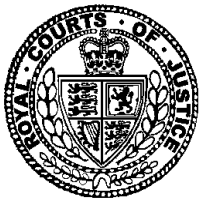

Neutral Citation Number: [2022] EWCA Civ 1357

Case No: CA-2021-001464

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM
The Special Immigration Appeals Commission (Johnson J, Upper Tribunal Judge Smith, Mr Philip Nelson)
SC/144/2017

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21 October 2022

Before:

LADY JUSTICE MACUR
LORD JUSTICE PETER JACKSON
and
LADY JUSTICE ELISABETH LAING

- -

Between:

L3	**Appellant**
- and -	
SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Respondent**

- -
- -

Hugh Southey KC and Nick Armstrong (instructed by **AGI Criminal Solicitors**) for the **Appellant**
Rory Dunlop KC and Jennifer Thelen (instructed by **The Treasury Solicitor**) for the **Respondent**
Ashley Underwood KC and Tom Little KC (Special Advocates) for the **Respondent**

Hearing date: 11 October 2022

- -

Approved Judgment

This judgment was handed down remotely at 10.30am on 21 October 2022 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lady Justice Elisabeth Laing:

Introduction

1. The Appellant ('A') appeals from a decision of the Special Immigration Appeals Commission ('SIAC') (Johnson J, Upper Tribunal Judge Smith and Mr Philip Nelson). SIAC dismissed A's application (under section 2C of the Special Immigration Appeals Commission Act – 'the 1997 Act') for a statutory review of the Secretary of State's decision to exclude him from the United Kingdom.

2. I gave permission to appeal on two grounds.
    i. SIAC erred in paying no attention to the importance of children being brought up in the country of their citizenship: *ZH (Tanzania) v Secretary of State for the Home Department* [2011] UKSC 4; [2011] 2 AC 166. There is no reference in SIAC's judgment to *ZH* or to the weight to be given to the British citizenship of A's children.
    ii. In its consideration of the *Zambrano* principle (*Ruiz Zambrano v Office Nationale de l'Emploi* (C-34/09) [2012] QB 886) SIAC cited *VM v Secretary of State for the Home Department* [2017] EWCA Civ 255 but not *Patel v Secretary of State for the Home Department* [2019] UKSC 59; [2020] 1 WLR 228. *Patel* makes clear that the best interests of children is a factor in the assessment of dependency and of whether there is a compulsion to leave the United Kingdom.

3. The Secretary of State served a Respondent's Notice dated 28 February 2022 ('the RN'). The Secretary of State relied on eight points. Four concerned article 8 and four the *Zambrano* principle.
    i. Article 8 was not engaged.
    ii. The ministerial submission complied with *ZH (Tanzania)* because it expressly considered the duty to safeguard and promote the welfare of A's children, their best interests and the fact that they were British citizens.
    iii. The observations in *ZH (Tanzania)* were obiter and related to the facts of that case. They are not to be applied by rote to every case involving British children. The weight to be given to citizenship depends on the circumstances.
    iv. Any impact on the best interests of British citizen children was outweighed by the need to protect national security.
    v. The *Zambrano* principle was not engaged because none of the family was living in the United Kingdom at the relevant time.
    vi. If it was engaged, and if the test in *Patel* is different from the test in *VM*, A failed to meet the necessary threshold.
    vii. If it was engaged, it was not breached because a threat to national security such as that posed by A is sufficient to deny a third country national a derivative right of residence.
    viii. If the *Zambrano* principle was breached, there would be no point quashing decision 2, as EU law no longer applies and the *Zambrano* principle would not apply to any fresh decision.

4. On this appeal, A has been represented by Mr Southey KC and Mr Armstrong. The Secretary of State was represented by Mr Dunlop KC and Ms Thelen. I thank counsel for their written and oral submissions.

5. The Special Advocates, Mr Underwood KC and Mr Little KC, did not apply for permission to appeal on any CLOSED grounds. In particular, they did not challenge any of the conclusions which SIAC described in the OPEN judgment but which were based on the CLOSED material. They had indicated in correspondence before the OPEN hearing that they wished to support the OPEN grounds of appeal with CLOSED argument. Having heard from them at the start of the OPEN hearing, the Court decided that it would not be necessary to hear any CLOSED submissions. There was therefore no CLOSED hearing. I say more about this issue in paragraph 79, below.

6. Paragraph references are to SIAC's OPEN judgment, to the authorities, or to any relevant document, as the case may be, unless I say otherwise.

The background

7. A is a Libyan national. Until the Secretary of State's decision dated 8 September 2017 ('decision 1'), which cancelled it, he had limited leave to remain ('LLTR') in the United Kingdom. It had been due to expire in 2018. His wife is a dual citizen of Libya and of the United Kingdom.

The family's movements

8. I now summarise what A and his wife said in their witness statements about their movements to and from the United Kingdom. A's wife was born in the United Kingdom but moved to Libya when she was 1 or 2 years old. She is a law graduate. She and A married in Libya in 2005. They now have six children, who are dual British/Libyan citizens. Their three eldest children were born in Libya. Their fourth child was born in the United Kingdom in 2014. At the date of the hearing in SIAC, the children were 13, 11, 8, 6 and 1 years old. As Mr Southey explained, the two youngest children are twins. They were born in Turkey.

9. A came to the United Kingdom in 2014 with LLTR until April 2018. His wife entered the United Kingdom with him, at the end of July 2014. The three elder children stayed in Turkey with an aunt. A's wife stayed in the United Kingdom for three months and then went to Turkey. While she was in the United Kingdom, their fourth child was born. She and the four children then stayed in Turkey until October 2015. They were waiting for British passports for the children. They then all came to the United Kingdom. During the intervening period, A made frequent visits to Turkey and she made frequent visits to him.

10. A then went to Libya for about two weeks with his family in September 2017 after the death of his father. When the family was on its way back to the United Kingdom, A found out about decision 1, which excluded him from the United Kingdom as well as cancelling his LLTR. His wife and children went to the United Kingdom without him but found that they could not tolerate the separation. 'They were used to me doing everything'. They stayed in the United Kingdom until 26 October 2017 and then went to Turkey.

11. A and his family have been in Turkey since then apart from a period of about nine months between June 2018 and an undisclosed date in 2019 when they all returned to Libya. They left Libya, in short, because A came under pressure again to become involved in the civil war in Libya.

The evidence of A and of his wife about the effects of decision 1

12. A and his wife described the effects of decision 1 in paragraphs 79-81 of A's witness statement dated 24 November 2019 and in paragraphs 11, 12, 13 and 14 of A's wife's witness statement dated 10 November 2019, respectively.

13. She said that life in the United Kingdom was 'good. We were integrated into the system immediately'. Her children learnt to speak English from scratch 'within 2-3 months'. The children were happy. She could get treatment for her glandular problems easily. It was difficult to deal with people in Turkey, particularly in schools and hospitals. She and the children experienced racism. When she thought her son was harassed by a teacher at school in England, everyone sided with her after one visit to the school. In Turkey only Turkish children can take part in physical education. The children were not happy at school in Turkey. She would not be treated in hospital in Turkey if she lost her residence card. She has received poor hospital treatment. Getting a residence card can be difficult. Her sons had been waiting for two months for theirs. They could go nowhere without the cards and could not get emergency medical treatment. The children are unhappy and contrast their lives in England with their lives in Turkey. It is difficult for her to get a job. She also has to look after the children.

14. A said that when decision 1 was made his ties with the United Kingdom were 'strong'. His three eldest children, who were 5, 8 and 10 had been at school in England for two years; the youngest, who was 3, for one year. They were doing 'excellently' and spoke 'fluent' English. He was studying for a Master's degree in accounting. His studies were going well. He planned to do work experience. His wife was receiving medical treatment for her glands. They were able to finance themselves with a scholarship from the Libyan government and were also receiving child tax credit, child benefit and housing benefit. Jobcentreplus had sent his wife to an English school so that she could get a job. He was 'also looking to improve [his] English. It was already good enough to study at university. It has got worse since through lack of practice'.

15. In Turkey he had a tourist visa. It enabled him to study but not to work. His children were in the same position. If he could find a job he could change his visa to one which enabled him to work. Schools in Turkey do not accept children from other cultures. One son was ganged up on at school and the teachers did not help. The children did not speak fluent Turkish. They had to rely on other Arab children to translate. Two had started to forget their English. The children are not as happy as they were in England. He is studying Turkish. His wife is not working as she is pregnant. Interactions with medical professionals in Turkey can be difficult.

16. A's wife's brother was helping them financially. It was not sustainable in the long term. Life in Turkey was very difficult because it was expensive and there was prejudice. He would go to Libya if circumstances there were to change.

The Secretary of State's agreement to reconsider decision 1

17. On 27 February 2020 the Secretary of State agreed to reconsider decision 1.

The ministerial submission

18. The OPEN version of the relevant ministerial submission is dated 26 March 2020. The issue for the Secretary of State was said to be whether she should withdraw and re-make decision 1 in the light of the updated case. The recommendation was that the Secretary of State should agree to re-exclude A, on the grounds that his presence in the United Kingdom was not conducive to the public good by reason of national security. The submission described the background. A hearing had been due to take place in SIAC on 31 March 2020. A had submitted a large amount of OPEN evidence in late December 2019. The submission summarised that evidence briefly. The best way to proceed was to withdraw decision 1 and to re-make it, taking into account the new material.

19. A was said to have held a leadership position in the Zintan Martyrs Brigade ('ZMB'), a militia group active in Libya. It had hard line elements and engaged in arbitrary detentions. He killed a security guard at a hospital while holding that position. A admitted killing the guard in his OPEN evidence but said he acted in self-defence. He accepted in his OPEN evidence that he held a leadership position in the ZMB. His expert evidence confirmed that the ZMB comprised mainly Islamist fighters, that its leaders had an Islamist worldview and that it was 'undeniable that …the ZMB…contained hard line Islamist elements'. In his OPEN evidence he admitted having contact with people who later became extremists or terrorists but said he did not share their views. He mentioned two names, including Wissam Ben Hamid.

20. The submission referred to A's article 8 rights. Article 8 is a qualified right. Interference with article 8 rights may be justified on the grounds of national security if it is necessary and proportionate. A lived in the United Kingdom between 2014 and 2017 with LLTR. His wife and children all held British citizenship. He had been living in Turkey with his family since 2017. His OPEN evidence suggested that his family life was more precarious in Turkey than in the United Kingdom. He could not work and his wife had problems getting medical treatment. They were still able to enjoy their family life there. Officials considered that 'any such interference with his or his family's family or private life is necessary and proportionate when balanced with the threat that he is assessed to pose to the United Kingdom.'

21. Paragraphs 10-12 are headed 'Section 55: Duty to Safeguard & Promote Welfare of Children'. Officials had considered their duty under section 55 of the Borders Citizenship and Immigration Act 2009 ('the 2009 Act') to ensure that relevant functions of the Secretary of State are discharged having regard to the need to safeguard and promote the welfare of children who are in the United Kingdom. Officials understood that A had four children, who were between 5 and 12 years old. They were outside the United Kingdom so section 55 did not apply, but the courts had confirmed that 'the spirit of section 55 should be applied' in cases like this. If section 55 did apply, officials noted that the exclusion decision only applied to A. As British citizens, his wife and children could have stayed in the United Kingdom when decision 1 was made, or could have returned to the United Kingdom and continued their lives here. Instead they had chosen to move to Turkey. The aim was to exercise immigration functions with 'the minimum possible interference with a family's private life'. But there had to be a

balance 'with upholding national security'. For the reasons given above, officials were content that decision 2 was compatible with section 55.

Decision 2

22. On 31 March 2020 the Secretary of State notified A that she had personally withdrawn decision 1 and, on 26 March 2020, had made a further decision to exclude A from the United Kingdom on the grounds of national security ('decision 2'). The reason for decision 2 was that it was assessed that A 'held a leadership position in the [ZMB] a militia group active in Libya, which contained hardline Islamic elements and engaged in arbitrary detentions, and that [he] killed a security guard at a hospital whilst holding this position'. The Secretary of State certified decision 2 under section 2C of the 1997 Act with the consequence that any review of decision 2 might, on application, be made to SIAC.

The procedural consequences of decision 2

23. A had applied to SIAC for a review of decision 1. After the Secretary of State withdrew decision 1 and made decision 2, A contended that he could continue with his application for a review of decision 1. Steyn J held, in a judgment dated 19 June 2020, that the effect of rule 11A of the Special Immigration Appeals Commission (Rules of Procedure) Rules 2003 was that the application for a review of decision 1 was treated as withdrawn. A's challenge had to proceed as an application for a review of decision 2.

24. The six grounds for A's re-amended application for a review were that decision 2 was irrational, a breach of the Secretary of State's policy, insufficiently reasoned, a breach of article 8 and of the *Zambrano* principle, and unfair.

Further disclosure

25. In paragraph 27 SIAC referred to discussions between counsel for the Secretary of State and the Special Advocates which resulted in further disclosure to A in a letter dated 5 October 2020: 'In deciding whether to withdraw [decision 1], the Home Secretary had regard to an assessment that [A's] statements as to his associations may give a misleading account of the full extent and nature of those associations and that he had regular and frequent contact with Ben Hamid as late as December 2015'.

The evidence before SIAC

26. The vast majority of the 17 witness statements lodged by A for the SIAC hearing concerned the national security case against A. When Peter Jackson LJ asked Mr Southey, in the course of his oral submissions, what evidence there was about the consequences of decision 2 for family and private life, he agreed that the relevant evidence was in paragraphs 79-81 of one of A's three witness statements, and in paragraphs 11-14 of A's wife's witness statement. I have summarised that material in paragraphs 12-16, above.

The written arguments before SIAC

27. Two of the 48 paragraphs of A's skeleton argument dated 18 November 2020 concerned article 8. Paragraph 35 said that decision 2 had caused the family to decide to live

together in Turkey because that was the only place where they could live safely. The impact was set out in their witness statements but was also said to include that all the children were British citizens. 'It is trite that the best interests of British children must attract particular weight'. Section 55 was referred to 'as well as the *ZH (Tanzania)* …line of cases'. The right to reside in one's country of nationality 'is important'.

28. The Secretary of State's response in her skeleton argument was that if article 8 was engaged, what was at issue was 'relatively slight private interests' to be weighed against national security. If A posed a risk to national security as assessed and there was no equally effective way to mitigate the risk, 'it must be reasonable and proportionate to exclude him from the UK even if that prevents his family from living together as a family unit in their preferred choice of country' (paragraph 86).

29. A also relied on two speaking notes which set out his final written submissions.

30. The first is dated 16 December 2020. It is 70 paragraphs long, and deals with the national security case against A.

31. The second is 64 paragraphs long and dated 17 December 2020. Paragraph 4 said that one of the issues was whether 'the rights of children to effective residence have been breached'. A argued that SIAC should find relevant facts because of the engagement of article 8 and of EU law. Paragraph 12 described decision 2 as a decision which, it was 'arguable…will effectively deny UK national children an upbringing in the state of their nationality'. Paragraph 16.b stated that 'the effective consequence of the decision is that British children will be required to depart from their state of nationality [sic]'.

32. Paragraphs 37-47 concerned ground 4. Paragraph 37 said that 'the case law makes it clear that a child has particular ties with their country of nationality'. Paragraphs 38 and 39 referred to material in A's and his wife's witness statement. Paragraph 41 attacked the ministerial submission for failing to acknowledge that 'the family was stuck between a rock and a hard place: either split, or live in a precarious place'. Paragraphs 42 and 43 argued that article 8 was engaged on the facts, contrary to the position of the Secretary of State.

33. Paragraph 44 argued that if article 8 was engaged, the issue was proportionality 'with a particular focus on the best interests of the (British) children'. *ZH* was said to show that the best interests of the children were a primary consideration. 'It is a binding obligation in international law'. In that context, 'nationality is important'. Paragraph 44b summarised the issues raised by A and by his wife. The intrinsic importance of citizenship should not be played down. 'The family has rights that they will not be able to exercise if they move to another state. They will lose the advantage of growing up and being educated in their own country, and that will be lost if they come back as adults'. These points were also said to show that article 8 was engaged. The actions of the Secretary of State were said to have prevented the children from living in the United Kingdom. In paragraph 47, the family's position in the United Kingdom was contrasted with their position in Turkey, by reference to A's wife's witness statement.

34. The Secretary of State described the principles which are relevant to article 8 in paragraph 78 of her closing submissions. The fourth principle was 'When weighing proportionality and/or fair balance, the court is entitled to give significant weight to

national security. It is unrealistic to submit that the preferences of one family as to where to live could outweigh the public interest in protecting the safety of the public'.

35. In paragraph 81, the Secretary of State submitted that the 'private interests of L3 and his family in permitting L3 to live in the UK were not particularly compelling'. Five reasons were listed. They included that the family's ties with the United Kingdom were relatively short-lived, that they had strong connections to Turkey and had spent longer there than in the United Kingdom. They were all Libyan citizens, had spent long periods there, and had returned for nine months. They could return to Libya. A's wife and children could choose to return to the United Kingdom at any time. It had emerged during the hearing that A had not been truthful about the length of time for which he had been working in Turkey and that he needed an interpreter to give evidence, despite having lived in the United Kingdom for three years on a student visa and having claimed to be studying in English.

SIAC's decision

36. SIAC referred to A's six children and to their British citizenship in the second sentence of paragraph 1 of its OPEN judgment. SIAC introduced the issues in paragraphs 1 and 2, and described the facts and evidence in paragraphs 3-18. SIAC noted in paragraph 5 that A's wife was a dual Libyan-British national and that the children were issued with UK passports in October 2015. In paragraphs 19-28, it set out the procedural background. SIAC set out the information provided to the Secretary of State in the ministerial submission in paragraph 23, including A's potential article 8 arguments. This paragraph referred again to the fact that when A was excluded, his wife and children were British citizens.

37. In paragraph 27 SIAC referred to the further disclosure (see paragraph 25, above). SIAC summarised A's response to that disclosure in paragraph 28. In effect, he denied 'to the best of his recollection' any contact with Ben Hamid after he left Libya in 2014.

38. SIAC described the legal framework in paragraphs 29-32 by reference to the relevant statutory provisions, including section 2C of the 1997 Act, and the Secretary of State's relevant policy.

39. In paragraphs 33-43, it made its assessment of the OPEN evidence. That evidence did not 'unambiguously show that [A] pose[d] a risk to national security'. It was not clear on that evidence that 'the only rational decision that could be made [was] that [A] pose[d] a risk to national security' (paragraph 34).

40. There was a serious question whether A's shooting of the security guard was really in self-defence (paragraph 37). But even if he was not acting in self-defence, that did not clearly show that he was a risk to national security (paragraph 38). The OPEN evidence did show that A had associated in the past with those who, it later became known, have become extremists, that he was experienced in armed conflict, and that he had killed an armed guard (whether or not in self-defence).

41. But the OPEN evidence did not stand alone. There was also CLOSED evidence. SIAC had considered the CLOSED evidence in the light of all the OPEN evidence. For the reasons given in the CLOSED judgment, SIAC had concluded that the Secretary of

State was entitled to assess that A 'had associated with known Islamist extremists, including individuals involved in AAS, and including regular and frequent contact with Ben Hamid, and that his statement as to his associations may give a misleading account of the full extent and nature of those associations' (paragraph 41). There was no clear 'innocent' reason for such contact, as late as December 2015, and for A to have lied about it. It was not 'therefore surprising that the Secretary of State concluded that there was unlikely to be an innocent reason for that contact. It is therefore easy to see how it might be concluded that [A] would pose a risk to national security'. His background as a military commander, 'with his experience and network of contacts' was 'relevant to the *level of risk* that he would pose' (paragraph 42) (my emphasis).

42. 'Against that background' SIAC then considered the grounds of challenge, in paragraphs 44-75. SIAC observed, in paragraph 58, that if A had had the level of contact suggested by the CLOSED evidence, 'then his denial of such contact is dishonest…Such dishonesty suggests that the contact was, in itself, for a sinister purpose'. SIAC added that A had led an armed militia unit in combat, and had used lethal force (although possibly in self-defence). SIAC considered that 'the Secretary of State was entitled to conclude, on the basis of these factors, that [A] posed a *significant* risk to national security' (my emphasis).

43. In paragraph 59 SIAC said that if A 'posed a *significant* risk to national security it was entirely rational to exclude him from the United Kingdom' (my emphasis). It added that 'It has not been shown that the threat could satisfactorily have been addressed by any other means that would have had less of an impact on [A]'. Decision 2 struck a fair balance between A's rights and the public interest which the Secretary of State was seeking to uphold.

44. SIAC considered article 8 in paragraphs 69-70. It noted that the parties disagreed about whether A could rely on article 8. SIAC again referred to the factor that A's wife and children were British citizens. It decided that it would assume, without deciding, that article 8 was engaged (paragraph 69).

45. In paragraph 70, SIAC said 'We also accept that the effect of the decision to exclude [A] is that his wife and children, who were otherwise living in the United Kingdom, and as British citizens were entitled to remain in the UK have left the UK. [A's] wife explains the practical impact in her witness statement. We accept the evidence of [A's] wife as to the impact that the exclusion decision has had on all members of the family. We accept that this amounts to a significant interference with the right of each member of the family to respect for private and family life'.

46. As against that, the family had not been in the United Kingdom for long. 'The primary difficulties' they had faced were 'economic and cultural'. The impact on family life was 'more indirect'. Moreover, the Secretary of State was concerned to protect national security. '…Given the Secretary of State's rational conclusion that his presence in the United Kingdom would be a threat to national security, there was no measure less intrusive to family life which she could have taken to address the assessed risk'. The Secretary of State took account of the impact on family life. SIAC's view was that decision 2 struck a fair balance between the family's article 8 rights and the need to protect national security. Any interference with article 8 rights was therefore justified.

47. SIAC considered A's argument based on *Zambrano* in paragraphs 71-73. A's case was that his children had a fundamental right to exercise the substance of the rights conferred on them by virtue of their EU citizenship, which included a right to stay in the United Kingdom. They were dependent on A. 'The effect of the Secretary of State's decision is that they were compelled to leave the United Kingdom', they said, because they had in fact left the United Kingdom for Turkey, despite the 'obvious advantages' of staying in the United Kingdom.

48. In paragraph 72, SIAC quoted paragraphs 60-63 of *VM v Secretary of State for the Home Department* [2017] EWCA Civ 255, a deportation case. Sales LJ (as he then was) had held that the *Zambrano* principle only applies in cases in which the children are 'entirely dependent on the excluded person' so that they will 'inevitably' have to leave the EU. *VM* was a case in which the father had no claim to stay in the United Kingdom as a result of the citizenship of his wife, KB, and their children. If he was deported, KB and the children '(with KB deciding for them) will face a difficult choice whether to relocate there with him or remain in the UK without him'. The fact of that choice, and that they might 'in practice feel compelled to go with him' did not engage EU law. On the authorities the test was whether there was 'an entire dependency' of the relevant child on the person concerned. There was no such dependency 'because' they could stay in the United Kingdom with their mother, who, as a British citizen, had a right to be here.

49. Sales LJ also referred to *FZ (China) v Secretary of State for the Home Department* [2015] EWCA Civ 550 and to paragraphs 61-67 of *R (Agyarko) v Secretary of State for the Home Department* [2017] UKSC 11. In *FZ (China)* a third country national was married to a British wife. They had a British daughter. The wife would face a difficult choice if her husband was deported, but the *Zambrano* principle was not engaged so as to give her husband a right to stay in the United Kingdom. She might feel compelled by circumstances to leave the United Kingdom, but was not 'compelled by law to do so'. That meant that the daughter did not 'entirely depend' on her father, the person who was to be deported.

50. SIAC concluded that the same reasoning applied to A. The history showed that his children were not 'entirely dependent' on him. Between July 2014 and October 2015 they had lived in a different country from him. There was no legal bar to the return of his wife or of the children to the United Kingdom. The fact that they had chosen to go to Turkey to be with him did not engage the *Zambrano* principle.

The authorities

(a) The best interests of the child

51. The appellant in *ZH (Tanzania) v Secretary of State for the Home Department* [2011] UKSC 4; [2011] 2 AC 166 arrived in the United Kingdom in 1995. Over the next ten years she made several unsuccessful applications for leave to remain including two asylum claims in false names. In 1997, she formed a relationship with a British citizen. They had two children together and then separated. The children were British citizens. They lived with the appellant but had regular contact with the father. He was then diagnosed as HIV positive. She made a human rights claim, arguing that to remove her from the United Kingdom would be a disproportionate interference with her article 8 rights. The Secretary of State refused that claim. Her appeals were unsuccessful. By

the time of the appeal to the Supreme Court, the children were about 13 and 10 years old and had lived in the United Kingdom all their lives.

52. Baroness Hale, giving a judgment with which the other members of the Court agreed, referred to two lines of Strasbourg authorities: those dealing with settled migrants who committed crimes, and cases in 'the ordinary immigration context' where an appellant is to be removed because he has no right to be in the country (paragraphs 17 and 18).

53. In paragraph 22, Baroness Hale said that the European Court of Human Rights ('the ECtHR'') had recognised a 'broad consensus – including international law – in support of the idea that in all decisions concerning children, their best interests must be paramount' (paragraph 21). She also referred, in paragraph 23, to article 3.1 of the UN Convention on the Rights of the Child, 'a binding obligation in international law', to section 11 of the Children Act 2004, into which 'the spirit, if not the precise language' of article 3.1 had been 'translated into our national law', and to section 55 of the 2009 Act.

54. Section 55 requires, in her words, that '…in relation among other things to immigration, asylum or nationality, the Secretary of State must make arrangements for ensuring that those functions "are discharged having regard to the need to safeguard and promote the welfare of children who are in the United Kingdom"'. She recorded (paragraph 24) that the Secretary of State accepted that section 55 applies not only to how children are looked after in the United Kingdom while decisions are made about them, but that it also applies to the decisions themselves. That meant, said Baroness Hale, that 'any decision which is taken without having regard to the need to safeguard and promote the welfare of any children involved will not be "in accordance with the law" for the purpose of article 8.2. Both the Secretary of State and the tribunal will therefore have to address this in their decisions' (paragraph 24).

55. It was also clear that the ECtHR 'will expect the national authorities to apply article 3.1… and treat the best interests of the child as a "primary consideration"' (paragraph 25). In that regard, Baroness Hale distinguished between decisions which directly affect a child's upbringing and decisions which may affect a child more indirectly, such as decisions about where one or both of her parents are to live. In the case of the second type of decision, the decision maker must not treat any other consideration as inherently more significant than the best interests of the children, but can decide that other factors outweigh them. 'The important thing, therefore, is to consider those best interests first' (paragraph 26).

56. In paragraph 29, Baroness Hale began to consider how to apply this approach. One question was whether it was reasonable to expect the child to live in another country. The degree of integration in the United Kingdom, the length of absence from 'the other country', where and with whom the child is to live, the arrangements for looking after the child in the other country, and the strength of any ties with parents or other members of the family if the child has to move away are all relevant to that question.

57. In paragraph 30, she added that while nationality is not a trump card, it is 'of particular relevance in assessing the best interests of any child'. It was especially important in a case like *ZH*. The children in that case were British, not just through the accident of birth in the United Kingdom, but because their father was British. They had an

unqualified right of abode in the United Kingdom. They had lived here all their lives, were being educated here, had social links with the community here and a good relationship with their father here. A young child might readily adapt to life in another country if she moved with both parents to a country which they knew well and into which they could easily reintegrate. It was very different for 'children who have lived here all their lives and are being expected to move to a country which they do not know and will be separated from a parent whom they also know well' (paragraph 31).

58. The intrinsic importance of citizenship should not be played down. As citizens, the children had rights which they would not be able to exercise if they moved to another country. They would lose the advantage of growing up and being educated in their own country 'with their own culture and their own language' (paragraph 32).

59. The appellant in *Zoumbas v Secretary of State for the Home Department* [2013] UKSC 74; [2013] 1 WLR 3690 was a failed asylum seeker from the Republic of Congo. He had married another failed asylum seeker from the Congo. They had three children together after their unsuccessful asylum appeals. The children were not British citizens. The Secretary of State decided that further representations by the appellant were not a 'fresh claim' and decided to remove him and his children. The appellant argued that his children's best interests should dictate the outcome and that it was irrational to conclude that their best interests would be served by their removal to the Congo.

60. The Supreme Court summarised the legal principles, which were not in dispute. The children's best interests were an integral part of the proportionality assessment under article 8. They must be a primary consideration in such an assessment although not always the only primary consideration, and not a paramount consideration. They can be outweighed by other considerations, but no other consideration can be treated as inherently more significant. Different judges might approach the issue in different ways but it was important to ask the right questions in an orderly way in order to avoid the risk that the best interests of the child might be undervalued when other important considerations were in play. It is important to have a clear idea of what the child's best interests are before asking whether they are outweighed by other considerations. There is no substitute for a careful examination of all the relevant factors. A child must not be blamed for things which are not his or her fault (paragraph 10 per Lord Hodge).

(b) The Zambrano principle: the nature of the dependency

61. *VM*, to which SIAC referred, was a deportation case. Sales LJ said that it was not a case in which the family had to leave the United Kingdom or the EU. It was, rather, a case in which they faced difficult choice; to stay in the United Kingdom without 'the engaged parent', or to leave with him. In such a case, the test is a test of 'entire dependency'. The facts did not engage EU rights in a way which created an EU right for VM to stay in the United Kingdom, because there was a member of family who could stay in the United Kingdom and look after children. KB was a British citizen. Sales LJ did not use the phrase 'primary carer' in his judgment.

62. There were two appellants in *Patel*: Mr Patel and Mr Shah. Neither had any right to be in the United Kingdom. Each was described as the primary carer of a British citizen. Mr Patel cared for his parents. Mr Shah was the primary carer for his son, while his wife worked. Each applied for a residence card on the grounds they had a derived right of residence; that is to say, he was the primary carer of an EU citizen who would be

compelled to leave the EU if he was compelled to leave it. The First-tier Tribunal (Asylum and Immigration Chamber) ('the FtT') held that Mr Patel's parents would not be compelled to leave the EU if he had to, and that Mr Shah's son would be so compelled. The FtT found that if Mr Shah had to leave the EU, his wife would go with him and the child would be compelled to leave. The FtT held that he was entitled to an EU residence card. The Upper Tribunal (Immigration and Asylum) Chamber ('the UT') upheld both determinations. The Court of Appeal upheld the UT in Mr Patel's case, but overturned the decisions of the UT and of the FtT in Mr Shah's case. This Court held that if Mr Shah had to leave the EU, his wife could look after their son.

63. Lady Arden, giving the judgment of the Supreme Court noted, in paragraph 13, that the CJEU had distinguished, in paragraph 76 of its judgment in *KA v Belgium* (C-256/11) [2018] 3 CMLR 28, between cases where the dependant is a child and cases in which he is an adult. When the dependant is an adult, the necessary relationship of dependency will only exist 'in exceptional circumstances where in the light of all the relevant circumstances, any form of separation…is not possible'. When the dependant is a child, 'the assessment of the existence of a such a relationship of dependency must be based on consideration, in the best interests of the child, of all the specific circumstances, including the age of the child, the child's physical and emotional development, the extent of his emotional ties to each of his parents, and the risks which separation from the third country national parent might entail for the child's equilibrium. The existence of a family link…and cohabitation …is not necessary…'

64. She also quoted paragraphs 51 and 52 of the judgment of the CJEU in *KA v Belgium*. The effectiveness of citizenship of the EU might be undermined if as a consequence of the refusal of a derivative right of residence, the EU citizen was obliged 'in practice' to leave the EU. That is only likely if there is, between the citizen and the third country national, 'a relationship of dependency of such a nature that it would lead to the [EU] citizen being compelled to accompany the third country national' and to leave the EU.

65. In paragraph 18 she quoted paragraphs 66-68 of *Dereci v Bundesministerium für Inneres* (Case C-256/1) [2012] All ER (EC) 373. The mere fact that 'it might appear desirable to a national of a member state for economic reasons or in order to keep his family together in the territory of [the EU] for members of his family' who are not nationals of a member state to live with him is not enough. In paragraph 22, Lady Arden said that the heart of the CJEU decisions is the requirement that the citizen would be 'compelled to leave' if the third country national, with whom he has a relationship of dependency, is removed. The question was whether removal of the third country national would actually cause the citizen to leave.

66. She said, in paragraph 23, that in the case of a child it is necessary, first, to decide who the primary carer is and whether there is a relationship of dependency with the third country national or with the national parent, and if there is, what its characteristics are. The fact that the citizen parent is actually able and willing to take responsibility for the child's care is relevant but not enough. In order to decide whether there is the necessary relationship of dependency, account must be taken, having regard to the child's best interests, of all of the specific circumstances including the child's age, his physical and emotional development and the extent of his emotional ties to both parents and the risks to the child's equilibrium of separation from the third country national parent. Because Mr Shah was the child's primary carer, the test was met (paragraph 25).

67. She added that it could not be inferred that the CJEU had watered down the requirement of compulsion. She considered that this Court had erred in taking into account that if the mother left the EU that would be her choice, and that she was perfectly able to look after the child. The question was whether the son would be compelled to leave by reason of his dependence on his father. 'The test of compulsion is thus a practical test to be applied to the actual facts and not to a theoretical set of facts' (paragraph 30).

(c) The Zambrano principle is not absolute

68. *Robinson (Jamaica) v Secretary of State for the Home Department* [2020] UKSC 53; [2021] 2 WLR 65 was a deportation case. The Supreme Court recognised that in *Rendón Maríin v Administración del Estado* (C-165/14) [2017] QB 495, *S v Secretary of State for the Home Department* (C-304/14) [2017] QB 558, and *KA v Belgium*, the CJEU had held that the *Zambrano* principle was qualified. There was an exception to it, linked to upholding the requirements of public policy and safeguarding public security.

69. The issue in *Robinson* concerned the nature of that exception. The Supreme Court held that it did not require the Secretary of State also to show that there were exceptional circumstances. The court must consider whether the third country national's conduct '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 grounds of protecting the requirements of public policy or public security' the relevant measure. The national court must assess the extent of the danger to society and any consequences which the conduct may have for the requirements of public security (paragraph 45 per Lord Stephens).

70. If there is such a threat, the national court must balance the nature and degree of the threat against the right to respect for private and family life and must observe the principle of proportionality, and take into account the best interests of any child, taking into account his circumstances (paragraph 46).

Discussion

Ground 1

71. My outline of the facts (see paragraph 51, above) shows that *ZH* was an expulsion case (see also paragraphs 14, 15 and 16 of the judgment). By the time of the appeal to the Supreme Court, the Secretary of State had accepted that it would be disproportionate to remove the appellant. She was, nevertheless, 'understandably concerned about the general principles which the Border Agencies and the appellate authorities should apply' (paragraph 13). It is also clear from the last sentence of paragraph 31 that *ZH* was an academic appeal.

72. One of Mr Dunlop's submissions was that *ZH* was obiter and we should not follow it. I do not think, in the circumstances, whatever the strict legal position, this Court should treat the relevant passages in *ZH* as obiter. They are the guidance which the Secretary of State asked the Supreme Court to give her.

73. In my judgment, the guidance in *ZH* is not decisive in the present context. The public interests to be weighed in the proportionality balance in *ZH* were the interests in firm immigration control and in the economic wellbeing of the country. The best interests

of children and best interests of British citizen children who have been settled in the United Kingdom all their lives, as had the children in *ZH*, may very well play a different role in that balance than the role which they can have in a case in which, after considering the CLOSED material, the specialist court has made the findings which SIAC made in this case, and the findings which it made about the private and family life of A, his wife, and children.

74. The first finding is that the children's father is a significant risk to national security, and that his background as a military commander, his network of contacts, and the fact that he had used lethal force (even if that was in self-defence) were relevant to the level of that risk (paragraphs 39, 42 and 58). The second finding has two facets. First, in paragraph 59, SIAC held that there was a rational connection between the threat posed by A and the means used to address that threat (decision 2). 'It has not been shown that the threat could satisfactorily have been addressed by any means that would have had less of an impact on [A]'. Second, in paragraph 70, SIAC found that the Secretary of State's legitimate aim was to protect national security, that there was a rational connection between that aim and decision 2, and that 'there was no measure less intrusive to family life that she could have taken to address that assessed risk', having taken into account the impact on family life.

75. On the other side of the balance, SIAC held that '…the effect of [decision 2] is that his wife and children, who were otherwise living in the United Kingdom, and as British citizens were entitled to remain in the UK, have left the UK'. SIAC expressly accepted A's wife's evidence which I summarised in paragraph 13, above, about the effect of decision 2 on all the members of the family. In the light of SIAC's reservations about the truthfulness of some of A's evidence, it is understandable that SIAC did not expressly accept his evidence on this topic. In the light of her evidence, SIAC concluded that decision 2 was 'a significant interference with the right of each family member to respect for private and family life.' SIAC also took into account, however, the relatively short period for which the family had been living in the United Kingdom (paragraph 70). SIAC did not find (perhaps because there was no evidence on this specific point) that it was anything other than in the best interests of the children to be living with both parents.

76. In any event, I would accept Mr Dunlop's broad submission that SIAC's reasons do not show that it erred in law. First, a specialist tribunal can be taken to have applied law which is 'trite' in its specialist field (Mr Southey's description, see paragraph 27, above) even if it does not say so expressly. One member of the SIAC panel which decided this case is an experienced Judge of the Upper Tribunal (Immigration and Asylum) Chamber. Section 55 of the 2009 Act and *ZH* are routinely referred to and applied in that jurisdiction in immigration cases which concern children. I am not prepared to draw an inference, in circumstances where *ZH* was expressly drawn to SIAC's attention in A's written submissions, and section 55 was addressed in the Ministerial submission, that SIAC did not have that decision and that provision well in mind. Mr Dunlop referred us, in this regard, to paragraph 114 of the judgment of the Vice-President in *HA (Iraq) v Secretary of State for the Home Department* [2020] EWCA Civ 1176; [2021] 1 WLR 1327. As Mr Dunlop also pointed out, this approach generally applies even in that very different type of case.

77. Second, in my judgment, SIAC's express reasons show that it had well in mind the fact that A's children were British citizens and that they were entitled to live in the United Kingdom. No-one suggests that British citizenship is a trump card (see paragraph 57, above) and the weight to be given to it must depend on the facts of each case. SIAC accepted all of A's wife's evidence about the practical effects of decision 2 on the family, and held that those amounted to a significant interference with their private and family life. SIAC also bore in mind, and was entitled to take into account, that the family's links with the United Kingdom were not deep or longstanding despite the fact that A's wife and children were British citizens.

78. Third, SIAC's specific findings which I describe in paragraph 74, above, mean, in my judgment, that SIAC could not, on the facts of this case, rationally have concluded that the children's best interests and British citizenship could have outweighed the public interest, particularly when they were all dual citizens, and there was no finding that they would not be safe in Libya. If this point were remitted to SIAC, the outcome is inevitable. Any error of law is therefore, immaterial.

79. I have considered whether or not this conclusion is unfair to A, because it deprives the Special Advocates of the opportunity to refer this Court to the CLOSED material which deals with the level of risk posed by A. I do not consider that this is unfair. The OPEN findings which SIAC made based on its CLOSED reasons (see paragraph 74, above) are sufficient in themselves. SIAC held that the Secretary of State was entitled to decide that the risk was significant, and described cogent features which were relevant to the level of that risk. In addition, SIAC found that there was no less intrusive way of managing the risk. There is, in my judgment, no need for this Court to refer to the CLOSED material or to any CLOSED submissions in order fairly to deal with ground 1, or with the Respondent's Notice, in so far as they relate to the precise level of risk posed by A.

80. For those reasons, I would dismiss ground 1. In the light of that conclusion, I should make it clear that I have not considered it necessary to decide whether or not article 8 applied on the facts of this case. My judgment should not be read as deciding, or implying, that article 8 did apply.

Ground 2

81. I reject the Secretary of State's argument (which was raised even later than the RN) that this Court should not consider this ground of appeal because A did not apply for an EEA residence permit. This is an appeal. If the Secretary of State had wanted to rely on this point, it should have been raised before SIAC.

82. I have quoted the authorities which are relevant to ground 2 at some length. I accept Mr Southey's submission that SIAC applied the wrong test to the *Zambrano* issue. The test is not whether the family are legally compelled to leave the United Kingdom, nor is the level of dependency which is required 'total'. The application of the *Zambrano* principle depends on a multifactorial test, and its application depends on compulsion in practice, not legal compulsion. Mr Southey is also right to submit that SIAC did not make a multi-factorial assessment.

83. But it is debatable whether SIAC was provided with enough material on which to base a multi-factorial assessment so as to show that the test was satisfied. There was no material which showed whether A or his wife, or both, was a primary carer, which according to the Supreme Court (see paragraph 66, above) is highly relevant, because it is described as 'the first question'. The citations in *Patel* (see paragraphs 63, and 66, above) show that the inquiry about dependency must be detailed and based on the child's actual circumstances and on the nature of his ties to each parent. It cannot be based on assumptions. The burden was on A, on his appeal to SIAC, to show that the *Zambrano* principle applied to him. On the material which A provided to SIAC, it would have been open to SIAC to infer that A's wife was the primary carer. I do not consider that, in circumstances in which SIAC had reservations about the truthfulness of A's evidence, it was bound to accept his assertion that he 'did everything' not least because, for about a year, A's wife must have looked after the children in Turkey on her own (perhaps with the help of the aunt). But A's assertion, even if accepted, was not enough to show that the test was satisfied. There was, for example, no professional evidence about the impact separation from A would have on any of A's children. The fact that the A's wife and children chose to return to Turkey to be with A is not, by itself, enough. I would accept Mr Dunlop's submission that if SIAC had applied the right test, it could not have found, on the evidence, that it was met.

84. Even if the test was met, I would accept Mr Dunlop's further submission that, in the light of the findings I have described in paragraph 74, above, SIAC would have been bound to hold that any *Zambrano* right was outweighed by the interests of national security, applying the approach described in *Robinson* (see paragraphs 69 and 70, above). Thus, if SIAC erred in law, and if this point were remitted to SIAC, the outcome is inevitable. Any error of law is therefore, immaterial.

85. The United Kingdom has left the EU, and the *Zambrano* principle is not part of retained EU law. If it is supposed that all my conclusions about ground 2 are wrong, my provisional view is that remitting the case to SIAC on this ground would be futile. There would be no point in SIAC quashing decision 2 on this ground if the Secretary of State would not be bound by the *Zambrano* principle when re-making the decision. Mr Southey nevertheless submitted that, if SIAC's decision were quashed because it had erred on ground 2, and the appeal were remitted to SIAC, SIAC would be able to do something useful on the remission.

86. Mr Southey's submission was in three parts. First, he argued that there is some connection between the *Zambrano* principle and article 8. I disagree. They have different sources and protect different interests. The authority on which he relies, *Usmanov v Russia* (2021) 72 EHRR 33, is about the impact on the applicant's article 8 rights of the annulment of his Russian citizenship. It concerns a conceptually distinct point. His second linked argument was that if decision 2 was a breach of the *Zambrano* principle, it was 'not in accordance with the law' for the purposes of article 8. I reject that submission, for reasons similar to those given in *FWF v Secretary of State for the Home Department* [2021] EWCA Civ 88; [2021] 1 WLR 3781, a decision to which Mr Dunlop drew the Court's attention. His third argument was that if decision 2 did breach the *Zambrano* principle, that would create an historic injustice which the Secretary of State would be bound to take into account when re-making the decision. Even if it is assumed in A's favour that it would be an historic injustice and that she would be bound to take it into account, I consider it inconceivable that she could reach any other

conclusion than that she should make a further exclusion order. I therefore consider that my provisional view is correct.

87. I have not found it necessary to consider Mr Dunlop's argument that the *Zambrano* principle did not apply because none of the family was living in the United Kingdom when decision 2 was made.

88. For those reasons, I would dismiss ground 2.

Conclusion

89. For the reasons I have given in relation to grounds 1 and 2 I would dismiss this appeal.

Lord Justice Peter Jackson

90. I agree.

Lady Justice Macur

91. I also agree.