Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/00666/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 30th November 2015	**On 20th January 2016**

Before

UPPER TRIBUNAL JUDGE HEMINGWAY

Between

P A
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr S Whitwell (Home Office Presenting Officer)
For the Respondent: Mr D Mold (Counsel)

DECISION AND REASONS

1. The Secretary of State has appealed, with permission, against a decision of a panel of the First-tier Tribunal comprising Judge Dineen and Mrs L R Schmitt, JP (hereinafter the "panel" unless otherwise stated) promulgated on 30th March 2015 following a hearing on 1st October 2014, by which the panel allowed the appeal of P A (hereinafter the "Claimant") against a decision of the Secretary of State of 9th April 2014 to make a deportation order by virtue of Section 3(5)(a) of the Immigration Act 1971. The decision followed the Claimant's conviction of 7th July 2013 of an offence of causing death by dangerous driving and which led to her receiving, on 27th August 2013, a sentence of sixteen months' imprisonment.

Immigration History and Background Facts

2. The Claimant is an Indian national and she was born on 4th July 1982. She lived her early life in India but, on 4th November 2007, entered the UK with valid entry clearance as the spouse of a man I shall simply refer to as K who, himself, hailed form India but who had entered the UK in 2002 as a work permit holder and had subsequently received a grant of indefinite leave to remain in the UK on 20th June 2006. Subsequently, in fact on 2nd July 2007, he had obtained British nationality. On 7th October 2008 the Claimant gave birth to the couple's child who I shall simply refer to as D. That child is a British citizen. On 22nd December 2009 the Claimant was herself granted indefinite leave to remain in the UK. It was clearly anticipated that the family would remain in the UK for the foreseeable future. Since the date of the hearing before the panel, the Claimant has given birth to a further child who has also been fathered by K.

3. There is no dispute about the fact that the Claimant was a person of previous good character. However, she decided to learn how to drive and passed her driving test on 1st September 2012. Thereafter, on 5th October 2012, she lost control of a car which she was driving and, as a result, two pedestrians, a married couple, were struck and injured. Very sadly indeed the male member of that couple died in consequence of his injuries. It is that which led to the conviction referred to above.

Relevant Legal Provisions

4. The relevant legal provisions are Section 117B to D of the Nationality, Immigration and Asylum Act 2002 (the "2002 Act") and paragraphs 398, 399 and 399A of the Immigration Rules. There is, however, an issue as to whether the version of the Immigration Rules in force at the date of the decision under appeal or the version in force as at the date of the hearing before the panel apply. The way I have set them out below illustrates the relevant differences between the two versions.

5. Section 117A to D of the 2002 Act, which came into effect on 28th July 2014, along with the second of the two versions of the Immigration Rules referred to above, provides as follows;

> "**I17A Application of this Part.**
>
> (1) This Part applies where a court or Tribunal is required to determine whether a decision made under the Immigration Acts –
>
> (a) breaches a person's right to respect for private and family life under Article 8, and
>
> (b) as a result would be unlawful under Section 6 of the Human Rights Act 1998.
>
> (2) In considering the public interest question, the court or Tribunal must (in particular) have regard –
>
> (a) in all cases, to the considerations listed in Section 117B, and

(b) in cases concerning the deportation of foreign criminals, to the considerations listed in Section 117C.

(3) In sub-Section (2), 'the public interest question' means the question of whether an interference with a person's right to respect for private and family life is justified under Article 8(2).

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.

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 sub-Sections (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.

117D Interpretation of this Part

(1) In this Part –

'Article 8' means Article 8 of the European Convention on Human Rights;

'Qualifying child' means a person who is under the age of 18 and who –

(a) is a British citizen, or

(b) has lived in the United Kingdom for a continuous period of seven years or more;

'Qualifying partner' means a partner who –

(a) is a British citizen, or

(b) who is settled in the United Kingdom (within the meaning of the Immigration Act 1971 – see Section 33(2) of that Act).

(2) In this Part "foreign criminal" means a person –

(a) who is not a British citizen,

(b) who has been convicted in the United Kingdom of an offence, and

(c) who –

(i) has been sentenced to a period of imprisonment of at least twelve months,

(ii) has been convicted of an offence that has caused serious harm, or

(iii) is a persistent offender."

6. Given that, as noted above, an issue which has arisen in this case is whether the panel applied the correct version of the Immigration Rules, it is necessary to note that HC 352 amended paragraphs 398, 399 and 399A of the Immigration Rules with effect from 28th July 2014. The words added by HC 352 are in bold below and the words deleted are crossed and in square brackets. As at the date of the Secretary of State's decision on 9th April 2014, the Rules that applied were the same as those in force on 27th July 2014, i.e. immediately prior to HC 352 coming into effect.

"**A.398. These Rules apply where:**

(a) a foreign criminal liable to deportation claims that his deportation would be contrary to the United Kingdom's obligations under Article 8 of the Human Rights Convention;

(b) a foreign criminal applies for a deportation order made against him to be revoked.

398. Where a person claims that their deportation would be contrary to the UK's obligations under Article 8 of the Human Rights Convention 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 four 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 four years but at least twelve 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 [~~it will only be in exceptional circumstances that the public interest in deportation will be outweighed by other factors~~].

399. This paragraphs 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 seven 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 [~~it would not be reasonable to expect the child to leave the UK~~]**; and

(b) **it would be unduly harsh for the child to remain in the UK without the person who is to be deported.** [~~There is no other family member who is able to care for the child in the UK~~];

7. The rest of the wording is not relevant for the purposes of this appeal bearing in mind the decision which I have ultimately reached.

The Decision of the Panel

8. The panel summarised the arguments presented on behalf of the Claimant and those presented on behalf of the Secretary of State in this way;

"**<u>The Appellant's Case</u>**

13. Oral evidence was given by the appellant, her husband, and [AG], independent social worker. Reliance was placed on an appeal bundle of 158 pages.

14. The material points of the appellant's case are as follows.

15. She had passed her driving test on 1st September 2012, and began to drive in mid-September in a second-hand car with automatic gears which her husband bought for her, and in which she displayed "P" plates at all times.

16. The accident occurred due to "unintended acceleration" when she was pulling out into a major road and her husband shouted at her to apply the brakes. It seems that she wrongly pressed the accelerator. The circumstances are described in a report by [Dr AS], which appears at pages 55-79 of the appeal bundle.

17. The result of this split second error was that, her car having gone out of control as noted above, it struck [the couple].

18. The effect on the appellant herself is described in a psychological report by [MG], which appears at pages 88-93 of the bundle. She has suffered from hypervigilence, sleep disturbance, intrusive images, flashbacks, nightmares and avoidance. She had great distress in relation to the bereaved family, felt terrified about the impact of a custodial sentence on herself and her daughter, and believed that she would not be able to face her parents, friends or family again. She was preoccupied and tormented by thoughts of her daughter's unmet needs should they be separated. The report, dated 4th July 2014 describes the appellant as suffering from severe depression and anxiety including societal withdrawal and isolation, sleep disturbance, appetite difficulties, recurring negative thoughts, rumination and worry.

19. The report concludes that in the opinion of [MG], an enforced separation from her daughter and husband would be detrimental to the appellant's mental health and have negative implications for the mental health and wellbeing of her daughter.

20. [AG], who gave oral evidence and adopted the contents of her written report at pages 79-86 of the appeal bundle, states with regard to [D], that:-

> '[D] is a young girl who has suffered emotional harm due to separation from her mother who is her primary attachment relationship. In addition she witnessed a traumatic car accident and severe deterioration in her mother's mental health following this accident. She has been reunited with her mother and is clearly benefiting from this; however [D] and her family face further trauma and upheaval should her mother be deported to India. If [D] and her father, as British citizens, choose to remain living in the United Kingdom where [D's] health and educational needs will be best met, she will have to endure separation once again from her mother, who is her primary attachment figure. Whilst some relationship can be maintained, this will not, in my view, prevent her from suffering significant emotional harm …'

21. The appellant and her husband made it clear that if the appellant has to return to India, they will not accompany her. [D] has some special health needs. She has multiple food allergies, suffers from eczema and asthma, and has a problem with the alignment of her feet, for which she is receiving physiotherapy. She needs a high level of consistent and attentive care, and a special diet. She requires an 'epi-pen' to be available at all times in case she goes into anaphylactic shock due to her allergies. She cannot therefore easily be cared for by a succession of carers. Her father found it difficult to prepare food for her and attend all her hospital appointments while the appellant was in custody.

22. [D] has been to India on two occasions with the appellant, but on both occasions she had to be taken into hospital for treatment of acute bronchitis due to pollution there. A letter from the medical superintendent at Aditya Hospital Hyderabad, at page 126 of the bundle, confirms this.

23. Separation of the appellant from her husband and child would be a terrible experience for all of them. This is borne out by a report from the head

teacher at [D's] school, at page 133 of the appeal bundle. This states that since her mother's release from custody, [D] has been much happier and more confident. Without any doubt she would suffer greatly if her mother was to be deported as the family would be broken up. [D] needs her mother to help her get over the trauma she has experienced with her mother's sentence.

24. At the time of the appeal hearing, in addition to her responsibilities to [D], the appellant was pregnant.

25. The appellant has been greatly supported by friends and others. At page 97 there is a strong letter of support from Councillor [B]of the [the Ward in which he is a Councillor], which is where the accident took place, and where the appellant and her family live. He states his deep sadness for the victims of the accident, and also for the appellant and her family.

26. There is also a letter of strong support from the appellant's MP in [the relevant constituency which he represents], which is at page 95.

27. A letter dated 18th August 2014 from the appellant's temple, which is at page 99 of the appeal bundle, also attests to her good character.

28. Letters of support from seven friends of the appellant also appear in the bundle at pages 101-115.

29. The appellant's OASys Report shows, unsurprisingly, a low risk of re-offending, as indicated in a letter from National Probation Service at page 75 of the bundle. While in custody, the appellant has pursued a number of constructive educational courses.

30. The appellant's Counsel submitted a skeleton argument, containing reference to the Immigration Rules current at the time of the respondent's decision, and to the applicable provisions of the Immigration Act 2014. It was submitted that the requirement of proportionality under Article 8 of the European Convention on Human Rights does not require the appellant's deportation.

The Respondent's Case

31. The respondent relied on the reasons letter referred to above.

32. The Tribunal was reminded that the appellant was subject to automatic deportation provisions.

33. It was submitted that it was not relevant that the sentencing judge did not recommend deportation.

34. The family has the option of relocating to India with the appellant.

35. Although [D] was unwell in India, the treatment which she received there appeared to have been successful.

36. As to schooling of [D] in India, her parents would obviously do their best for her.

37. Her parents well know how to deal with her medical problems. They could make life work in India for the family.

38. Both the appellant and her husband have spent their formative years in India. [K] has a good skill set and could re-establish himself in that country.

39. Return to India would not be unduly harsh for any member of the family.

40. If the appellant were to be separated from her family, that would also not be unduly harsh. The 'single parent phenomenon' is not unknown. [K] made a good job of looking after [D] when his wife was in prison.

41. There is a public interest in the deportation of the appellant. A clear message must be given to foreign criminals.

42. The respondent also made reference to the applicable Immigration Rules and the Immigration Act 2014."

9. The panel considered that it was obliged to decide the appeal under the version of the Immigration Rules which was in existence as at the date of the decision under appeal. That is to say it had regard to the wording shown with a line through it above and not to the wording in bold. On that version of the Rules it was persuaded that the Claimant's appeal ought to succeed on the basis that, having regard to her relationship with D she satisfied paragraph 399(a)(i)(a) of the Immigration Rules. That was on the basis that D is a British citizen and that it would not be reasonable to expect D to leave the UK. Additionally, the panel considered it had to take into account the content of Section 117 of the 2002 Act, as set out above, and, in that context, it decided that the Section 117 considerations did not require her deportation and that, in particular, Exception 2 as set out in Section 117C(5) applied to the Claimant. It's key reasoning is set out below;

"49. It was suggested that as a British citizen who has as such been required to surrender his Indian passport, K could not return to live and work in India, but there is no basis for finding that he could not be admitted to that country as a spouse, or that he would not be able to obtain an Overseas Citizenship of India ('OCI') card.

50. This is however an immaterial matter because it is clear from the evidence of herself and her husband, which is accepted because it is consistent and credible, that if the appellant were to be removed to India, her family members would not accompany her.

51. In any event, pursuant to the decision of the Upper Tribunal at paragraph 95 in the appeal of **Sanade and Others [2012] UKUT 00048**, where a child or remaining spouse is a British citizen, it is not possible to require them to relocate outside the European Union, or to submit that it would be reasonable for them to do so.

52. It is clear that the removal of the appellant to India would constitute an interference with the family life of all concerned.

53. That interference would be for a lawful purpose contemplated by Article 8.2.

54. The issue then arising is that of proportionality.

55. That issue is in part dealt with by the Immigration Rules current at the time of the respondent's decision.

56. Paragraph 396 of the Rules provides that it is in the public interest to deport where the Secretary of State must make a deportation order in accordance with Section 32 of the UK Borders Act 2007.

57. The appellant falls within paragraph 398(b), because she was sentenced to more than twelve months, but less than four years imprisonment.

58. It is thus necessary to consider whether paragraphs 399A or 399 apply.

59. She is not within paragraph 399A, because neither she nor her husband fulfil the requirements of that paragraph for length of time living continuously in the UK immediately preceding the date of the immigration decision giving rise to the present appeal.

60. As to paragraph 399, the appellant does not satisfy (b) which is concerned with her relationship with her husband, because he had not lived in the UK with valid leave for at least the fifteen years immediately preceding the date of the immigration decision.

61. However, the appellant does satisfy paragraph 399(a)(i) to the extent that she has a genuine and subsisting parental relationship with her daughter who is a British citizen.

62. To bring herself within paragraph 339, however, she also needs to satisfy sub-sub-sub-paragraph (a)(ii)(a) to the effect that it would not be reasonable to expect her child to leave the UK. As to that:-

    (i) [D] has health problems which are referred to above.

    (ii) She has been to India on two occasions when she fell ill there, as described above.

    (iii) The fact of British citizenship itself makes her removal unreasonable pursuant to the principle in **Sanade**.

    (iv) Regard has to be had to [D's] best interests under Section 55 of the Borders, Citizenship and Immigration Act 2009, which requires that, in making a decision in relation to immigration matters, regard has to be had to the need to safeguard and promote the welfare of children who are in the United Kingdom.

63. Taking into account the above considerations and all the circumstances of the case, it would not be reasonable to expect [D] to leave the UK.

64. Therefore, the appellant falls within paragraph 339, and so far as the applicable Immigration Rules are concerned, it is not necessary to show exceptional circumstances for the public interest in deportation to be outweighed by other factors.

65. However, it is also necessary to consider Section 117 of the Nationality, Immigration and Asylum Act 2002, introduced by the Immigration Act 2014.

66. Section 117C(3) states that in the case of a foreign criminal who has not been sentenced to a period of imprisonment of four years or more, the public interest requires deportation unless one of two exceptions applies.

67. The first exception set out in Section 117C(4) does not apply.

68. As to whether the second exception contained in paragraph 117C(5) applies, the appellant satisfies the first part of the requirement in sub-Section (5) because she has a genuine and subsisting relationship with British citizens who are respectively a qualifying partner and a qualifying child. It is then necessary to consider whether the appellant's deportation would be unduly harsh on either of them. Dealing with both husband and child together, it would be unduly harsh because:-

    (i) There is a clear dependency by both husband and child on the day-to-day care provided by the appellant.

    (ii) [D] has certain special requirements as a result of her health issues referred to above.

    (iii) It was hard for the appellant's husband to cope while she was in custody.

    (iv) There is no evidence of a suitable quantity and quality of care being available from other sources.

    (v) In any event the separation of a mother from her family in the circumstances contemplated would in itself amount to undue harshness, given the clear closeness of the family relationships which exist.

69. It is therefore not the case that, pursuant to the statutory provisions, the public interest requires the appellant's deportation.

70. It is nevertheless still necessary to consider public interest comprised within the requirement of proportionality under Article 8.

71. In this connection the Tribunal is required by Section 117A to consider Section 117B, and Section 117C sub-Section (1) and (2). Without reciting the provisions set out in the legislation, the material factors applicable in the appellant's case under those provisions are as follows:-

(i) The maintenance of effective immigration control is in the public interest.

(ii) Deportation of foreign criminals is in the public interest.

(iii) The more serious the offence committed, the greater is the public interest in deportation.

(iv) The appellant is an English speaker, which is in the public interest.

(v) She and her husband are financially independent.

(vi) The appellant and her husband married before her entry as the spouse of a British citizen. Thus no question arises of any private life or family life being formed while any immigration status was unlawful or precarious.

72. The above is however not necessarily an exhaustive list of factors relevant to the question of public interest.

73. Drawing the threads together and distilling the various requirements of primary and delegated legislation, it is necessary to consider the question of the proportionality of the interference with family or private life which would be caused by the appellant's deportation, without needing to show there are exceptional circumstances in order for the public interest in deportation to be outweighed by other factors. As to that:-

(i) The factors set out above under Section 117B and 117C weigh in favour of the appellant.

(ii) Although causing death by dangerous driving is a grave offence with tragic consequences, it is not an offence of deliberate intent, and in the present case was a result of a catastrophic error, probably committed in panic, in a matter of no more than a few seconds.

(iii) The appellant will not offend again.

(iv) She is of good character.

(v) She has shown great remorse.

(vi) She has suffered in her own mental health as a result of the accident.

(vii) The effect on her family of her deportation would be unduly harsh, as found above.

(viii) The effect on the appellant herself would be unduly harsh in the light of separation from her family; the fact that she has already served a sentence for the offence; the distress she has already experienced apart from the sentence; and the conditions of living in India which clearly would contrast unfavourably with her current life in the UK.

74. In the light of all the above, we find that it would not be proportionate to the respondent's lawful aims for the appellant to be deported. Thus, as indicated to the appellant, the appeal succeeds under Article 8."

10. Hence, the Claimant's appeal succeeded.

The Permission Stage

11. The Grounds of Appeal filed on behalf of the Secretary of State ran to some 25 paragraphs. Some of what was said clearly amounted to no more than disagreement with the outcome but it was asserted that the panel had erred in law in failing to apply the wrong test in its consideration of the position under the Immigration Rules and, specifically, in failing to consider whether it would be unduly harsh for D to leave the UK or for D to remain in the UK without the Claimant. Permission was granted by a Judge of the First-tier Tribunal and the salient part of that grant reads as follows;

"2. The Tribunal found, for the purposes of paragraph 399(a)(ii)(a) of the Immigration Rules, that it would not be reasonable to expect the Appellant's child to leave the United Kingdom.

3. Grounds 1 to 12 contend that the Tribunal erred because the correct test under paragraph 399(a)(ii)(b) was whether it would be unduly harsh for the child to leave the United Kingdom and that the Tribunal also erred in failing to consider paragraph 399(a)(ii)(b) which required that it be unduly harsh for the child to remain in the United Kingdom without the person to be deported.

4. In fact, contrary to what the grounds contend, at the date of decision, which is generally the relevant date for determining the applicable Immigration Rule (see **MD (Jamaica)** and **GE (Canada) v SSHD [2010] EWCA Civ 213**), the test under paragraph 399(a)(ii)(a) was, as the Tribunal rightly indicated, the reasonableness test.

5. It is nevertheless arguable that the Tribunal erred in failing also to consider paragraph 399(a)(ii)(b) – not because that test involved undue hardship as the grounds contend but because it required the Appellant to show that there was no other family member who was able to care for the child in the UK and that was not a specific issue addressed by the Tribunal.

6. Although, in the light of the Tribunal's findings under Section 1117C of the 2002 Act, any error under paragraph 399 may well be immaterial, that is open to argument and accordingly permission is granted on the basis that the Tribunal arguably erred in accepting that the Appellant met the requirements of paragraph 399, without considering 399(a)(ii)(b). I do not refuse permission on the remaining grounds."

12. Permission having been granted there was a hearing before the Upper Tribunal to consider whether the decision of the panel ought to be set aside and, if so, whether the decision could be remade without the need for a further hearing.

Assessment

13. Mr Whitwell relied upon the grounds and addressed me briefly to elaborate upon them. His main contentions were to the effect that the panel had erred in applying the wrong version of the Immigration Rules notwithstanding what had been said in the grant of permission. Specifically, he said that the Rules which had to be applied were those in force as at the date of the hearing before the panel not the version which applied as at the date of the decision. He cited, in particular, in support of that proposition the judgment in **YM (Uganda) v Secretary of State for the Home Department [2014] EWCA Civ 1292** but also upon **Chege (section 117D – Article 8 – approach) [2015] UKUT 00165 (IAC)** and **AB (paragraph 399(a)) Algeria [2015] UKUT 00657 (IAC)**. He contended the version of the Rules applicable from 28th July 2014, which he argued the panel should have applied, required it to look at the situation of the child if that child were to live in the country to which the Claimant would be deported (India) and also the position if the child were to remain in the UK without the Claimant but that this exercise had not been performed by the panel as a consequence of its error in applying the wrong Rules. He also submitted that the panel's findings regarding Section 117C(5) were unsafe because it had been considering the question of Exception 2 against a background test of "reasonableness" as opposed (as I understand it) to a test of undue harshness.

14. Mr Mold, for the Claimant, argued that Mr Whitwell had misunderstood **YM**, that **YM** was also misunderstood by those deciding **AB** and **Chege** and that the panel correctly applied the Rules in force as at the date of the decision under appeal. He went on to say that whilst the panel did not specifically refer to the requirement at 399(a)(i)(b) of the earlier version of the Rules, any such error stemming from that was not material because if the panel, given its other findings, had asked itself whether there was any other family member able to care for the child in the UK it would inevitably have concluded there was not bearing in mind observations it had made in a passage from paragraph 21 to paragraph 23 of its determination. Those paragraphs are set out above. Anything else in the grounds, submitted Mr Mold, was mere disagreement and were the sorts of points heavily criticised in **Greenwood (2) (paragraph 398 considered) [2015] UKUT 629**. Further, the content of Section 117, which had come into force on 28th July 2014 along with the new Immigration Rules, was only to be taken into account if it was decided that the requirements of paragraph 399 or 399A of the Immigration Rules were not met.

15. I accept Mr Whitwell's submission to the effect that the panel erred in failing to consider the position under the version of the Immigration Rules which was in force as at the date of the panel hearing, as opposed to the version which was in force as at the date of the deportation decision under appeal. I bear in mind all that Mr Mold has to say about that but it seems to me that the Court of Appeal, in **YM**, was clearly laying down the general principle that, in the context of deportation, and bearing in mind what is said in Rule A362, it is the case that the Rules to be applied at a first instance appeal are the Rules in force as at the date of the hearing of that appeal. I really cannot see how paragraph 39 of the judgment can be read in any other way. I also note that the Upper Tribunal in **Chege** and in **AB** had the same view of **YM**. That is not by any means the end of the matter though because it is necessary to

consider whether any such error is a material one bearing in mind the other findings and conclusions which the panel had reached.

16. In this context, despite its taking the view that it should not look at the Rules which came into force on 28th July 2014, the panel did take into account the new statutory provisions now contained in the amended Section 117 of the 2002 Act which also came into force on that date. Of course, those statutory provisions and the Immigration Rules which came into force on 28th July 2014 substantially mirror each other. Indeed, it would be very odd indeed if they did not do that. That is because they are both to be considered when a deportation decision is appealed and they both seek to lay down the same sorts of principles. In this context, I reject Mr Whitwell's submission that the section 117C(5) consideration was conducted against the background of an application of an incorrect test being that of "reasonableness". It is clear from what the panel said at paragraph 68 that it was considering the Section 117C(5) requirements on the basis of the applicable test being one of undue harshness. To recap, the second Exception in Section 117C(5) of the 2002 Act applies in circumstances where a Claimant has a genuine and subsisting relationship with a qualifying child and the effect of the Claimant's deportation on that child would be unduly harsh. There are similar provisions relating to partners but I focus, here, upon the child. There is little practical difference, it seems to me, between Exception 2 as it relates to a child within Section 117C and the post 27th July 2014 requirements of the Immigration Rules appearing at paragraph 399(a)(i)(a) and (b). The panel's reasoning at paragraph 68 of the determination to the effect that Exception 2 does apply is, it may be seen from a plain reading, very much focused upon the situation of the child. Reference is made to the child being dependent upon the Claimant, the child having special requirements as a result of health concerns, the difficulty the Claimant's husband had in coping with the child, the lack of evidence of available care and the gravity of a separation of mother and child. It seems to me that in looking at what it had to say, the panel was, there, effectively deciding that it would be unduly harsh for the child to live in India and unduly harsh for the child to remain in the UK without it's mother. Were it not so deciding it is difficult to see why it would conclude that the effects of the Claimant's deportation on the child would be unduly harsh. As to the question of whether it was open to the panel to so decide, it seems to me that that was a matter for it on the basis of the facts as it found them to be.

17. I conclude, therefore, in light of the above, that if the panel had asked itself the correct question with respect to the current version of paragraph 399(a)(i)(a) and (b) it would have concluded in favour of the Claimant on the basis of the child. The error it made was not, therefore, a material one. Accordingly, its decision is not set aside.

Notice of Decision

The making of the decision of the First-tier Tribunal did not involve the making of a material error on a point of law and its decision shall stand.

Anonymity

The First-tier Tribunal made an anonymity order which applied to the Claimant and members of his family. I continue such order in the same terms. No report of these proceedings shall directly or indirectly identify the Claimant or any members of the Claimant's family. This Direction applies both to the Claimant and to the Secretary of State. Failure to comply with this Direction may lead to contempt of court proceedings.

Signed Date

Upper Tribunal Judge Hemingway

TO THE RESPONDENT
FEE AWARD

I make no fee award.

Signed Date

Upper Tribunal Judge Hemingway