsay asked the appellant about her Pakistani identity card which records a permanent address in Pakistan. Her response was that the address was for a relative of her mother who is now deceased. She added, following a question posed by Mr Sarwar, that it is necessary to have a permanent address to obtain an ID card from Pakistan.

28. The appellant was asked about the reference to an uncle in Pakistan in the decision of the First-tier Tribunal. She stated that this was a relative of her mother who is deceased. When asked to clarify, she stated that the relative was deceased but she did not know when he died or if he had children. She thought the address on her ID card is that of this deceased relative.

29. She stated that she did not know if her partner (who is of Pakistani heritage) had family in Pakistan and that they had never discussed this.

30. In response to questions about her partner's work, she said that he is a carpet fitter who works "on and off" earning between £200 and £300 a week.

31. Mr Lindsay asked the appellant about the 2016 application and the 2018 application. She stated that the forms were completed on her behalf by her solicitor.

Evidence of the appellant's partner

32. The appellant's partner adopted his witness statement dated 15 April 2019.

33. In his statement he stated that the appellant is the main carer for their daughter and that because of his work commitments he is unable to look after her. He also stated that he would not be able to cope with looking after her.

34. He stated that he and the appellant enjoy a family life with his two sons from a previous marriage.

35. He also stated that due to the nature of his work and financial commitment of supporting three children he would find it difficult to meet the financial requirements for his partner to be granted entry clearance.

36. In oral evidence he stated that he is a carpet fitter on a zero hours contract earning £250-£300 a week "cash in hand". He stated that he was a carpet shop proprietor a number of years ago for a short period but it had not gone well. In response to questions about his income, he said that he would not be able to earn £19,000 – £20,000, which he understood was the level required for his partner to be admitted to the UK. When asked why, in the 2018 application, it was said that he earned £1,600 a month after tax, his response was that his income goes up and down and he can have some good and some bad months; but he does not earn near that amount and it is impossible to do so in his line of work.

37. He stated that all his family live in the UK and he does not have any extended family in Pakistan.

38. He stated that his partner used to have an uncle in Pakistan but that he has now moved to the UK. He stated that his partner speaks to this uncle on the telephone now and then. He also stated that his partner did not have any other extended family in Pakistan. In response to Mr Lindsay pointing out that the appellant had said her uncle had died, he stated that this was probably a different uncle and that he did not really know the details.

Documentary evidence

39. In the 2016 application form the appellant stated that her place of birth was Dubai. She stated that she was 30 weeks pregnant and the purpose of the application was to obtain a further 6 months leave in order to have her baby and recover fully before leaving the UK.

40. In the 2018 application form she gave Pakistan as her place of birth. She stated that the relationship with her partner began in 2015 and that they began cohabiting in May 2016. She stated that her partner earned approximately £1,600 a month after income tax and other deductions.

41. The appellant's daughter's birth certificate records the occupation of the appellant's partner as "carpet shop proprietor".

42. On the birth certificate of his oldest son (born in 1982), the appellant's partner is described as a "restaurant proprietor". The birth certificate of his younger son (born in 2003) describes his occupation as "sales assistant".

43. The appellant's identification card from Pakistan (issued in January 2010 and expiring in January 2020) records an address in Dubai as her present address and under the heading "permanent address" records an address in Pakistan.

44. The appellant submitted a letter from her daughter's nursery stating that the child is progressing well and has developed friendships with peers; a letter from her GP confirming she is registered with the practice (along with her partner and child); a letter from a friend confirming a longstanding friendship; and a letter from a neighbour attesting to the good character of the appellant and her partner.

45. The documentary evidence before us regarding timescales for entry clearance applications to join a family member in the UK indicates that it takes up to 12 weeks from attending the visa application centre appointment to receive a decision, or 30 days if the priority service is paid for.

Assessment of the evidence

46. Mr Lindsay submitted that the appellant and her partner had sought to obscure and minimise their connection to Pakistan. He argued that the evidence pointed to the appellant having an uncle in Pakistan who is sufficiently close to her that she was able to use his address for her identification document. He maintained that the appellant and her partner gave contradictory evidence about the uncle: the appellant stated that he is deceased whereas the evidence of her partner was that the appellant speaks to him on the telephone.

47. Mr Lindsay argued that it is not possible to conclude, based on the oral and other evidence, that the appellant and her partner would face difficulties meeting the financial eligibility requirement for entry clearance. He noted that in the 2018 application form the after tax income of the appellant's partner was recorded as £1,600 per month (a sum which is sufficient to meet the financial eligibility requirements) and that on his daughter's birth certificate he is described as a proprietor of a carpet shop. He submitted that there was no plausible explanation for the discrepancy between the income stated in the 2018 application form (£1,600 per month) and that stated in oral evidence (£250 – £300 a week).

48. Mr Sarwar argued that the evidence of the appellant and her partner about the appellant's uncle was not inconsistent as the appellant could have more than one uncle and her partner was not asked if any of the appellant's relatives had died. Mr Sarwar noted that the appellant's Pakistani ID card was issued whilst her mother was still alive, which is consistent with her claim that her only contact with extended family in Pakistan was via her mother.

49. He argued that the evidence of the appellant and her partner shows that neither have family ties in Pakistan and that there is no one in Pakistan who would be in a position to provide the appellant with support or accommodation. He highlighted that the appellant has lived her whole life in Dubai and has no experience of life in Pakistan.

50. With respect to the prospect of the appellant succeeding in an application for entry clearance, Mr Sarwar noted that the appellant's partner would need evidence, such as wage slips and self-assessment returns, to prove his income which would not be possible given that he works "cash in hand". He noted that the reference to the appellant's partner being a shop proprietor was 3.5 years earlier, and the evidence was that the shop had not been successful. Mr Sarwar submitted that the evidence shows that if the appellant is removed from the UK she will not be able to return.

51. Mr Sarwar also submitted that the evidence shows that the appellant has not used deception and has "done everything through the front door". He argued that she had intended to return to Dubai to apply for settlement but because of her child's health issues was forced to change her plans. He also contended that because of the delay by the respondent the appellant has established roots in the UK and now has a close relationship with her partner's two sons.

52. We agree with Mr Lindsay's assessment of the evidence. It is apparent that rather than state matters in a straightforward way the appellant and her partner have sought to present their evidence in a way that they believe will assist them. An example of this is the evidence given about the appellant's partner's income. In the 2018 application form the appellant stated that her partner earned approximately £1,600 a month after income tax and other deductions. This corresponds to £19,200 before tax a year and would be sufficient to meet the financial eligibility requirements under Appendix FM. The appellant stated in oral evidence that this form was completed by a solicitor on her behalf. She would have been aware (through her solicitor) of the importance of providing accurate information. We note that at the time this form was completed the appellant is likely to have believed that it was in her interests for her partner to have an income that met the requirements under Appendix FM. In contrast, at the hearing before us, where we were told in oral evidence that the appellant's partner earns £250-£300 per week (corresponding to £13,000 - £15,600 per year), the appellant was seeking to convey the opposite - that her partner's income did not meet the threshold under Appendix FM.

53. We found several aspects of the oral evidence problematic. In particular:

    a. The appellant stated that she had never spoken to her partner about whether he has any family in Pakistan (even though he is of Pakistani heritage). We find it wholly unbelievable that, faced with the

possibility of being returned to Pakistan with their daughter, the appellant and her partner would not have discussed whether the appellant's partner has any family or friends in Pakistan who might be able to provide assistance.

b. The appellant stated that she had no idea when her father moved to the UK. We do not find it credible that she did not even know whether her father was already in the UK when she came to the UK, given her claim to be entirely dependent upon him for her right to reside in the United Arab Emirates.

c. The appellant stated that she does not know whether her uncle had any children. Even if she only heard about her family through her mother and is not in contact with them herself, it is not plausible that she would not know if she has any cousins.

d. The appellant claimed that when her family visited Pakistan from Dubai they would stay in hotels and not visit family; and that she has never met any extended family. However, this does not stand with the appellant's acknowledgment that her mother's brother lived in Pakistan, the evidence of her partner that she speaks to her uncle on the telephone, and the documentary evidence – in the form of her Pakistani identity document – which gives an address that she accepted was probably his as her "permanent address".

e. It is not credible that the appellant, if she genuinely intended to return to Dubai after her child was born (as she stated in oral evidence), would not have taken steps to ensure she remained entitled to reside in Dubai before her United Arab Emirates' visa expired at the end of 2016. Similarly, given that she had no basis for believing she would be able to remain in the UK, it is not plausible that, if moving to Pakistan would be as challenging as she claims, she would not have taken steps to ensure that she would be able to return to Dubai in order to avoid the risk of having to relocate to Pakistan.

54. We also found that there was an inconsistency between the appellant's claim that she has never had contact with any family in Pakistan and the evidence of her partner that she speaks on the telephone to her uncle who recently moved to the UK from Pakistan. We were left with the clear impression, following Mr Lindsay's cross-examination of the appellant, that she failed to mention her uncle – and then stated that he was deceased – as part of an attempt to minimise and downplay the extent of her ties to Pakistan. We do not accept Mr Sarwar's attempt to suggest the appellant and her partner might have been talking about different people.

55. In addition, we found the evidence about the income of the appellant's partner to be unreliable not only because of the substantial discrepancy between the income stated on the 2018 application form and the oral evidence but also because the appellant's partner contradicted himself by stating in answer to one question from Mr Lindsay that he could earn £1,600 in a good month and in response to another question that it would be impossible to earn that much as a carpet fitter.

56. We also noted that the appellant's evidence about her daughter's health difficulties was not corroborated by the letter from the child's nursery, which describes her as healthy; or the letter from the appellant's GP practice, which includes no reference to there ever having been any health concerns. Likewise, there was no medical or other evidence to corroborate the appellant's claim that she was warned not to travel when pregnant because of a miscarriage risk.

57. For these reasons, we approach the witness evidence of the appellant and her partner with a high degree of caution. Moreover, we are unable to rely on their oral evidence about the presence of family in Pakistan and the earnings of the appellant's partner as it is apparent to us that they have sought to portray these matters in a way that they believe would be favourable to the appellant's claim.

D. Findings of Fact

58. The appellant was born, and has lived most of her life, in the United Arab Emirates.

59. The appellant is in a genuine and subsisting relationship with her partner who is a British citizen. They have a daughter, born on 6 September 2016, who is a British citizen.

60. The appellant lives with her partner and child as a family unit. Her partner has two (British citizen) teenage sons from a previous relationship who he sees regularly (primarily on weekends and holidays). The appellant has developed a relationship with her partner's sons.

61. The appellant travelled to the UK from the United Arab Emirates in May 2016 (whilst pregnant with the child of her British citizen partner) as a visitor. Their relationship was subsisting at the time. The appellant claims that her intention was to return to the United Arab Emirates and it is only because of difficulties with the pregnancy, and then with her child's health, that she did not do so. However, she did not adduce any medical evidence to support her claim to have been unable to return to the United Arab Emirates either whilst pregnant or shortly after the child was born. Nor has she explained why she did not return to Dubai prior to her United Arab Emirates residency visa

expiring in order to avoid a situation where her only option, other than to remain in the UK, would be to return to Pakistan, where she claims she would be without any support or accommodation. We have no doubt, and find as a fact, that the appellant entered the UK with the intention of giving birth and remaining with her partner permanently. We also find that she had this intention when she completed the 2016 application form in which she stated she only wished to remain in the UK for a further six months.

62. The appellant has never lived in Pakistan. However, along with her immediate family, she has maintained a connection to the country, visiting on several occasions. We find it far more likely than not that on those visits she stayed with family, rather than in hotels. We also find – in the absence of any evidence pointing to the contrary – that it is more likely than not that she is familiar with the language, culture, religion and societal norms of Pakistan, having grown up in a Pakistani family and within the Pakistani community in Dubai.

63. For the reasons explained above, the evidence we heard from the appellant and her partner about the presence of (and her relationship with) extended family in Pakistan was not credible. We find it more likely than not that the appellant has - and maintains a relationship with - extended family in Pakistan.

64. The appellant's partner works as a carpet fitter. He works under a "zero hours contract" taking on work when available. The evidence indicates that he has extensive experience in the field, having previously been a carpet shop proprietor. In the 2018 application form the appellant indicated that her partner's income was at a level that would be sufficient to meet the financial eligibility requirements under Appendix FM. Her (and her partner's) oral evidence, however, was that his income is substantially below that level and it would not be possible for him to meet the threshold. We have explained above why we are unable to give any weight to the oral evidence we heard on this issue. We find it more likely than not that the appellant's partner's current income meets the financial eligibility threshold but that even if it does not he could in a short space of time increase his income (by, for example, taking on more carpet fitting work from different sources) in order to meet the threshold.

65. Taking into consideration the time it is likely to take to compile the necessary evidence for an entry clearance application, to secure an appointment in Pakistan, and to receive the decision once the application is made, we find that the appellant will be out of the UK (in Pakistan, awaiting a grant of entry clearance) for between 4 and 9 months.

66. The appellant is the primary carer for her daughter. Given her partner's work commitments and the child's young age, it is more likely than not that the

appellant will bring her daughter with her to Pakistan if she is required to leave the UK.

67. The appellant's daughter is a healthy child with no developmental or other problems.

68. There was no evidence to suggest that the appellant has any health difficulties and therefore we find that she does not have any physical or mental health problems.

E. Analysis

The respondent's concession that it would be disproportionate for the appellant to be removed unless she would be able to re-enter the UK

69. The respondent has conceded that there are insurmountable obstacles to family life continuing outside the UK and that it would not be reasonable or proportionate for the appellant's family unit to be indefinitely separated. It follows, therefore, that if the appellant would be unable to re-enter the UK after her removal for an indefinite (or lengthy) period her appeal would fall to be allowed on the basis of the respondent's concession.

70. The appeal cannot, however, succeed on this basis because we have found that the appellant will be able to re-enter the UK within 4 – 9 months of her removal, and therefore there will not be indefinite, or lengthy, separation.

Entitlement to leave under the Immigration Rules

71. Mr Sarwar argued that the appellant satisfies the requirements of para. EX.1(b) of Appendix FM (insurmountable obstacles to family life with a partner continuing outside the UK) and her appeal should be allowed on this basis. Mr Lindsay argued, in response, that para. EX.1 is not freestanding and the appeal cannot succeed under Appendix FM because the appellant was a visitor in the UK when she made her application.

72. Mr Lindsay is plainly correct. It is not sufficient, in order to satisfy the requirements of Appendix FM, that a partner of a UK citizen is able to show that there would be "insurmountable obstacles" to the relationship continuing outside the UK. It is also necessary to satisfy certain of the eligibility requirements specified in paragraph E – LTRP, including that the applicant must not be in the UK as a visitor (E-LTRP.2.1). The appellant had leave as a visitor when she submitted the 2016 application and that leave continued – and continues – by operation of section 3C of the Immigration Act 1971. She therefore does not satisfy the Rules because she does not meet the eligibility immigration status requirement at E-LTRP.2.1.

73. Mr Sarwar also argued that because the appellant has never lived, and has no family or accommodation, in Pakistan, there would be very significant obstacles to her integration in Pakistan and therefore she satisfies the requirements of para. 276ADE(1)(vi) of the Immigration Rules. Mr Lindsay argued that this contention has no merit because under para. 276ADE(1) it is necessary to look at the position at the date of the application and at that date the appellant had only been in the UK for a very short period of time.

74. We reject the argument that the appellant satisfies para. 276ADE(1)(vi) for two reasons. First, at the date of the appellant's application (which, as submitted by Mr Lindsay, is the relevant date) the appellant would, by her own account, have been able to return to the United Arab Emirates, a country in which she has lived nearly all her life and in which she has close family. Clearly, she would not face very significant obstacles integrating into the United Arab Emirates.

75. Second, and in any event, there are not very significant obstacles to the appellant integrating into Pakistan. In *Kamara v SSHD* [2016] EWCA Civ 813 Sales LJ explained that the concept of integration is a broad one. He stated:

> "The idea of integration calls for a broad evaluative judgment to be made as to whether the individual will be enough of an insider in terms of understanding how life in the society in that other country is carried on and a capacity to participate in it so as to have a reasonable opportunity to be accepted there, to be able to operate on a day by day basis in that society and to build up within a reasonable time a variety of human relationships to give substance to the individual's private or family life".

76. Although the appellant has never lived in Pakistan and would consequently face some difficulties and challenges establishing herself in the country, she is familiar with the language, culture, religion and societal norms of Pakistan, having grown up in a Pakistani family and within the Pakistani community in Dubai. She also has maintained a connection with extended family in Pakistan, including family members whose address she has used for her identity card and with whom she has stayed on family visits. Given her background and family connections, we are satisfied that the appellant would be an insider in Pakistan, in the sense that she would have an understanding as to how life is carried on and the ability to integrate and be accepted. The difficulties and challenges she would face integrating fall a long way short of being "very significant obstacles".

77. It was not argued before us that the assessment of very significant obstacles under para. 276ADE(1)(vi) should take into account the length of time the appellant would be outside of the UK. It is not necessary for us to consider this issue – and therefore we do not do so - because, on the facts of this appeal, there would not be very significant obstacles to integration in

Pakistan whether the appellant remained there permanently or for a short period.

Public interest and proportionality of removing the appellant in circumstances where she will be granted entry clearance to re-enter the UK within several months of her removal ('the *Chikwamba* principle')

78. The appellant, relying on what has been referred to by the parties as the *Chikwamba* principle, argues that (a) there is no public interest in requiring her to leave the UK merely in order to make a successful application for entry clearance; and (b) because there is no public interest in her removal it is not necessary for her show that temporary separation would be disproportionate or would give rise to any kind of unusual hardship.

79. To support these contentions, the appellant relies on a passage (at para. 44) in *Chikwamba v SSHD* [2008] UKHL 40 where Lord Brown stated:

> [I]t seems to me that only comparatively rarely, certainly in family cases involving children, should an article 8 appeal be dismissed on the basis that it would be proportionate and more appropriate for the appellant to apply for leave from abroad."

80. This is said to be reinforced by *R (Agyarko) v SSHD* [2017] UKSC 11, where Lord Reed stated at para. 51 that:

> Whether the applicant is in the UK unlawfully, or is entitled to remain in the UK only temporarily, however, the significance of this consideration depends on what the outcome of immigration control might otherwise be. For example, if an applicant would otherwise be automatically deported as a foreign criminal, then the weight of the public interest in his or her removal will generally be very considerable. **If, on the other hand, an applicant—even if residing in the UK unlawfully—was otherwise certain to be granted leave to enter, at least if an application were made from outside the UK, then there might be no public interest in his or her removal.** The point is illustrated by the decision in *Chikwamba v Secretary of State for the Home Department*." (Emphasis added).

81. Mr Lindsay argued in response that there is a public interest in the appellant's (temporary) removal from the UK. He described the applicable public interests as being the maintenance of an effective system of immigration control, the promotion of public confidence in the immigration system, and deterrence of others from seeking to enter or remain without appropriate leave.

82. In addition, he argued that it was for the appellant to submit evidence to show that temporary removal would be disproportionate and she had not demonstrated that the nature and extent of any disruption to her family life would interfere disproportionately with her rights under article 8.

83. Neither *Chikwamba* nor *Agyarko* support the contention that there cannot be a public interest in removing a person from the UK who would succeed in an entry clearance application. In *Agyarko*, a case in which the *Chikwamba* principle was not at issue, it is only said that that there "might" be no public interest in the removal of such a person.

84. The appellant in *Chikwamba* was a failed asylum seeker from Zimbabwe whose removal was temporarily suspended because of the harsh conditions in Zimbabwe. Whilst in the UK she married a national of Zimbabwe who had been granted asylum and they had a daughter. Shortly after her daughter was born, the suspension on removals to Zimbabwe was lifted. It was accepted that the appellant would succeed were she to make an application for entry clearance from Zimbabwe but the respondent's policy nonetheless required her removal. Lord Brown, allowing the appellant's appeal, concluded at paragraph 46:

> "Is it really to be said that effective immigration control requires that the claimant and her child must first travel back (perhaps at the taxpayers' expense) to Zimbabwe, a country to which the enforced return of failed asylum seekers remained suspended for more than two years after the claimant's marriage and where conditions are 'harsh and unpalatable', and remain there for some months obtaining entry clearance, before finally she can return (at her own expense) to the United Kingdom to resume her family life which meantime will have been gravely disrupted? Surely one has only to ask the question to recognise the right answer."

85. If, as the appellant claims, the principle of *Chikwamba* is that, irrespective of individual circumstances, there is no public interest in requiring a person to leave the UK simply in order to make a successful application for entry clearance, then the individual circumstances of an appellant (including issues such as the difficulties they might face on return) would be irrelevant. All an appellant would need to show is that he or she would succeed in the application from abroad as that would be sufficient to establish that there is no public interest in removal (and therefore removal is disproportionate). The difficulty with this interpretation of *Chikwamba* is that it does not explain why Lord Brown engaged in a detailed consideration of the individual and particular circumstances of the appellant (specifically, that the conditions in Zimbabwe were "harsh and unpalatable", her husband could not accompany her and she would need to bring to Zimbabwe – or be separated from – her child). These factors, which form part of Lord Brown's reasoning to support his conclusion that there was not a public interest in the appellant's removal, would have been irrelevant if all that mattered was that the appellant would be granted entry clearance.

86. The appellant's interpretation of *Chikwamba* also ignores the analysis of Lord Brown at paragraphs 41-42 where he made clear that in some cases there will

be a public interest in removing (and it will not be disproportionate to remove) a person from the UK even though they will be granted entry clearance when applying from abroad. He noted that the appellant in *R (Ekinci) v SSHD* [2003] EWCA Civ 79 (a person with an appalling immigration history who would only be required to travel to Germany for one month for a decision on his application) was such a person. In addition, he identified factors relevant to both whether there is public interest in removal (a person's immigration history) and whether temporary removal would be disproportionate (the prospective length and degree of family disruption, and the circumstances in the country of temporary return).

87. The Court of Appeal, when interpreting *Chikwamba*, has been clear that the case does not stand for the proposition that it is sufficient, in order to resist removal under article 8 ECHR, for an appellant to show that he or she would succeed in an entry clearance application. In *Secretary of State for the Home Department v Hayat (Pakistan)* [2012] EWCA Civ 1054, for example, the Court of Appeal upheld a First-tier Tribunal decision that removal would be proportionate, even though an entry clearance application would succeed. Elias LJ found at para. 52 that the individual circumstances of the case (where separation would be short, family life could continue outside the UK, the appellant had no legitimate expectation of a right to remain, and the consequences of separation would be far less serious than that in *Chikwamba*) were such that "there were cogent factors justifying the conclusion that Article 8 was not infringed by requiring the appellant to return to Pakistan."

88. Mr Lindsay drew our attention to a more recent Court of Appeal judgment in which the *Chikwamba* principle was considered: *Kaur, R (on the application of) v Secretary of State for the Home Department* [2018] EWCA Civ 1423. The appellant's argument raising the *Chikwamba* principle was not ultimately decided by the Court but the nature of the principle was discussed. Holroyde LJ noted that the facts in *Chikwamba* were "stark". At paragraph 45 he stated:

> I have quoted in paragraph 26 above the passage in which Lord Reed (at paragraph 51 of his judgment in *Agyarko*) referred to *Chikwamba*. It is relevant to note that he there spoke of an applicant who was "certain to be granted leave to enter" if an application were made from outside the UK, and said that in such a case there *might* be no public interest in removing the applicant. That, in my view, is a clear indication that the *Chikwamba* principle will require a fact-specific assessment in each case, will only apply in a very clear case, and even then will not necessarily result in a grant of leave to remain.

89. The Upper Tribunal considered the *Chikwamba* principle in *R (on the application of Chen) v Secretary of State for the Home Department) (Appendix FM – Chikwamba – temporary separation – proportionality)* IJR [2015] UKUT 00189 (IAC). Upper Tribunal Gill observed that Lord Brown was not laying down a legal test when he suggested in *Chikwamba* that requiring a claimant to make an application for entry clearance would only "comparatively rarely" be proportionate in a

case involving children, and that in all cases it will be for the individual to demonstrate, through evidence, and based on his or her individual circumstances, that temporary removal would be disproportionate.

90. *Chikwamba* pre-dates Part 5A of the Nationality Immigration and Asylum Act 2002 ("the 2002 Act"), which was inserted by the Immigration Act 2014. Section 117A(2) of the 2002 Act provides that a court or tribunal, when considering "the public interest question," must have regard to the considerations listed in section 117B (and 117C in cases concerning the deportation of foreign criminals, which is not relevant to this appeal). The "public interest question" is defined as "the question of whether an interference with a person's right to respect for private and family life is justified under article 8(2)". There is no exception in Part 5A of the 2002 Act (or elsewhere) for cases in which an appellant, following removal, will succeed in an application for entry clearance. Accordingly, an appellant in an Article 8 human rights appeal who argues that there is no public interest in removal because after leaving the UK he or she will be granted entry clearance must, in all cases, address the relevant considerations in Part 5A of the 2002 Act including section 117B(1), which stipulates that "the maintenance of effective immigration controls is in the public interest". Reliance on *Chikwamba* does not obviate the need to do this.

91. In the light of the foregoing analysis, we approach the appellant's *Chikwamba* argument as follows.

92. The first question to be addressed is whether her temporary removal from the UK is a sufficient interference with her (and her family's) family life to even engage article 8(1). If article 8(1) is not engaged then the proportionality of removal under article 8(2) - and therefore the *Chikwamba* principle - does not arise.

93. We did not hear argument on this point and both parties proceeded on the basis that article 8 is engaged. In this case, where one of the consequences of temporary removal will be that the appellant's daughter is separated from her father for several months, we are in no doubt that article 8(1) is engaged. However, even though the threshold to engage article 8(1) is not high (see *AG (Eritrea)* [2007] EWCA Civ 801 and *KD (Sri Lanka*) [2007] EWCA Civ 1384), it is not difficult to envisage cases (for example, where there would not be a significant impediment to an appellant's partner accompanying the appellant to his or her country for a short period) in which article 8 would not be engaged.

94. The second question is whether an application for entry clearance from abroad will be granted. If the appellant will not be granted entry clearance the *Chikwamba* principle is not relevant. A tribunal must determine this for itself based on the evidence before it, the burden being on the appellant: see *Chen* at

39. In this case, we have found, for the reasons explained above, that, on the balance of probabilities, the appellant will be granted entry clearance if she makes an application from Pakistan to join her partner.

95. The third question is whether there is a public interest in the appellant being required to leave the UK in order to undertake the step of applying for entry clearance; and if so, how much weight should be attached to that public interest.

96. In some cases, the fact that a person will be able to re-enter the UK means that there will be no public interest at all in his or her removal. By way of example, in *Parveen v The Secretary of State for the Home Department* [2018] EWCA Civ 932 the appellant had entered the country lawfully and genuinely on a spouse visa and had remained married to her husband and resident in the UK ever since but had not, thirteen years earlier, made an application for leave. Underhill LJ observed at para. 28:

> "It is hard to see how it could be right to insist on the empty but disruptive formality of leaving the country in order to correct a venial administrative error made thirteen years previously".

97. If there is no public interest in a person's removal then it will be disproportionate for him or her to be removed and no further analysis under Article 8 is required. On the other hand, if there is at least some degree of public interest in a person being temporarily removed then it will be necessary to evaluate how much weight is to be given to that public interest so that this can be factored into the proportionality assessment under article 8(2).

98. We have found that the appellant (a) entered the UK as a visitor even though her real intention was to remain in the UK with her partner; and (b) remained in the UK despite stating in the 2016 application that she would leave after 6 months. We agree with Mr Lindsay that, in the light of this immigration history, the public interest in the appellant's removal from the UK is strong; and the strength of that public interest is not significantly diminished because she will be able to re-enter the UK. The integrity of, and the public's confidence in, the UK's immigration system is undermined if a person is able to circumvent it, as the appellant has attempted to do by entering the UK as a visitor with the intention of remaining permanently. Requiring the appellant, in these circumstances, to leave the UK in order to make a valid entry clearance application as a partner, far from being merely a disruptive formality, serves the important public interest of the maintenance of effective immigration controls.

99. The fourth question is whether the interference with the appellant's (and her family's) right to respect for their private and family life arising from her being required to leave the UK for a temporary period is justified under

article 8(2). This requires a proportionality evaluation (i.e. a balance of public interest factors) where consideration is given to all material considerations including (in particular) those enumerated in section 117B of the 2002 Act.

100. The evidence before the Tribunal indicates that temporary removal will result in a substantial interference with the appellant's family life. Most significantly, the appellant's daughter will be separated from her father (who will not be able to accompany her because of his work commitments and responsibilities for his sons) for several months. In addition, the appellant will be separated from her partner, and will have to reside in a country she has never previously lived in. That said, there is no reason the appellant will not be able to live comfortably (her partner can provide her with financial support during her temporary period outside of the UK) and she will be living in a culture with which she is familiar and in proximity to extended family.

101. A primary, but not determinative, consideration is the best interests of the appellant's daughter. It is not in the child's best interests to be separated from father, or from her step-brothers. Although removal will be temporary, we have found that it may take up to 9 months for the appellant to be in a position to re-enter the UK, which is a substantial period of time for a young child. On the other hand, the child is healthy, and because of her young age there will not be any significant disruption to her education (she is in nursery and has not yet started school). In addition, she would have the benefit of experiencing life in the country of her mother's nationality. Weighing these factors, whilst we consider that it would be in the child's best interests to not have to relocate to Pakistan without her father, we are equally of the view that she will not suffer any detriment by doing so, given the temporary nature of the separation.

102. We apply the considerations in section 117B as follows:

a. Section 117B(1) provides that the maintenance of effective immigration controls is in the public interest. For the reasons we have set out above, this factor weighs heavily in favour of removal.

b. Following *Rhuppiah v SSHD* [2018] UKSC 58 at para. 57, we treat sections 117B(2) (ability to speak English) and 117B(3) (financial independence) as neutral factors, as the appellant's partner earns a sufficient income for the family to not be a burden on the state and, although we were not provided with evidence on this point and the appellant gave evidence through an interpreter, we are prepared to accept that she speaks English.

c. Section 117B(4) is not applicable because the appellant has not been in the UK unlawfully.

d. Section 117B(5) (little weight to a private life established when a person's immigration status is precarious) does not apply to the appellant's relationship with her partner because (a) the relationship engages her family, rather than private, life; and (b) it was established before she came to the UK; ie not at a time when her immigration status was precarious.

e. Section 117B(6) (no public interest in removal where it would not be reasonable to expect a qualifying child to leave the UK) does not apply because, for the reasons set out below, we reject the argument that it is not reasonable to expect the appellant's child to leave the UK.

103. Adopting the balance sheet approach recommended by Lord Thomas in *Hesham Ali (Iraq) v Secretary of State for the Home Department* [2016] UKSC 60 we find as follows.

104. Weighing on the appellant's side of the balance sheet is that:

a. The appellant's daughter will be separated from her father (and the appellant from her partner) for up to 9 months. This is a substantial period of time, particularly for the daughter.

b. It is in the best interests of the appellant's daughter to remain in the UK with both parents rather than temporarily reside in Pakistan with just the appellant.

c. The appellant will face some challenges setting herself up and organising her life in Pakistan, given that she has not lived there previously.

105. Weighing on the other side of the balance sheet is that even though the appellant's removal will be followed by her re-entry, there is, for the reasons explained above, nonetheless a strong public interest in her being required to leave the UK in order to comply with the requirement to obtain valid entry clearance as a partner.

106. Balancing the factors weighing for and against the appellant, we reach the firm conclusion that her removal, in order to make an entry clearance application from Pakistan, is proportionate.

Section 117B(6) of the Nationality Immigration and Asylum Act 2002 and the reasonableness of expecting the appellant's daughter to leave the UK

107. Section 117B(6) of the 2002 Act provides that:

> (6) In the case of a person who is not liable to deportation, the public interest does not require the person's removal where—
>
> (a) the person has a genuine and subsisting parental relationship with a qualifying child, and
>
> (b) it would not be reasonable to expect the child to leave the United Kingdom.

108. Section 117B(6) of the 2002 Act is a self-contained provision, such that where the conditions specified therein are satisfied the public interest does not require the person's removal. See *MA (Pakistan) & Ors v Upper Tribunal* [2016] EWCA Civ 705.

109. The respondent accepts that the appellant meets the condition in 117B(6)(a). The respondent also accepts that it would not be reasonable to expect the appellant's daughter to leave the UK indefinitely. However, the respondent argues that the condition in section 117B(6)(b) is not met because it would be reasonable to expect the appellant's daughter to leave the UK temporarily whilst her mother makes an application for entry clearance from Pakistan.

110. Section 117B(6)(b) requires a court or tribunal to assume that the child in question will leave the UK: *Secretary of State for the Home Department v AB (Jamaica) & Anor* [2019] EWCA Civ 661 and *JG (s 117B(6): "reasonable to leave" UK) Turkey* [2019] UKUT 00072 (IAC). However, once that assumption has been made, the court or tribunal must move from the hypothetical to the real: paragraph 19 of *KO (Nigeria) & Ors v Secretary of State for the Home Department* [2018] UKSC 53. The length of time a child is likely to be outside the UK is part of the real world factual circumstances in which a child will find herself and is relevant to deciding, for the purpose of section 117B(6)(b), whether it would be unreasonable to expect the child to leave the UK.

111. A court or tribunal must base its analysis of reasonableness on the facts as they are (having assumed, for the purpose of this analysis, that the child will leave the UK with his or her parent or parents). The "real world" context includes consideration of everything relating to the child, both in the UK and country of return, such as whether he or she will be leaving the UK with both or just one parent; how removal will affect his or her education, health, and relationships with family and friends; and the conditions in the country of return. The conduct and immigration history of the child's parent(s), however, is not relevant. See *KO* at paras. 16 – 18.

112. The "real world" circumstances in the country of return may be significantly different if a child will be outside the UK only temporarily rather than indefinitely. For example, when a child will be leaving the UK indefinitely the

availability and adequacy of education in the destination country might be highly relevant to whether it is a reasonable to expect the child to relocate to that country. On the other hand, if the child will be leaving the UK for only a few months, it is the disruption to his or her education in the UK that is likely to be more significant than the availability of suitable education in the country of return.

113. Both parties agreed that the length of time a child will be outside the UK is part of the real world factual circumstances in which a child will find herself and we were not presented with (and cannot conceive of) any good reason why this should not be the case. Accordingly, whether it would be reasonable to expect the appellant's daughter to leave the UK is to be assessed on the basis of our finding of fact that she will be outside the UK, with the appellant, for 4 - 9 months.

114. Mr Sarwar argued that it would not be reasonable to expect the appellant's daughter to leave the UK for even a short period because she would be without her father and step-siblings; would be unable to access the UK education and health system, and would face emotional turmoil from being uprooted. In addition, he submitted that she would face a challenging environment in Pakistan because the appellant has never lived there and would not have family or other support. Mr Sarwar relied on the respondent's policy as set out in the document titled Family Policy: family life (as a partner or parent), private life and exceptional circumstances dated 10 December 2019 which states at page 50 that the respondent "would not normally expect a qualifying child to leave the UK".

115. Mr Lindsay argued that it is not unreasonable for the appellant's daughter to be separated from her father and step siblings for only a short period and that there would not be a significant disruption to her education (as she has not yet started school) or healthcare provision (as the evidence is that she is healthy). He also submitted that the circumstances in Pakistan would not be harsh; and the appellant's daughter would be with her primary carer, in the country of her mother's nationality where extended family live.

116. We do not accept Mr Sarwar's contention that the appellant's daughter will face emotional turmoil as a result of spending up to nine months in Pakistan. She is a young child who will be with her mother (who is her primary carer) in the country of her mother's citizenship. Although the appellant has not lived in Pakistan, she is familiar with the culture, environment, societal norms and has extended family. The evidence does not indicate that Pakistan would be a difficult or harsh environment for the appellant's child. She has not yet started school, so there will be no disruption to her education. Nor is there a reason to believe that spending a period of time in Pakistan will be detrimental to her health as there is no evidence before us that she has any medical problems.

117. The appellant's daughter will be separated from her father and step siblings. However, the separation will only be temporary, during which time she will be able to remain in contact with them through telephone, skype and other means of communication (and her father could visit her). As we have explained above, whilst we consider that it would be in her best interests to not have to relocate to Pakistan without her father, we are equally of the view that she will not suffer any detriment by doing so, given her young age and the temporary nature of the separation. Although the daughter will be temporarily removed from nursery school, there is no evidence to justify the conclusion that this will have any materially adverse effect on her education and general development. Taking all of these factors into consideration, we are satisfied that it would not be unreasonable to expect the appellant's daughter to leave the UK for a temporary period whilst her mother applies for entry clearance.

The principle in *Ruiz Zambrano v Office national de l'emploi* (Case C-34/09) and the appellant's entitlement to a right of residence to avoid her daughter being deprived of the genuine enjoyment of the substance of her European Union citizenship rights

118. Article 20 of the Treaty on the Functioning of the European Union ("TFEU") precludes national measures which have the effect of depriving citizens of the European Union of the genuine enjoyment of the substance of the rights conferred by virtue of their status as citizens of the Union. This was applied in *Zambrano* to mean that a parent of a child who is a British citizen (and therefore also a European Union citizen) is entitled to a (derivative) right of residence to avoid the child being compelled to leave the territory of the European Union as a result of his or her parent being required to leave.

119. The scope of the concept of "being compelled" to leave the European Union was recently considered by the Supreme Court in *Patel v Secretary of State for the Home Department* [2019] UKSC 59. At paragraph 30 Lady Arden stated:

> The overarching question is whether the son would be compelled to leave by reason of his relationship of dependency with his father. In answering that question, the court is required to take account, "in the best interests of the child concerned, of all the specific circumstances, including the age of the child, the child's physical and emotional development, the extent of his emotional ties both to the Union citizen parent and to the third-country national parent, and the risks which separation from the latter might entail for that child's equilibrium" (*Chavez-Vilchez*, para 71). **The test of compulsion is thus a practical test to be applied to the actual facts and not to a theoretical set of facts.** As explained in para 28 of this judgment, on the FTT's findings, the son would be compelled to leave with his father, who was his primary carer. That was sufficient compulsion for the purposes of the *Zambrano* test. There is an obvious difference between this situation of compulsion on the child and impermissible reliance on the right to respect for family life or on

> the desirability of keeping the family together as a ground for obtaining a derivative residence card. It follows that **the Court of Appeal was wrong in this case to bring the question of the mother's choice into the assessment of compulsion.** (Emphasis added).

120. The appellant and her partner could choose for their daughter to remain in the UK with her father whilst the appellant leaves the UK. The Court of Appeal in *Patel* found that the existence of such a choice meant that there was no question of compulsion: see para. 75 of *Patel v SSHD* [2017] EWCA Civ 2028. The Supreme Court, however, concluded to the contrary, finding that there is compulsion, for the purposes of the *Zambrano* test, where, in practice and based on the actual facts, the child will in fact leave the territory of the Union.

121. We have found, as a fact, that the appellant is the primary carer of her daughter and that if she is required to leave the UK she will take her daughter with her. Accordingly, applying the interpretation of the *Zambrano* test in *Patel*, we find that the appellant's daughter will be compelled to leave the UK as a result of her mother leaving the UK.

122. In *Zambrano,* as well as the subsequent CJEU cases interpreting and developing the derivative right of residence described therein, the children in question faced indefinite exclusion from the territory of the Union. In these cases, it followed inextricably (and therefore was not in dispute) that the children, if compelled to leave the UK, would be deprived of the genuine enjoyment of the substance of Union citizenship rights protected by Article 20 TFEU.

123. However, in this appeal, in contrast, the appellant and her daughter will be outside the Union (in Pakistan) for only a temporary period (of up to 9 months). Whilst in Pakistan the appellant's daughter will be deprived of the enjoyment of the substance of her Union citizenship rights. The deprivation she will face, however, is only theoretical because if she were to remain in the UK for this temporary period it is extremely unlikely that, as a young child attending nursery, she would engage in any activities (such as moving within the Union) where her rights as a Union citizen would be relevant. The question to resolve, therefore, is whether it is enough that she will be temporarily deprived of the genuine enjoyment of her rights as a citizen of the Union in a theoretical sense.

124. As far as we are aware this question has not been considered in any European or UK cases. However, in *Patel*, the Supreme Court, after considering the CJEU's *Zambrano* jurisprudence, concluded that the test of compulsion is "a practical test to be applied to the actual facts and not to a theoretical set of facts". Given that the assessment of whether a child will be compelled to leave the Union for the purposes of Article 20 TFEU must be based on the actual facts (rather than any hypothetical or theoretical

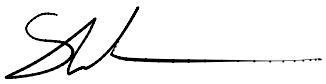
scenarios), it follows that the assessment of whether a child, as a result of being compelled to leave the territory of the European Union, will be deprived of his or her genuine enjoyment of the rights conferred by Article 20 TFEU in accordance with *Zambrano* falls to be assessed by considering the actual facts (including how long a child is likely to be outside the territory of the Union), rather than theoretical possibilities.

125. Accordingly, we find that it is not contrary to the principle in *Zambrano* for the appellant's daughter to be compelled to leave the UK with the appellant because she and the appellant will re-enter the UK several months later and any loss of enjoyment of the substance of her Union citizenship rights (which will be limited to that temporary period) will only be theoretical.

Decision

126. The appeal is dismissed.

Signed



Upper Tribunal Judge Sheridan Dated: 23 March 2020