Case No: C5/2015/0871

Neutral Citation Number: [2018] EWCA Civ 797
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM
Upper Tribunal (Immigration and Asylum Chamber)
DA/00239/2014

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 17/04/2018

Before :

LADY JUSTICE ARDEN
LORD JUSTICE HICKINBOTTOM
and
LORD JUSTICE MOYLAN

- -

Between :

DW (Jamaica) — **Respondent**

- and -

Secretary of State for the Home Department — **Appellant**

- -
- -

Julie Anderson (instructed by **Government Legal Department**) for the **Appellant**
Emeka Pipi (instructed by **Damien Wilson**) for the **Respondent**

Hearing dates : 14 February 2018

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Judgment LADY JUSTICE ARDEN :

1. ISSUES FOR DETERMINATION

1. This is the Secretary of State's appeal from the decision of the Upper Tribunal (Immigration and Asylum Chamber) (King J and UTJ Coker) dated 17 October 2014. There are two issues on this appeal: (1) did the First-tier Tribunal (Ms E.G. Elliman) ("the FTT") err by treating the effect on the children of the respondent ("DW") of his deportation as "unduly harsh" for the purposes of Immigration Rule 399 ("IR 399") without giving appropriate weight to the public interest in his deportation? and (2) did the Upper Tribunal err in holding that the Secretary of State had no permission to argue on appeal that the FTT had so erred?

2. FACTUAL BACKGROUND

2. DW has been convicted of serious criminal offences. He has built up the family life on which he relies during a period of unlawful residence after absconding from immigration control. DW has four children by three mothers. They were all under twelve years of age at the date of the hearing before the FTT. They all live with their mothers though DW assisted in their care by taking them to school and helping with their homework and so on. Any decision about DW's deportation must have regard to the children's interests as a primary consideration under section 55 of the Borders, Citizenship and Immigration Act 2009.

3. DW entered the UK on 25 December 2000 as a visitor. When his visa expired, he was granted temporary leave to stay as a student. When that leave expired (30 June 2002), he unsuccessfully claimed asylum. He was then served with immigration enforcement papers but failed to comply with his reporting obligations. In 2001, he was listed as an absconder. In February 2010, he was arrested. In May 2011, he was arrested and charged with possession of a Class B drug (cannabis). On 17 July 2011, he was sentenced to a community order for 1 year. On 5 October 2011, he was charged with assault. On 20 February 2012, he was arrested and charged on 3 counts of possession of Class A drugs (heroin and crack cocaine) and Class B drugs (cannabis). On 22 February 2012, he was charged with dangerous driving. On 9 July 2012, he was convicted of possession of class A drugs with intent to supply and dangerous driving. The sentencing Judge noted that his dangerous driving put the lives of school children at risk, forced two vehicles to take evasive action to avoid head on collisions with DW's vehicle and forced a police officer to throw himself out of the path of DW's vehicle as DW drove it straight at him. DW was sentenced on 11 July 2012 to 45 months' imprisonment and disqualified from driving for 12 months.

4. As a result of this sentence, DW was subject to automatic deportation under section 32 (5) of the UK Borders Act 2007 ("the 2007 Act"), which takes effect subject to section 33 of that Act.

5. On 27 January 2014, the Secretary of State determined that the exclusions in section 33 did not apply to DW. In addition to the deportation decision, the letter of 27 January 2014 also refused DW's application for settlement.

6. DW appealed that decision on 5 February 2014. On 18 August 2014, the FTT allowed the appeal on the basis of Article 8 of the European Convention on Human Rights ("the Convention").

7. The Secretary of State appealed to the Upper Tribunal. On 17 October 2014, the Upper Tribunal dismissed the appeal.

LEGAL FRAMEWORK

8. Section 32 of the 2007 Act (referred to above), which requires the deportation of a foreign criminal (as defined) unless the foreign criminal shows that an exception under s. 33 applies, provides as follows:

32 Automatic deportation

(1) In this section "foreign criminal" means a person–
(a) who is not a British citizen,
(b) who is convicted in the United Kingdom of an offence, and
(c) to whom Condition 1 or 2 applies.
(2) Condition 1 is that the person is sentenced to a period of imprisonment of at least 12 months.
(3) Condition 2 is that–
(a) the offence is specified by order of the Secretary of State under section 72(4)(a) of the Nationality, Immigration and Asylum Act 2002 (c. 41)(serious criminal), and
(b) the person is sentenced to a period of imprisonment.
(4) For the purpose of section 3(5)(a) of the Immigration Act 1971 (c. 77), the deportation of a foreign criminal is conducive to the public good.
(5) The Secretary of State must make a deportation order in respect of a foreign criminal (subject to section 33).
(6) The Secretary of State may not revoke a deportation order made in accordance with subsection (5) unless–
(a) he thinks that an exception under section 33 applies,
(b) the application for revocation is made while the foreign criminal is outside the United Kingdom, or
(c) section 34(4) applies…

9. Exception 1 in section 33 provides that section 32(4) and (5) do not apply where the removal of a foreign criminal would result in a breach of Article 8 of the Convention. Article 8 provides:

Right to respect for private and family life

Article 8

1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

10. Accordingly Article 8 is a qualified right. The state may be justified in interfering with the right if the conditions in Article 8(2) are satisfied.

11. As Lord Reed explained in detail in *Hesham Ali v Secretary of State for the Home Department* [2016] 1 WLR 4799, there has since 2006 been a presumption that, where a person was liable to deportation, the public interest required that he should be deported. New immigration rules ("the 2012 IR") were introduced in 2012 to ensure consistency in decision-making where issues under Article 8 arose and to emphasise the strength of the public interest regarding the desirability of deportation of foreign criminals With effect from 28 July 2014, new legislative provisions came in force, namely Part 5A of the

Nationality, Immigration and Asylum Act of 2002 ("the 2002 Act"). The purpose of these provisions was to give the status of statute to the 2012 IR in question. Amendments to the IR were introduced, but the IR as amended were substantially the same as the relevant 2012 IR.

12. Part 5A applies whenever a court or tribunal is required to determine whether a decision made under the Immigration Acts breaches a person's rights under Article 8 and would be unlawful under section 6 of the Human Rights Act 1998: see section 117A(l). Section 117B sets out the considerations which apply in all cases. In cases concerning the deportation of foreign criminals the court or tribunal must have regard to the considerations set out in section 117C.

13. Section 117B provides:

> **117B Article 8: public interest considerations applicable in all cases**
> (1) The maintenance of effective immigration controls is in the public interest.
> (2) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are able to speak English, because persons who can speak English—
> (a) are less of a burden on taxpayers, and
> (b) are better able to integrate into society.
> (3) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are financially independent, because such persons—
> (a) are not a burden on taxpayers, and
> (b) are better able to integrate into society.
> (4) Little weight should be given to—
> (a) a private life, or
> (b) a relationship formed with a qualifying partner,
> that is established by a person at a time when the person is in the United Kingdom unlawfully.
> (5) Little weight should be given to a private life established by a person at a time when the person's immigration status is precarious.
> (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.

14. Section 117C provides:

> **117C Article 8: additional considerations in cases involving foreign criminals**
> (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.

(4) Exception 1 applies where—
(a) C has been lawfully resident in the United Kingdom for most of C's life,
(b) C is socially and culturally integrated in the United Kingdom, and
(c) there would be very significant obstacles to C's integration into the country to which C is proposed to be deported.
(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.(7) The considerations in subsections (1) to (6) are to be taken into account where a court or tribunal is considering a decision to deport a foreign criminal only to the extent that the reason for the decision was the offence or offences for which the criminal has been convicted.

15. The IR which apply in this case are IR 398 and 399(a). IR 398 and 399 in their amended form provide as follows:

> 398. Where a person claims that their deportation would be contrary to the UK's obligations under Article 8 ... and
>
> (a) the deportation of the person from the UK is conducive to the public good and in the public interest because they have been convicted of an offence for which they have been sentenced to a period of imprisonment of at least 4 years;
>
> (b) the deportation of the person from the UK is conducive to the public good and in the public interest because they have been convicted of an offence for which they have been sentenced to a period of imprisonment of less than 4 years but at least 12 months; or
>
> (c) the deportation of the person from the UK is conducive to the public good and in the public interest because, in the view of the Secretary of State, their offending has caused serious harm or they are a persistent offender who shows a particular disregard for the law,
>
> the Secretary of State in assessing that claim will consider whether paragraph 399 or 399A applies and, if it does not, the public interest in deportation will only be outweighed by other factors where there are very compelling circumstances over and above those described in paragraphs 399 and 399A.
>
> 399. This paragraph applies where paragraph 398 (b) or (c) applies if –
> (a) the person has a genuine and subsisting parental relationship with a child under the age of 18 years who is in the UK, and
> (i) the child is a British Citizen; or

(ii) the child has lived in the UK continuously for at least the 7 years immediately preceding the date of the immigration decision; and in either case

(a) it would be unduly harsh for the child to live in the country to which the person is to be deported; and

(b) it would be unduly harsh for the child to remain in the UK without the person who is to be deported**;** or

(b) the person has a genuine and subsisting relationship with a partner who is in the UK and is a British Citizen or settled in the UK, and

(i) the relationship was formed at a time when the person (deportee) was in the UK lawfully and their immigration status was not precarious; and

(ii) it would be unduly harsh for that partner to live in the country to which the person is to be deported, because of compelling circumstances over and above those described in paragraph EX.2. of Appendix FM; and

(iii) it would be unduly harsh for that partner to remain in the UK without the person who is to be deported.

16. The principal differences relevant to this appeal between these rules as introduced in 2012 and as amended in 2014 were (1) that there was no longer a provision which prevented a person from relying on a parental relationship with a child if there was a primary carer for the child who was not liable to deportation; (2) The final unnumbered paragraph of IR 398 ("the tailpiece") as introduced in 2012 referred to "exceptional circumstances" whereas IR 398 as amended in 2014 referred to "very compelling circumstances"; and (3) the concepts of undue harshness was introduced into IR 399 in place of a previous requirement, in the case of a child, that it would not be reasonable for the child to leave the UK and there was no other family member able to care for the child in the UK.

17. In *MM (Uganda)* [2016] EWCA Civ 617, this Court considered the approach to cases alleging that deportation was 'unduly harsh' that had hitherto been applied by the Upper Tribunal (referred to as the *'MAB'* approach'). This Court cited the headnote of the report of *MAB* at [18] being:

> The phrase 'unduly harsh' in para 399 of the Rules (and s. 117C (5) of the 2002 Act) does not import a balancing exercise requiring the public interest to be weighed against the circumstances of the individual (whether child or partner of the deportee). The focus is solely upon an evaluation of the consequences and impact upon the individual concerned.

18. This Court rejected the *MAB* approach as failing to give effect to Parliament's intention in the statutory regime governing the issue under s. 117 of the 2002 Act by paying insufficient respect to the public interest in deportation of a foreign criminal. Laws LJ held:

> 22. …"Unduly harsh" is an ordinary English expression. As so often, its meaning is coloured by its context. Authority is hardly needed for such a proposition but is anyway provided, for example by *VIA Rail Canada* [2000] 193 DLR (4th) 357 at paragraphs 35 to 37.

23. The context in these cases invites emphasis on two factors, (l) the public interest in the removal of foreign criminals and (2) the need for a proportionate assessment of any interference with Article 8 rights. In my judgment, with respect, the approach of the Upper Tribunal in *MAB* ignores this combination of factors. The first of them, the public interest in the removal of foreign criminals, is expressly vouched by Parliament in section 117C(1). Section 117C(2) then provides (I repeat the provision for convenience):

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

24. This steers the tribunals and the court towards a proportionate assessment of the criminal's deportation in any given case. Accordingly the more pressing the public interest in his removal, the harder it will be to show that the effect on his child or partner will be unduly harsh. Any other approach in my judgment dislocates the "unduly harsh" provisions from their context. It would mean that the question of undue hardship would be decided wholly without regard to the force of the public interest in deportation in the particular case. But in that case the term "unduly" is mistaken for "excessive" which imports a different idea. What is due or undue depends on all the circumstances, not merely the impact on the child or partner in the given case. In the present context relevant circumstances certainly include the criminal's immigration and criminal history….

26. For all these reasons in my judgment *MAB* was wrongly decided by the Tribunal. The expression "unduly harsh" in section 117C (5) and Rule 399(a) and (b) requires regard to be had to all the circumstances including the criminal's immigration and criminal history.

3. FTT DECISION

19. The crucial paragraph in the decision of the FTT is paragraph 30, which reads:

> 30. I acknowledge that the appellant's deportation must be considered as being in the public interest as he has been convicted and sentenced to a term of imprisonment of 45 months and I am keenly aware of the OASys assessment that does indicate that he has not addressed his rehabilitation fully but I heard evidence of the appellant's personal reticence about discussing himself and his problems and I do accept that the proper evidence of his rehabilitation has been manifested a its best in his relationship with his children and his commitment to family. That the appellant has the full support of the mothers of all his children is, I find, a further important factor in his favour

as they clearly see the degree to which it would be unduly harsh for the children if the appellant is deported. I have considered this appellant's circumstances in the light of the judgement in *MF (Nigeria)* and I am, as noted above, satisfied that there is a strong public interest in this appellant's deportation due to the nature of his offence, the probation assessment and his disregard for the conditions of his staying in the United Kingdom. However, after much consideration of the evidence presented, I am satisfied that the public interest is outweighed by the degree to which the fabric of the family life of the appellant and his children would be destroyed by his removal. He is pivotal to the family arrangements and provides practical and emotional support to his children and their mothers that I do consider render his removal unduly harsh. The eldest child is over the age of 10 and I consider if would be unduly harsh for her to have to consider living in a different country and particularly as that would entail separation from her mother. Considering whether it would be 'unduly harsh' for the appellant's children to live outside the United Kingdom, it is of some weight that he has four children with three different mothers and that his deportation would necessarily therefore have an enormous and detrimental impact on the mothers and other family members. The children would be forced to live apart from their mothers and other siblings as well as being forced to adapt to a country where they have clearly never lived nor contemplated living in. I equally consider that the appellant's removal – for the reasons set out above – would be more than disruptive to the children's lives, it would have an impact on the children and their mothers, would change the focus of their lives and would be unduly harsh when considering emotional commitment that he appellant gives his children. I am satisfied that paragraph 399(a) does apply in this case and that – despite the importance of the public interest in the appellant's deportation it is outweighed by these particular individual family considerations.

4. GROUNDS OF APPEAL FROM THE FTT TO THE UPPER TRIBUNAL

20. The Secretary of State then applied for permission to appeal on the following grounds:

…

Making a material misdirection in law

4. It is respectfully submitted that the First-tier Tribunal materially misdirected itself in law in allowing the appeal under the Immigration Rules and under Article 8, and the decision is not in accordance with the law.

Immigration Rules

5. The Tribunal found that the Appellant met the requirements of paragraph 399(a) as an exception to deportation. However, it is respectfully submitted that the Appellant cannot meet the tests set out in that paragraph, as there is clearly another family member who is able to care for the children in the United Kingdom. The Appellant's partner also admitted that an elder child assists with the care of the other children, and therefore the Appellant's partner would not be left on her own to care for the children.

6. It is submitted that the Tribunal have gone beyond the test set out in paragraph 399(a) in their consideration, and the decision is not in accordance with the law.

Exceptional Circumstances and Public Interest

7. Furthermore, the Tribunal has failed to identify or give reasons as to why the Appellant's circumstances are exceptional and outweigh the public interest in deporting him.

8. As found by Lord Justice Laws in the case of *SS (Nigeria) v SSHD* [2013] EWCA Civ 550 ("SS Nigeria") that the public interest in deporting foreign criminals is "pressing" and that the interest would be injured where a foreign criminal is not deported for a serious offence.

9. The Appellant's offending was highly serious and it was found, as stated at paragraph 30, that he has not addressed his rehabilitation fully. The Appellant has committed serious offences for which the Secretary of State made a Deportation Order against the Appellant under primary legislation.

10. As found in the case of *SS Nigeria*, at paragraph 53: "An Act of Parliament is anyway to be specially respected; but all the more so when it declares policy of this kind. [. . .] Clearly, Parliament in the 2007 Act has attached very great weight to the policy as a well justified imperative for the protection of the public and to reflect the public's proper condemnation of such wrong-doers. Sedley LJ was with respect right to state that "in the case of a foreign criminal" the Act places in the proportionality scales a markedly greater weight than in other cases."

11. The decision to deport the Appellant was made according to primary legislation of the UK Borders Act 2007 and the Immigration Rules. The power under the Immigration Rules is derived from the 2007 Act and as found in the case of *SS Nigeria*, is to be specially respected. *The Appellant does not qualify under Paragraphs 399* or 399A and his circumstances should not have been found to

outweigh the public interest. He is a serious offender who has committed a number of dangerous and serious offences, and the public interest would be damaged if the Appellant was allowed to remain the United Kingdom despite his offending.

12. The Secretary of State submits that the First-tier Judge has been materially misdirected in concluding that the individual circumstances of the Appellant are so exceptional that they outweigh the pressing public interest in deporting the Appellant. *The assessment of the public interest is fundamentally flawed* and, therefore, the decision of the First-tier Judge to allow the appeal is not in accordance with the law. (Italics added)

FTT GRANTS PERMISSION TO APPEAL TO THE UPPER TRIBUNAL

21. There is an issue as to the scope of the permission which the FTT gave for an appeal by the Secretary of State. When granting permission, the FTT said this:

> 2. The grounds maintain (1) that the Judge erred in law in finding that paragraph 399(a) of the Immigration Rules applied to the Appellant's case, and (2) in her finding that to deport him to Jamaica would be unduly harsh *[as required by rule 399(a)(ii)]*.
>
> 3. Given that the Judge's finding in para 30 of her determination that paragraph 399(a) of the Immigration Rules applied was inconsistent with her earlier finding that the Appellant's partner assisted by her elder child cared for the Appellant's children, then the Judge's finding that para 399(a) applied arguably amounted to a material error of law which also rendered her finding that it would be unduly harsh (which is also arguably the wrong test) to deport the Appellant unsafe. (words in square brackets added)

DECISION OF THE UPPER TRIBUNAL

22. The Upper Tribunal decided two matters relevant to this appeal. The Upper Tribunal held the Secretary of State was wrong to say that the FTT erred in holding that the requirements of paragraph 399(a) were made out. The only error for which the Secretary of State contended was that there was another family member who was able to care for the children in the UK and that therefore the requirements of paragraph 399(a) could not be met. The Upper Tribunal held that by the date of the hearing this was no longer a factor which disqualified a person from relying on IR 399(a). Second, the Upper Tribunal held that it was not open to the Secretary of State to argue that the FTT had erred in its interpretation of the words "unduly harsh". That argument was not within the grounds of appeal and it was too late to raise it at the hearing.

SUBMISSIONS AND DISCUSSION

Issue (1): did the FTT give appropriate weight to the public interest?

23. Ms Julie Anderson, for the Secretary of State, submits that public interest was not in this case assessed in the required way and having regard to its various facets. The FTT had failed to consider each of the three parts of the public interest that is avoiding the risk of reoffending, deterrence and public revulsion. In *Hesham Ali*, Lord Wilson and Lord Kerr had criticised the concept of public revulsion and Lord Wilson in particular preferred to refer to public confidence in the immigration system rather than to public revulsion, but they were not in the majority. The children were not being cared for by DW, but by others, and the FTT had to deal with that point in her conclusion as a factor favouring deportation.

24. Mr Emeka Pipi, for DW, submits that DW had developed a private life during his unlawful stay. He submits that, as explained by Lord Kerr in *Hesham Ali* at [168] to [169], section 117A to D concerns and promotes family unity. As was said by this Court in *SS (India) v SSHD* [2010] EWCA Civ 388 at 50, modern means of communication are not enough.

25. Mr Pipi points out that the FTT correctly referred to the OASys report. This was an independent report that reflected the public interest. DW had a certificate that he had completed certain drugs courses. He had three character references. This was a classic balancing exercise. The seriousness of the offence was obvious even though the Upper Tribunal did not say it was serious or give any details other than saying that the Secretary of State considered it serious. This applies to the FTT. There was a reference to the sentencing remarks earlier in the decision, which showed that this case involved public safety.

26. I have already set out paragraph 30 of the decision of the FTT, which contains the FTT's conclusion. It refers to the public interest, but it is clear that, when the FTT made its assessment of the effect of DW's deportation on the children (first on the basis that they left with him, and then on the basis that he was deported but the children remained in the UK), that the FTT came to its conclusion that the effect was "unduly harsh" without having regard to all the circumstances of DW's offending and immigration history as required by section 117C and IR 399(a), as interpreted by this Court in *MM (Uganda)*, and without reference to the fact that he was not the primary carer.

27. *MM (Uganda)* was decided after the date of the FTT's decision, but it is merely declaratory of the law as it existed at that date. Moreover, the FTT was already aware of the direction in which the law was travelling as she refers in paragraph 30 to *MF (Nigeria) v SSHD* [2014] 1 WLR 544, a decision of this Court on the 2012 IR which among other points decides that an individual whose family life was precarious in that he had no right to remain in the United Kingdom would be likely to establish that his removal was contrary to Article 8 only in the most exceptional circumstances. The individual in *MF Nigeria* succeeded in that case but only after the Upper Tribunal had conducted a "meticulous assessment" of the factors

weighing for and against deportation and where the Upper Tribunal had not taken into account any irrelevant considerations or failed to take into account any relevant factors (this Court's judgment, 50). The Upper Tribunal had observed that "Whereas previously it has been open to judges, within certain limits, to reach their own view of what the public interest is and the weight to be attached to it, the scope for doing so is now more limited" and that "The new rules were an index of the enhanced importance the Secretary of State attaches to the public interest in the deportation of foreign criminals." (This Court's judgment, 23, 27).

28. The FTT really only turned to the public interest once she had concluded that the impact of DW's removal on the children was quite independently "unduly harsh". When she considered it she paid very little regard to the seriousness of his criminal offending or his immigration history, referring to these matters in general terms and failing to attach to them the weight required having regard to section 117C taken with IR 398 and 399.

29. Accordingly, despite the references in this paragraph and/or elsewhere in the decision to section 117A, *Re MF (Nigeria)* and the public interest, and the incidental references to matters relating to DW's offending history referred to by Mr Pipi, I am satisfied that the FTT erred in law in applying the considerations constituting the public interest. This conclusion is reinforced by Ms Anderson's submission that the public interest is nowhere analysed into its component factors, which include deterrence and public revulsion or consequent lack of confidence in the immigration system.

Issue (2) Interpretation of the notice of appeal

30. Ms Anderson submits that the Upper Tribunal interpreted the grounds of appeal too mechanistically and that the Upper Tribunal had not considered section 117. The grounds of appeal had to be read as a whole. Paragraph 5 of the draft grounds brought in the "unduly harsh" issue.

31. Mr Pipi submits that the Upper Tribunal were correct to hold that the sole ground of appeal for which permission had been obtained was the question whether DW was unable to rely on sections 117A to D because the children lived with their primary carers. The rules required the appellant to set out the precise error of law. It was not for the Secretary of State simply to tell the court what the error was alleged to be on the opening of the appeal. The Secretary of State should follow the statutory procedures for seeking permission to appeal.

32. In my judgment, the Upper Tribunal was wrong to exclude the Secretary of State's argument about the FTT's erroneous approach to the words "unduly harsh" in IR 399(a) for two reasons.

33. First, the FTT when giving permission clearly considered that this matter was within the grounds: see paragraph 2(2) of its ruling, set out in paragraph 21 above. (Clearly the "(1)" is misplaced in paragraph 2 and should appear after "erred in

law".) Two errors of law were alleged: first in applying paragraph 399(a) and second in holding that the deportation was unduly harsh. The FTT judge went on to say as a reason justifying the grant of permission that the first error of law might lead to the second holding being unsafe, but he did not, as I see it, limit the grounds of appeal. As I read this decision, the FTT intended that the grounds should be read as raising two separate errors of law. The ruling of the FTT makes it clear that the grant of permission under IR 399 was not limited to the question whether concerning paragraph 399(a) the fact that there is another carer automatically means that the deportation of the non-carer parent cannot be unduly harsh. The parties' expectations were or should have been that that matter would be dealt with on the appeal. It would be inappropriate for the Upper Tribunal to interpret the grounds of appeal as excluding it in those circumstances.

34. Second the draft grounds submitted by the Secretary of State, when fairly read with a knowledge of the background to the 2014 changes, raise the point. By the date of the Upper Tribunal hearing it was well known that there was a strong public interest in deportation. The effect of the FTT's interpretation, on the other hand, was that the public interest was outweighed once it was concluded that the impact of deportation on the children remaining here was in her judgment unduly harsh for them. That was hardly consistent with the then well-known legislative approach in this field.

35. Although the grounds argue that the case did not meet the test for exceptional circumstances, they also stated that the case did not meet IR 399 quite separately from the misconceived argument based on the presence of a primary carer in the jurisdiction: see the words italicised in paragraph 11 of the draft grounds. In the context, that too should have been enough.

CONCLUSION

36. I would allow the Secretary of State's appeal and remit the matter to the Upper Tribunal.

LORD JUSTICE HICKINBOTTOM

37. I agree.

LORD JUSTICE MOYLAN

38. I also agree.