Neutral Citation Number: [2020] EWCA Civ 1385

Case No: C5/2019/1549

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL
(IMMIGRATION AND ASYLUM CHAMBER)
UPPER TRIBUNAL JUDGE FINCH
HU/05736/2017

Royal Courts of Justice,
Strand, London, WC2A 2LL

Date: 28/10/2020

Before :

LORD JUSTICE McCOMBE
LADY JUSTICE ASPLIN
and
LORD JUSTICE POPPLEWELL

- -

Between :

KB (JAMAICA)

Appellant

- and -
SECRETARY OF STATE
FOR THE HOME DEPARTMENT

Respondent

- -
- -

Sonali Naik QC and Helen Foot (instructed by **Bajaria Solicitors**) for the **Appellant**
Zane Malik (instructed by **Government Legal Department**) for the **Respondent**

Hearing dates : 21 October 2020

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Approved Judgment

Covid-19 Protocol:
This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be at 10 a.m. on Wednesday, 28 October 2020.

Lord Justice Popplewell :

Introduction

1. The appellant is a 38 year old citizen of Jamaica, whose name has been anonymised as "KB" in order to protect the interests of the children affected by the case. The respondent ordered the deportation of the appellant following his convictions for offences resulting in a total sentence of 18 months. KB appealed to the First-tier Tribunal ("FTT"), where the FTT Judge reached a decision that the effect of KB's deportation on four of his children would be unduly harsh, and quashed the deportation order. The Upper Tribunal ("UT") held that the FTT Judge had made an error of law and overturned her decision. In a remade decision, another UT Judge reached a contrary conclusion to that of the FTT Judge and upheld the deportation order. KB appeals with leave against the UT error of law decision. Permission to appeal was refused in relation to the remade decision.

Factual and procedural narrative

2. KB has four children from a relationship with their mother going back to 2003. They were all born and brought up in the United Kingdom and have British citizenship. There are two boys, now aged 15 and 14, and two girls, now aged 8 and 6. At the time of the FTT decision they were aged 12, 11, 5 and 3. KB does not reside with the mother, but it is not in dispute that he has a genuine and subsisting relationship with all the children and plays a significant role in their day-to-day life. He also has a child by another woman with whom he has no subsisting relationship, and who is irrelevant to this appeal.

3. KB first arrived in the UK on 15 April 2002, aged 20, and was granted temporary admission until 29 January 2003. On 21 January 2003 his application for leave to enter was refused. He failed to report as required on 30 January 2003, and was listed as an absconder. On 20 September 2011, he submitted a further application for leave to remain in the United Kingdom on human rights grounds, based on his family life. He was granted limited leave to remain until 10 May 2013. After an in time application he was given a second grant of leave to remain, until 16 June 2016, again based on his family life.

4. Between 5 March 2007 and 17 December 2013, KB was convicted of a total of nine offences comprising possession of cannabis and various driving offences. He pleaded guilty to those offences and received non-custodial sentences. The convictions which triggered deportation were on 24 January 2014 for the offences of assault occasioning actual bodily harm and doing an act intended to pervert the course of justice, to which he pleaded guilty. He received custodial sentences of 12 and 6 months respectively, to run consecutively.

5. On 22 November 2016, a Home Office decision was made to deport KB as a result of the conviction. KB responded by making submissions, raising a human rights claim, on 12 January 2017. On 24 March 2017, a Home Office decision was made to refuse KB's human rights claim. A deportation order against him was signed on 6 April 2017.

6. KB appealed the decision of the Secretary of State to the FTT. Following a hearing at which KB and the mother and others gave evidence, the appeal was allowed by FTT Judge Gurung-Thapa in a decision dated 16 October 2017 ("the FTT decision").

7. The Respondent appealed and permission was granted by UTJ Kekic on 2 August 2018, on the grounds that "arguably the judge did not apply the correct test particularly where there is a strong public interest in deporting foreign criminals and that she did not give reasons for why she found it would be unduly harsh to separate the appellant from his children".

8. On 31 January 2019, KB's appeal came before UT Judge Finch. In a decision dated 4 February 2019 the UT Judge allowed the appeal on the grounds of error of law and ordered that there be a fresh hearing of the appeal against the deportation order, to be heard in the Upper Tribunal ("the Error of Law decision").

9. On 7 May 2019, the rehearing of KB's appeal against the deportation order came before UTJ Norton-Taylor, who dismissed it in a decision dated 17 May 2019 ("the Remade decision"). The UT Judge determined that the effect of KB's deportation on his children would not be unduly harsh, and that there were no very compelling circumstances that outweighed the public interest in his deportation. The UT Judge observed, nevertheless, that "this case has been a very difficult case to determine".

The law

10. Section 32 of the UK Borders Act 2007 provides in relevant respects that the respondent must make an order deporting a foreign criminal, that is to say a non UK citizen sentenced to a period of imprisonment of at least 12 months, unless to do so would breach a person's rights under European Convention on Human Rights ("ECHR"). Deportation of foreign criminals is in the public interest, but that interest must be balanced against the rights of children, amongst others, under article 8 of ECHR. Parliament has struck that balance in sections 117A to 117D of the of the Nationality Immigration and Asylum Act 2002 ("the 2002 Act").

11. When considering whether deportation is justified as an interference with a person's right to respect for private and family life under article 8(2) of the Convention, section 117A(2) of the 2002 Act requires judicial decision makers to have regard in all cases to the considerations listed in section 117B, and in cases concerning the deportation of foreign criminals to the considerations listed in section 117C. Those sections were introduced by s. 19 of the Immigration Act 2014, which by s. 71 provided expressly that they did not limit the duty in s. 55 of the Border, Citizenship and Immigration Act 2009. Section 55 reflects the requirement in article 3.1 of the UN Convention on the Rights of the Child that in all state actions concerning children, the best interests of the child shall be a primary consideration.

12. Section 117C of the 2002 Act, so far as relevant, provides:

> "(1) The deportation of foreign criminals is in the public interest.
>
> (2) The more serious the offence committed by a foreign criminal, the greater is the public interest in deportation of the criminal.

> (3) In the case of a foreign criminal ("C") who has not been sentenced to a period of imprisonment of four years or more, the public interest requires C's deportation unless Exception 1 or Exception 2 applies.
> …
> (5) Exception 2 applies where C has a genuine and subsisting relationship with a qualifying partner, or a genuine and subsisting parental relationship with a qualifying child, and the effect of C's deportation on the partner or child would be unduly harsh.
>
> (6) In the case of a foreign criminal who has been sentenced to a period of imprisonment of at least four years, the public interest requires deportation unless there are very compelling circumstances, over and above those described in Exceptions 1 and 2."

13. Paragraphs 398 and 399 of the Immigration Rules faithfully replicate the primary legislation.

14. Although this is not readily apparent from the language of s. 117C, it was established in *NA(Pakistan) v Secretary of State for the Home Department* [2017] 1 WLR 207 that in relation to foreign criminals who receive a sentence of between one and four years imprisonment, deportation would be a disproportionate interference with the rights of the children with whom they are in a genuine and subsisting relationship if:

    (a) the effect of deportation on the children would be unduly harsh: s. 117C(5); or

    (b) if the effect would not be unduly harsh, but there are nevertheless very compelling circumstances: s. 117C(6).

15. The meaning of "unduly harsh" in the test provided for by s.117C(5) has been authoritatively established by two recent decisions: that of the Supreme Court in *KO (Nigeria) v Secretary of State for the Home Department* [2018] 1 WLR 5273; and the decision of this court in *HA (Iraq) v Secretary of State for the Home Department* [2020] EWCA Civ 117. It is sufficient to note the following without the need to quote the relevant passages:

    (1) The unduly harsh test is to be determined without reference to the criminality of the parent or the severity of the relevant offences: *KO (Nigeria)* para 23, reversing in this respect the Court of Appeal's decision in that case, reported under the name *MM (Uganda) v Secretary of State for the Home Department* [2016] EWCA Civ 617, in which at paragraph 26 Laws LJ expressed this court's conclusion that the unduly harsh test required regard to be had to all the circumstances including the criminal's immigration and criminal history.

    (2) "Unduly" harsh requires a degree of harshness which goes beyond what would necessarily be involved for any child faced with deportation of a parent: *KO (Nigeria)* para 23.

    (3) That is an elevated test, which carries a much stronger emphasis that mere undesirability or what is merely uncomfortable, inconvenient, or difficult; but

the threshold is not as high as the very compelling circumstances test in s. 117C(6): *KO (Nigeria)* para 27; *HA (Iraq)* paras 51-52.

(4) The formulation in para 23 of *KO (Nigeria)* does not posit some objectively measurable standard of harshness which is acceptable, and it is potentially misleading and dangerous to seek to identify some "ordinary" level of harshness as an acceptable level by reference to what may be commonly encountered circumstances: there is no reason in principle why cases of undue hardship may not occur quite commonly; and how a child will be affected by a parent's deportation will depend upon an almost infinitely variable range of circumstances; it is not possible to identify a base level of "ordinariness": *HA (Iraq)* paras 44, 50-53, 56 and 157, *AA (Nigeria) v Secretary of State for the Home Department* [2020] EWCA Civ 1296 at para 12.

(5) Beyond this guidance, further exposition of the phrase will rarely be helpful; and tribunals will not err in law if they carefully evaluate the effect of the parent's deportation on the particular child and then decide whether the effect is not merely harsh but unduly harsh applying the above guidance: *HA (Iraq)* at paras 53 and 57. There is no substitute for the statutory wording (*ibid* at para 157).

The issues on this appeal

16. There is a single ground of appeal, namely that the Error of Law decision should be set aside because the FTT Judge did not make any error of law. It is worth repeating the observations of Floyd LJ in *UT (Sri Lanka) v Secretary of State for the Home Department* [2019] EWCA Civ 1095 at paragraph 19:

> "19. I start with two preliminary observations about the nature of, and approach to, an appeal to the UT. First, the right of appeal to the UT is "on any point of law arising from a decision made by the [FTT] other than an excluded decision": Tribunals, Courts and Enforcement Act 2007 ("the 2007 Act"), section 11(1) and (2) . If the UT finds an error of law, the UT may set aside the decision of the FTT and remake the decision: section 12(1) and (2) of the 2007 Act. If there is no error of law in the FTT's decision, the decision will stand. Secondly, although "error of law" is widely defined, it is not the case that the UT is entitled to remake the decision of the FTT simply because it does not agree with it, or because it thinks it can produce a better one. Thus, the reasons given for considering there to be an error of law really matter. Baroness Hale put it in this way in *AH (Sudan) v Secretary of State for the Home Department* at [30]:
>
> > "Appellate courts should not rush to find such misdirections simply because they might have reached a different conclusion on the facts or expressed themselves differently."

17. The starting point is therefore to identify what reasons were given for finding an error of law in the Error of Law Decision. In paragraphs 8 and 10, the UT Judge found that the FTT decision could not stand because *MM (Uganda)* no longer represented the

law following *KO (Nigeria)*, and that the judge had been distracted from the fundamental test of undue harshness by giving weight to KB's criminality.

18. The UT Judge went on to address the second ground of appeal which was that the FTT Judge had given inadequate reasons. Having cited the passages in the judgment of Lord Carnwath JSC at paragraphs 23 and 27 of *KO (Nigeria)*, she identified the error of law in the following terms at paragraphs 15 and 18:

> "The First-tier Tribunal Judge did not direct herself to this test and it is arguable that the evidence she referred to could not meet this high threshold……As a consequence I find that the decision by First-tier Tribunal Gurung-Thapa contained arguable and material errors of law."

19. Mr Malik on behalf of the Respondent submitted, in our view correctly, that the Error of Law decision identified three bases for an error of law:

(1) When addressing whether the effect of deportation on the children would be unduly harsh, the FTT Judge had wrongly taken into account the criminality of KB, giving rise to the public interest in deportation, as something to be weighed in the balance against the effect of separation. *KO (Nigeria)*, which was decided after the FTT decision, had shown that approach to be erroneous.

(2) The FTT Judge did not direct herself to the right test in law for what was unduly harsh.

(3) The evidence before the FTT Judge was arguably insufficient to meet the correct test of undue harshness.

20. As to the first, Ms Naik QC on behalf of KB accepted that there was an error because, understandably, the FTT Judge was following the approach dictated by the relevant authority at the time, namely the decision of the Court of Appeal in *MM (Uganda)*, before that decision had been reversed by the Supreme Court in *KO (Nigeria)*. However what was required to justify setting aside an FTT decision was a *material* error of law. This error was not material because it was adverse to KB. Having concluded that the effect on the children was unduly harsh despite the factors going the other way in the form of KB's criminality and the public interest in deportation, the FTT Judge would have been bound to have found that the effect was unduly harsh ignoring those countervailing considerations, as required by *KO (Nigeria)*. Mr Malik on behalf of the Respondent accepted this analysis and accepted that the Error of Law decision could not be upheld on this basis.

21. As to the third, Ms Naik submitted that it cannot amount to an error of law if the evidence was only "arguably" insufficient to satisfy the correct test of undue harshness. That formulation presupposed that the evidence was arguably sufficient. The UT must decide whether there is in fact an error of law before interfering, not whether there is an arguable error of law. In order to demonstrate an error of law by reference to evidential insufficiency it was necessary to show that the evidence was incapable of supporting a finding of undue harshness if the correct test were applied. As to that, she drew attention to the detailed findings made in the FTT decision relating to the role of KB in the children's lives and the effect which his deportation would have on them, which demonstrated the significant educational, psychological

and emotional harm which would be caused by separation from a hands on father and role model who played an important part in the daily lives of the children. She submitted that the FTT Judge's findings were such as to be capable of meeting the test for undue hardship, as subsequently explained in *HA (Iraq)* and *KO (Nigeria)*. In short the FTT Judge was entitled to reach the conclusion she did.

22. By the conclusion of the hearing it became apparent that these propositions were not in dispute. Mr Malik accepted that merely arguable insufficiency of evidence was not enough to establish an error of law and the third basis of the Error of Law decision could not be defended. Moreover he went on to accept that this was one of those cases in which applying the correct test might lead different FTT judges to different outcomes; the FTT Judge in this case was not bound to have come to the conclusion that the effect of separation on the children was unduly harsh if she applied the correct test; but conversely she would have been entitled to reach that conclusion. In my view this concession was rightly made, and obviates the need to set out in any detail the factual findings made by the FTT Judge which support it. The realism of this concession is pointed up by the UT Judge in the Remade decision, going the other way from the FTT decision, stating that the case involved a very difficult determination.

23. That leaves the second basis for the Error of Law decision, namely that the FTT Judge did not direct herself to the correct test. Mr Malik's submissions sought to attack the FTT decision on three grounds which went beyond this, and in some respects even beyond a Respondent's Notice which was served, but Ms Naik did not object to them being raised and we will address them accordingly. They were that:

    (1) the FTT Judge did not apply the correct test: in particular she did not recognise the elevated nature of the test or that it required much stronger emphasis than mere undesirability;

    (2) the FTT Judge failed to give adequate reasons for her conclusion that the unduly harsh test was met;

    (3) the FTT Judge took into account matters which were irrelevant to the unduly harsh test.

Analysis and conclusions

Ground 1: failure to apply the correct test

24. Mr Malik was unable to point to any passage in which the FTT Judge expressed the test in a way which was erroneous. She simply referred to the statutory test of undue harshness (apart from the erroneous gloss of applying *MM (Uganda)*). Rather he submitted that the way in which she expressed her factual findings demonstrated that she must have applied an insufficiently elevated threshold.

25. I am unable to accept this submission for a number of reasons. First, the Judge set out the statutory test and said in terms that the crux of the case was whether the consequences for the children would be unduly harsh. A failure to refer expressly to any further exposition of that test cannot of itself amount to an error of law. As this

court said in *AA (Nigeria)* at para 9, the presumption is that the correct test has been applied unless it appears from something in the judgment that that is not so.

26. Secondly, there are several indications that the FTT Judge was well aware that it was an elevated test and that mere undesirability was insufficient. The Judge said at paragraph 62: "I keep in mind what the Court of Appeal said in *EJA v SSHD* [2017] EWCA Civ 10, namely that there must be relatively few cases in which there is a meaningful relationship between a parent and children where deportation of the parent, with consequential physical separation, will not have an adverse impact on the children. Whilst the interests of the children are of primary consideration, they can be outweighed by the public interest considerations…." Although *EJA* was not a case concerned with Article 117C(5) of the 2002 Act, this passage is a recognition that the public interest in deportation imposes an elevated standard of adverse impact, and chimes with what Underhill LJ said at para 51 of *HA (Iraq)*: the underlying question for tribunals is whether the harshness which the deportation will cause for the partner or the child is of a significantly elevated degree to outweigh that public interest. Further, the passages from *KO (Nigeria)* which stress that more is required than mere undesirability, difficulty, inconvenience or discomfort were not new; they come in paragraph 27, approving that aspect of the Upper Tribunal's decision in *MK (Sierra Leone) v Secretary of State for the Home Department* [2015] INLR 563 para 46. That was the prevailing authority as to the unduly harsh test at the time of the FTT Judge's decision in this case, and one which will have been familiar to FTT tribunals and which they can be assumed to have been applying. As this Court observed in *AA (Nigeria)* at paragraph 9, judges who are experienced in these specialised courts can be assumed by any appellate court or tribunal to be well familiar with the principles, and to be applying them, without the need for extensive citation unless it is clear from what they say that they have not done so. Indeed the passage in *MK (Sierra Leone)* subsequently approved by Lord Carnwath JSC in *KO (Nigeria)* was adopted and applied by the Upper Tribunal in *MAB (USA) v Secretary of State for the Home Department* (2015) UKUT 435 (IAC) which was in turn cited in *MM (Uganda)* to which the FTT Judge referred. Moreover there is some force in Ms Naik's submission that the fact that she held that the unduly harsh test was fulfilled *despite* the countervailing public interest considerations of KB's criminality demonstrates that she was applying a test which was elevated above that which she would have applied if she had (correctly) ignored the criminality.

27. Thirdly, Mr Malik's submissions are undermined by his concession that the Judge's findings were capable of meeting the threshold applying the correct test. They must be read as a whole and taken cumulatively. If addressed compendiously they are capable of meeting the correct elevated test, it is difficult to see how any of them taken individually can properly support an argument, advanced by way of inference, that a test involving too low a threshold was being applied.

Ground 2: inadequate reasons

28. At the hearing Mr Malik spent little time in addressing this as a separate point, and submitted that it followed from his arguments on the first ground. In my view it is not a fair criticism of the Judge. She set out the evidence at some length, in the course of which she made clear what evidence she was accepting; and made clear findings which were relevant to how the separation form KB would adversely affect the children, and the degree of that adverse impact. She did not summarise them in one

single paragraph before saying that the unduly harsh test was fulfilled, but that was not necessary. As Mr Malik has conceded, the evidence was sufficient to support a finding that the unduly harsh test was made out, and the FTT Judge sufficiently identified findings of fact which were capable of supporting that conclusion. That does not constitute a failure to give adequate reasons.

Ground 3: taking into account irrelevant matters

29. Mr Malik's third ground identified four irrelevant matters which it was said the FTT Judge wrongly took into account in applying the unduly harsh test. In order to address them it is necessary to set out the structure of the FTT decision.

30. The section headed "consideration and reasons" commences at paragraph 35. It addresses first whether there was a genuine and subsisting relationship between KB and the mother of their four children. The FTT Judge held not. From paragraph 45 she considered the position of the children. She addressed what Underhill LJ in *HA (Iraq)* called the "go scenario", and concluded that it would be unduly harsh for the children to go with their father to Jamaica. There is no challenge to that conclusion. She therefore concluded at paragraph 47 that the crux of the appeal was whether it would be unduly harsh for the children to remain in the UK without KB pursuant to paragraph 399(a) of the Immigration Rules (which reflects s. 117C(5) of the 2002 Act). Having referred to *MM (Uganda)* and the need to take into account the best interests of the children, she recited the evidence relevant to that question, making findings in relation to it, and concluded at paragraph 69 that looking at the whole of the evidence it would be unduly harsh for the children to have to remain without him. Within that section she addresses KB's criminality, observing that the facts of KB's offence made it a serious one, noting that he had pleaded guilty, and noting that he had shown remorse and that he was assessed as being at low risk of reoffending and had completed courses in prison, but that he had committed a further offence of possession of cannabis after release. After the conclusion in paragraph 69 that on the whole of the evidence the effect of separation on the children would be unduly harsh, she referred at paragraph 70 to the fact that he regretted his actions and was determined to be a good role model for his children. She said she took into account his efforts to start a business running a Caribbean restaurant, which had suffered a setback when the restaurant was destroyed by an explosion, but he hoped to start another one. At paragraph 71 she repeated that applying the approach in *MM (Uganda)* the deportation would have an unduly harsh effect on the children and that the requirements of para 399 of the Immigration Rules were met. There then followed a section from paragraph 72 to the end, referring first to *Hesham Ali v Secretary of State for the Home Department* [2016] 1 WLR 4799 and then carrying out a freestanding article 8 proportionality balancing exercise, which concluded that the public interest in deportation was outweighed by the interests of the children.

31. Mr Malik's first criticism of an irrelevant factor taken into account relied on what was said at paragraph 57, in which the FTT Judge referred to the fact that KB was supporting the mother of the children in caring for the latter's 58 year old mother, the children's maternal grandmother. The Judge had earlier explained that the mother was the sole carer for the grandmother and that KB helped by living with the grandmother at her home, and looking after her whilst he was living there. Mr Malik criticised the Judge's reference to KB supporting the children's mother, submitting that a loss of that benefit to her as a result of deportation was not a loss of benefit to

the children which could be relevant to an assessment of undue harshness for them. However, as the Judge explained in an earlier paragraph, the absence of KB would have an adverse effect on the welfare of the children, because it would require the mother, who had no siblings available to help, to spend more time caring for the grandmother and so less time with the children. The Judge found in terms that the need for her to become more involved in the grandmother's care would "in turn … impact on her ability to manage the family routine" (para 53). This was treated as an exacerbating factor in respect of the finding expressed earlier in the very same paragraph that the mother would struggle in the absence of KB to give each child the individual attention they needed; and was followed in the next paragraph by acceptance of the evidence from the independent social worker that the children would suffer significant trauma if KB were deported. The loss of KB's support for the mother in caring for the grandmother was therefore a relevant consideration because it would have a knock on effect on the welfare of the children.

32. Secondly, Mr Malik criticised various references to the fact that KB pleaded guilty, to his remorse and to his rehabilitation. He submitted that although rehabilitation and the seriousness of offending might be relevant to an inquiry as to whether there were very compelling circumstances which engaged s. 117C(6) of the 2002 Act, they could not be relevant to the s. 117C(5) inquiry into undue harshness which focused solely on the effect of separation from the children. However, although these references are to be found in the section leading up to the conclusion of undue hardship in paragraph 69, they appear as part and parcel of the consideration of KB's criminality as a factor weighing *against* him in the balance against the unduly harsh effect on the children. That is an exercise, as Mr Malik conceded, which was adverse to KB and so not material to whether the decision was erroneous: the Judge would have reached the same conclusion had she not taken them into account. In other words, they were not being taken into account as supporting the finding of undue hardship, but rather as factors counting against undue hardship in the erroneous balancing exercise. As such they cannot comprise a material error of law, in the same way as Mr Malik concedes that adopting the *MM (Uganda)* approach was not a material error of law.

33. It is true that in the first sentence of paragraph 70 the Judge refers again to KB regretting his actions, but that is in the context of his determination to be a good role model for his children. The loss of benefit to the children from KB acting as a role model was one of the factors relied on by the Judge in the earlier section of the decision, and is a legitimate consideration which may contribute to the deportation having unduly harsh consequences for the children.

34. Thirdly, criticism was advanced towards the FTT Judge's reference at paragraph 70 to KB's efforts to establish a business, matters which were said to be irrelevant to the effect of his deportation on the children. I am unable to agree that they were irrelevant. As I have observed, these were made in the context of KB being a role model for the children, the loss of which through deportation is relevant to whether the effect on them would be unduly harsh. Moreover future financial provision is itself directly relevant to the welfare of the children.

35. Fourthly, Mr Malik criticised the final section of the decision in which the FTT Judge undertook an article 8 proportionality exercise without reference to any statutory criteria. Mr Malik submitted that this was unjustified: as this court said in *HA (Iraq)* at para 27, the statutory structure is a complete code, in the sense that the entirety of

the proportionality assessment required by article 8 can and must be conducted within it. This criticism is well founded, but it provides no basis for interfering with the FTT decision. It comes in a section after she had reached her conclusions on the application of the unduly harsh test and cannot affect their validity. Had she found that s. 117C(5) was not fulfilled and the effect of deportation on the children would not be unduly harsh, she would have been bound to consider whether nevertheless there were very compelling circumstances fulfilling s. 117C(6); and to have done so within the statutory framework. Had she decided the case on the basis that the effect on the children would not be unduly harsh, Mr Malik's criticism would be relevant. As it is, however, the point is addressed to a passage in the decision which has no bearing on whether s.117C(5) is fulfilled.

Conclusion

36. If my Lord and Lady agree, I would allow the appeal and restore the order of the FTT Judge.

Lady Justice Asplin :

37. I agree.

Lord Justice McCombe :

38. I also agree.