IN THE UPPER TRIBUNAL

R (on the application of AB) v Secretary of State for the Home Department IJR [2015] UKUT 00352(IAC)

F ield House

London

3 October 2014

BEFORE

UPPER TRIBUNAL JUDGE RINTOUL

Between

THE QUEEN ON THE APPLICATION OF A B

(ANONYMITY ORDER MADE)

Applicant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Mr R Khubber, of Counsel, instructed by JCWI appeared on behalf of the Applicant.

Mr Z Malik, of Counsel, instructed by the Treasury Solicitor appeared on behalf of the Respondent.

JUDGMENT

ANONYMITY DIRECTION

In order to secure the anonymity of the applicant's children throughout these proceedings I direct that pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules that no report or other publication of these proceedings or any parts of them shall name or directly or indirectly identify the applicant's children. Failure by any person, body or institution whether corporate or incorporate, for the avoidance of doubt to include either party to this appeal, to comply with this direction may lead to a contempt of court. The direction shall continue in force until the Upper Tribunal or an appropriate court shall lift or vary it. It has been necessary to anonymise the appellant to prevent identification of his children as was the case when the matter was before the Court of Appeal

1. The applicant challenges the lawfulness of the decision of the respondent of 4 November 2013 refusing to revoke the deportation order against him. He also challenges the decision of the respondent made on 6 February 2014 to certify his right of appeal against the decision not to revoke his deportation order as "clearly unfounded" pursuant to Section 94 of the Nationality, Immigration and Asylum Act 2002 and that thus he is entitled only to an out of country right of appeal. The deportation order in question was signed in 1999, and there has been substantial litigation since then. In these circumstances, it is necessary to set out in some detail the history to this application.

Immigration History and Factual Background

2.
The applicant is a citizen of Morocco born on 21 January 1963. He entered the United Kingdom on 12 May 1991 and was granted twelve months' leave to enter as the spouse of a British citizen. He was later on 5 May 1992 granted indefinite leave to remain on the basis of marriage; that marriage was dissolved in May 1994.

3.
In 1996 the applicant was arrested, was convicted of indecent assault and sentenced to seven years' imprisonment with a recommendation from the court that he be deported. A decision was then taken to deport him on the basis of that recommendation and he appealed against that decision. That appeal was dismissed on 7 October 1999; the deportation order was signed on 26 November 1999 and on 8 June 2000 he was deported to Morocco.

4.
On 25 December 2000 the applicant re-entered the United Kingdom in breach of the deportation order and was granted temporary admission; he did not, however, comply with the conditions thereby imposed.

5.
The applicant then began to live with his now wife Ms S with whom he has two children. Ms S has a daughter from an earlier relationship who was born in 1997. In June 2006 the applicant was arrested following a domestic dispute between him and Ms S. He then applied for leave to remain on Article 8 grounds on the basis of his relationship, which was refused on 29 July 2006. His appeal against that decision was dismissed on 23 November 2006.

6.
A further application for permission to remain was made on the basis that Ms S was an EEA national, and that as the family member of an EEA national, the applicant could only be deported if he represented a 'genuine, present and sufficiently serious threat' to a fundamental interest of society which, he says, he did not. That application was refused, and an appeal against that decision was made to the First-tier Tribunal, an appeal that ultimately reached the Court of Appeal in 2012. I turn next to that decision and the findings made.

Decision of the Court of Appeal

7.
As noted, the appeal to the First-tier Tribunal reached the Court of Appeal. It was reported as DH (Jamaica) and AB (Morocco) v SSHD [2012] EWCA Civ 1736. At paragraphs 39 to 45 Lord Justice Elias summarised proceedings as follows:-

" 39. The decision was appealed to the First-Tier Tribunal ('FTT') on 1 December 2010 where it came before Judge Blake on 26 January 2011. The appeal was dismissed by a decision promulgated on 21 April 2011. The learned Judge's analysis was that the appellant's case fell within the scope of Article 3(1) of the Citizenship Directive 2004/38/EC ('the Citizens Directive'). Ms S was an EU national within the meaning of the EEA Regulations and AB qualified as a 'family member' within the meaning of those Regulations (paras 18-19). By regulation 21, AB could be deported only if he represented a 'genuine, present and sufficiently serious threat' to a fundamental interest of society.

40. The judge noted that he had no information before him to show whether the appellant had a propensity to re-offend. However, he agreed with the observations of DIJ Lewis in the earlier hearing to the effect that AB's remaining in the country for some ten years following an unlawful re-entry posed a genuine and present threat to maintenance control. The judge recognised that deportation would impact adversely on the Article 8 rights of the appellant and his family, but concluded nonetheless that this was one of those rare cases where the strength of society's interest in removal justified the impact it would have upon those rights. In exercising the proportionality assessment, the judge had regard to the best interests of the children as a primary consideration as required by the decision of the Supreme Court in ZH (Tanzania) v SSHD [2011] UKSC 4 (a case decided between the hearing and the judge finalising his decision). The judge had evidence in particular of certain difficulties in the health of AB's daughter.

The decision of the Upper Tribunal.

41. The Upper Tribunal (Mr Justice Blake and UT Judge Gill) dismissed the appeal from the decision of Judge Blake. The UT held that the FTT had in fact been wrong to conclude that the Citizenship Directive was applicable; it was not because Ms S had not exercised any free movement rights. The case was indistinguishable from the case of McCarthy decided after Judge Blake's decision, in which the CJEU held that the Directive did not apply to an EU citizen who had not exercised freedom of movement rights even where he or she was a dual national. Ms. S therefore had no rights under EU law and her partner could not claim any derivative right to a residence certificate.

42. The appellant had foreseen that possibility in the light of McCarthy and switched the focus of challenge from the Directive to the decision in Zambrano , but unsuccessfully. The Court did not accept that Zambrano was applicable either. The UT observed that Zambrano had been clarified by the ECJ in Dereci and concluded (para 25), in accordance with its earlier ruling in Sanade and Others v Secretary of State [2012] UKUT 48, that the relevant principle of EU law was that 'an EU national cannot be forced to leave the European Union whether he or she has exercised free movement rights or not.' In this case the removal of the appellant would not compel the wife and children to leave because they could subsist as a family unit without him. It was accepted that it would be unreasonable to expect them to go to Morocco but nonetheless the disruption of the family did not engage EU law.

43. As to the contention that deportation would be incompatible with Article 8, the UT held that the decision of the FTT disclosed no error of law. The UT concluded, contrary to the submissions of counsel, that the decision of the FTT was structured, particularly when seen in the light of DIJ Lewis' earlier decision, to which it made reference; that it properly considered the impact of deportation on the wife and children; and that sufficient weight had been given to the interests of the children in accordance with ZH (Tanzania) .

44. The UT made two particular observations which in my view are highly pertinent to the Article 8 submissions in each of these two appeals. First, the judges confirmed the principle recently reiterated in AH v Secretary of State that 'there are classes of offences so serious that, irrespective of a propensity to re-offend, public policy justifies removal'. Second, the Tribunal referred to the decision of the ECtHR in Nunez v Norway [2011] ECHE 1047 where that court concluded that exceptional circumstances were required before family life established after illegal entry with no right to remain would make removal incompatible with Article 8. As the Strasbourg court put it, 'expulsion would constitute an important means of general deterrence against gross or repeated violations of the Immigration Act.'

45. Accordingly, the UT concluded that although Judge Blake had erred in his conclusion that the Citizenship Directive was applicable, there was no material error of law vitiating his conclusions."

8.
Having considered the arguments put forward by the claimant Elias LJ dismissed the appeal for the following reasons:-

" 75. In my judgment, there was a very strong case for the First Tier Tribunal reaching the conclusion it did. There is a complaint that its decision was not a structured one, but as the Upper Tribunal noted, the First Tier Tribunal referred to and approved the earlier decision of DIJ Lewis which expressly followed the Razgar analysis, and one has to look at both judgments in order fully to understand the determination of Judge Blake.

76. Given that the appellant was at all times an illegal entrant and had committed a serious criminal offence, there was every justification for the conclusion which has in fact been made by all judges who considered this below, namely that the deportation of this appellant would not infringe the Article 8 rights either of himself or any member of his family.

77. In my view, the appellant is simply asking this court to re-assess the weight to be given to various factors. That is not its function, and in any event I do not see how the courts below could sensibly have reached any different conclusion."

9.
On 21 December 2012 his appeal was dismissed. Subsequent to that, in October 2013 the applicant was detained, the respondent's intention being to deport him in line with the deportation order made as long ago as 1999. Submissions were then made on his behalf, initially seeking a stay on removal, and then a request that the deportation order be revoked.

The Request to Revoke the Deportation Order

10.
This request was initially made on 29 October 2013, the applicant's solicitors having sought (ultimately unsuccessfully) to petition the European Court of Human Rights to place a stay on removal pursuant to Rule 39. The submissions to the respondent were, in summary, that:-

i.
A significant period of time had elapsed since the last Tribunal hearing such that the applicant and his family's Article 8 rights had strengthened rendering reliance on his past immigration and criminal history no longer reasonable or proportionate; that he had continued to comply with the requirements of immigration control, had continued to live a law-abiding life in the United Kingdom, and to play an integral role in the welfare of his children.

ii.
Any removal would have a seriously adverse impact on the welfare of his children and bearing in mind that the length of time that has elapsed since the criminal conviction the seriously adverse impact would be disproportionate, the children's best interest being a primary consideration.

11.
Subsequent to these submissions the applicant served on the respondent a report from Mr Peter Horrocks, an independent social worker, which deals with the relationship of the applicant and his children, his spouse's position and the impact that his removal would have on her.

The Report of Mr Horrocks

12.
In summary, Mr Horrocks concern is that the deportation of the applicant will have a significant and detrimental effect on the children and on the applicant's partner. That, given her particular mental vulnerabilities, will have a detrimental effect on her ability as the sole remaining parent, to care for the children, one of whom has special needs.

13.
Mr Horrocks' report was made after a visit to the family home and interviews with the applicant's spouse, their two children and Ms S's daughter from a previous relationship. Mr Horrocks noted that the separation between the father of L (his own daughter) appears to have been traumatic; that there is a close and loving relationship between L and her father, that he is a key figure in her life and one of her primary attachment figures [4.3]. He also noted that the son, A, had a positive relationship with his father but that his reaction to separation from his father had been less traumatic than that of his sister. He noted that the applicant is the only father figure that the stepdaughter has known; that she has significant learning difficulties and struggles with many aspects of her daily life not least her inability to accept any form of change, finding that anxiety-provoking and distressing concluding that the applicant plays a significant role in her life [4.59].

14.
Asked to comment on the likely impact on the children of their father being removed permanently from the United Kingdom, Mr Horrocks concluded that on the basis of L's previous reaction to removal from her daily life, a permanent removal could have a significantly more devastating impact [4.11] in that it also impacted on the applicant's wife such that the disappearance of the father would have an effect like the death of her mother when she was 9. Looking at the medium or long-term impact [4.14] the loss of the father were he to be removed could be inexplicable to them given their ages, it being likely that they would grow up with a sense of injustice and unfairness, it being difficult to provide an age-appropriate explanation to the children and that to separate them would be significantly more harmful than if they had grown up not knowing him, that they would experience a significant and traumatic loss of life which could have a long-term impact on all aspects of their development.

15.
Mr Horrocks noted that the applicant's wife, after the death of her mother, spent a number of years in care; has no other family other than her children, has in the past suffered from depression and self-harmed; the applicant is a stabilising figure and has become her key support and protection, enabling her to function effectively. He notes [4.18] that the effect on her of the applicant's deportation will lead to a significant downturn in her emotional/mental health, making it difficult for her to meet all aspects of her children's needs, causing them anxiety and stress, exacerbated by their father's absence. This, he is concerned, may lead to family breakdown

16.
Mr Horrocks considered that the removal of the applicant from the family on a permanent basis would have a significant negative impact on the lives of all children of the family and would not be in their best interests noting that the care he provides for the two younger children allows the mother to devote more time to her older child who has significant additional needs.

The Secretary of State's Response – 6 February 2014

17.

The respondent considered, having had regard to paragraph 390, 391 and 391A of the Immigration Rules concluding that there was no basis to justify revoking the deportation order. While accepting that the decision to remove the applicant to Morocco would give rise to interference with his rights under Article 8 and may not be in the best interests of his children she was satisfied that the interference was proportionate. Having had regard to paragraph 398 of the Immigration Rules she considered that there were no exceptional factors which warrant departure from the stated position given:

i.
that although the family had not been forced to return to Morocco with him they could choose to relocate there and plus there may be further difficulties impacting on the children in various ways. The wife is responsible for taking into account the needs of her children and for deciding whether or not she wishes to join her husband;

ii.
no medical evidence had been provided to confirm that Ms S suffers from mental health and takes anti-depressants and beta blockers; that if Ms S chooses to remain in the United Kingdom she could seek further support from the NHS to assist her problems and could seek treatment in Morocco where facilities might not be to the standard she currently accesses in the UK and as such her mental health did not reach the threshold of Article 3;

iii.
that if the wife decides to relocate her family to Morocco then it would be her responsibility to put mechanisms in place in order to support her daughter and although this change would bring some difficulties it is her responsibility to determine what would be the best for her children;

iv.
that Mr Horrocks' report did not provide details of any exceptional circumstances;

v.
that any interference with the rights to the appellant's family and private life was proportionate in that whilst the children's best interests would be served by having both parents to care for them ideally in the UK that the applicant's own actions by way of his criminality had led to him being separated from his children and stepchild;

vi.
that the best interests of the children and stepchild had previously been considered and that after consideration of all of the evidence available it had been decided that the applicant's claim was clearly unfounded and thus the decision to refuse to revoke the deportation order was certified pursuant to Section 94(2) of the 2002 Act.

The Supplementary Decision Letter of 8 May 2014

18.
The letter states that it is supplementary and should be read in conjunction with the decision of 6 February 2014. The letter considers that:-

i.
Deportation may well separate the applicant from his children which may have an adverse effect on their development but that this did not render his deportation disproportionate or unduly harsh;

ii.
the fact that this was considered in the context of the applicant's wife suffering from mental health and whilst it was understandable that she would want the applicant to reside with the family in the United Kingdom, if the deportation led to a downturn in her mental health or ability to meet the children's needs she could seek support from the NHS or local authorities;

iii.
having considered the best interests of the children as an integral part of the overall assessment, that in all the circumstances the best interests of the children are outweighed by the applicant's serious criminal conduct and his deportation is plainly proportionate;

iv.
there was no suggestion they should relocate to Morocco to save the family unit or that relocation would be reasonable, the applicant's relocation not being used to test proportionality; that the respondent had given consideration to the length of the applicant's residence in the United Kingdom, the time elapsed since the offence was committed and his conduct during the period but the offence committed was a particularly serious one and it justifies the deportation as being proportionate.

Legal Framework

19.
Section 82(1) of the 2002 Act provides a right of appeal to the First-tier Tribunal in respect of an immigration decision which includes by operation of Section 82(2)(k) a refusal to revoke a deportation order. Although Section 92 of the 2002 Act permits an appeal against such an immigration decision if the applicant has made an asylum claim or a human rights claim in the United Kingdom, the right to an in-country appeal only arises if the case is not certified pursuant to Section 94 which provides as follows:

"(1) This section applies to an appeal under section 82(1) where the appellant has made an asylum claim or a human rights claim (or both).

(1A) A person may not bring an appeal against an immigration decision of a kind specified in [section 82(2)(c), (d), (e) or (ha)] 2 in reliance on section 92(2) if the Secretary of State certifies that the claim or claims mentioned in subsection (1) above is or are clearly unfounded.

(2) A person may not bring an appeal to which this section applies [in reliance on section 92(4)(a) if the Secretary of State certifies that the claim or claims mentioned in subsection (1) is or are clearly unfounded."

Submissions

20.
The applicant's submissions are characterised by Mr Khubber in his skeleton argument as follows:-

i.
The respondent has materially misdirected herself in law in relation to Article 8 best interests consideration when making the decision on certification;

ii.
linked to ground 1 above, the respondent had failed to take into account relevant factors/taken into account less relevant factors; and,

iii.
the decision was ultimately irrational applying the anxious scrutiny test.

21.
Mr Khubber also raised as a preliminary issue as to whether the respondent should be allowed to rely on the new letter of decision produced in response to the decision to grant permission for judicial review. Relying on Nash v Chelsea College Of Art & Design [2001] EWHC Admin 538 he submitted that the letter should be viewed with great caution.

22.
Mr Khubber submitted that the Secretary of State erred when considering the best interests of the children and their welfare in considering the impact that the deportation would have on the children, the impact the deportation would have on the applicant's wife but not considering the impact that the latter would have on her ability to provide adequate care for the children thus adding or exacerbating the difficulties they would face.

23.
Mr Khubber submitted also that this issue is not properly dealt with in the second refusal letter (it being accepted that it is not dealt with properly in the first refusal letter) and further that the second letter is confused in that it appears in places to suggest that the family being able to relocate to Morocco was a factor taken into account whilst saying that it could not; and, the fact that they could not relocate to Morocco should in the proportionality exercise be seen as a factor weighing in favour of the applicant rather than being neutral.

24.
Mr Malik submitted that the decision in Nash needs to be viewed in context in that it was concerned with adequacy of reasons, an issue not pleaded in this case. He submitted also that much of what is now said with regard to article 8 had been considered by the Court of Appeal. While the welfare of the children is an important factor, it is not decisive, and that in reality the case does not disclose anything new. He submitted that viewing the decision as a whole it was not irrational taking into account the history of the case, the applicant's case being in reality nothing more than a disagreement about the weight attached by the Secretary of State to various factors and thus the criticisms are misplaced

25.
I put it to Mr Malik that what the Secretary of State has not done here is, in considering the "best interests" of the children to take account of the extent of the harm caused. Mr Malik submitted, relying on South Bucks v Porter [2004] UKHL at 35 and 36 that there was no need for the Secretary of State to deal with every single point. Mr Khubber submitted, however, that this issue is not one which could be put to one side.

26.
Mr Khubber in reply, submitted also that what needs to be borne in mind in this case is that the new refusal letter was developed once the Upper Tribunal had indicated that there was an arguable error of law. Whilst the applicant in Nash ultimately did not succeed, it has to be borne in mind that this was a case regarding education. Similarly, he submitted South Bucks District Council & Anor v Porter [2004] UKHL 33 was distinguishable from the circumstances of this case.

Legal Framework

27.
As it stood at the date of decision, section 82(1) of the Nationality, Immigration and Asylum Act 2002 provided a right of appeal against an “immigration decision” as defined in section 82 (2) which includes a refusal to revoke a deportation order (section 82 (2)(k)). Section 92 (1) of the 2002 Act restricts the categories of appeal under section 82 (1) which can be brought while an appellant is in the United Kingdom and excludes appeals against decisions to refuse to revoke a deportation order unless the appellant has, as is provided for in section 92 (4) made an asylum or human rights claim while in the United Kingdom. That is, however subject to section 94 of the 2002 Act which provides materially:

“94 Appeal from within United Kingdom: unfounded human rights or asylum claim

(1) This section applies to an appeal under section 82(1) where the appellant has made an asylum claim or a human rights claim (or both).

(1A) ...

(2) A person may not bring an appeal to which this section applies in reliance on section 92(4)(a) if the Secretary of State certifies that the claim or claims mentioned in subsection (1) is or are clearly unfounded.”

28.
In ZL v SSHD [2003] EWCA Civ 25 gave guidance as the proper approach to the “clearly unfounded” test. Lord Phillips MR, giving the judgement of the court, stated:

56. Section 115(1) empowers — but does not require — the Home Secretary to certify any claim “which is clearly unfounded”. The test is an objective one: it depends not on the Home Secretary's view but upon a criterion which a court can readily re-apply once it has the materials which the Home Secretary had. A claim is either clearly unfounded or it is not.

57. How, if at all, does the test in s.115 (6) differ in practice from this? It requires the Home Secretary to certify all claims from the listed states “unless satisfied that the claim is not clearly unfounded”. It is useful to start with the ordinary process, such as s.115(1) calls for. Here the decision-maker will —

(i) consider the factual substance and detail of the claim

(ii) consider how it stands with the known background data

(iii) consider whether in the round it is capable of belief

(iv) if not, consider whether some part of it is capable of belief

(v) consider whether, if eventually believed in whole or in part, it is capable of coming within the Convention.

If the answers are such that the claim cannot on any legitimate view succeed, then the claim is clearly unfounded; if not, not.

29.
These observations were later endorsed by the Court of Appeal in Bagdanavicius v SSHD [2003] EWCA Civ 1605. Further guidance was also given by the House of Lords in ZT (Kosovo) v SSHD [2009] UKHL 6 where Lord Phillips observed [23]:

“23 Where, as here, there is no dispute of primary fact, the question of whether or not a claim is clearly unfounded is only susceptible to one rational answer. If any reasonable doubt exists as to whether the claim may succeed then it is not clearly unfounded. It follows that a challenge to the Secretary of State's conclusion that a claim is clearly unfounded is a rationality challenge. There is no way that a court can consider whether her conclusion was rational other than by asking itself the same question that she has considered. If the court concludes that a claim has a realistic prospect of success when the Secretary of State has reached a contrary view, the court will necessarily conclude that the Secretary of State's view was irrational.”

Discussion

30.
There has been substantial consideration of the best interests of the children during the litigation preceding the decision of the Court of Appeal. This is not a “fresh claim” case but Elias LJ identified very strong reasons why the public interest was in favour of deporting the applicant. That said, there is now additional evidence in the form of an expert report; time has flowed and the relationships within the family may well have changed.

31.
I turn first to the issue of the second refusal letter. The judge in Nash held [34]-[36]:

“34. In my judgment, the following propositions appear from the above authorities:

(i) Where there is a statutory duty to give reasons as part of the notification of the decision, so that (as Laws J put it in Northamptonshire County Council ex p D) ‘the adequacy of the reasons is itself made a condition of the legality of the decision’, only in exceptional circumstances if at all will the Court accept subsequent evidence of the reasons.

(ii) In other cases, the Court will be cautious about accepting late reasons. The relevant considerations include the following, which to a significant degree overlap:

(a) Whether the new reasons are consistent with the original reasons.

(b) Whether it is clear that the new reasons are indeed the original reasons of the whole committee.

(c) Whether there is a real risk that the later reasons have been composed subsequently in order to support the tribunal’s decision, or are a retrospective justification of the original decision. This consideration is really an aspect of (b).

(d) The delay before the later reasons were put forward.

(e) The circumstances in which the later reasons were put forward. In particular, reasons put forward after the commencement of proceedings must be treated especially carefully. Conversely, reasons put forward during correspondence in which the parties are seeking to elucidate the decision should be approached more tolerantly.

35. To these I add two further considerations. The first is based on general principles of administrative law. The degree of scrutiny and caution to be applied by the Court to subsequent reasons should depend on the subject matter of the administrative decision in question. Where important human rights are concerned, as in asylum cases, anxious scrutiny is required; where the subject matter is less important, the Court may be less demanding, and readier to accept subsequent reasons.

36. Secondly, the Court should bear in mind the qualifications and experience of the persons involved. It is one thing to require comprehensiveness and clarity from lawyers and those who regularly sit on administrative tribunals; it is another to require those qualities of occasional non-lawyer tribunal chairmen and members."

32.
It is evident from paragraph 34 (ii) that the principles are not limited to a consideration of cases where "adequacy of reasons" is in issue; they go considerably wider, and are, for the reasons set out below, applicable here.

33.
It is important to bear in mind the context in which this second letter was produced. It was provided after a decision of the Upper Tribunal in which Judge Storey said:-

"As regards (ii) and (iii), which it is convenient to take together, we observe that the respondent accepted that removal may not be in the best interests of the children to the extent that separation from their father would cause them significant difficulties. The respondent also accepted that the stepdaughter, A, had learning difficulties. However, these findings did not necessarily preclude the respondent from concluding that the applicant's removal was proportionate. The principles relating to the best interests of the child as set out in Zoumbas v Secretary of State for the Home Department [2013] UKSC 74 made clear that while the best interests of the child are a primary consideration they are not a paramount consideration and that the assessment to be conducted as to the best interests involved is an overall one. In that context the respondent was entitled to consider that in terms of the applicant's relationship with his children the impact caused by him was limited to difficulties rather than undue hardship."

34.
However, having viewed the report from Mr Horrocks the panel said:-

"It seems to us that the decision fails to take into account the position of the spouse and the impact on her of the applicant's removal as evidenced by the independent social work report. Reference as to consideration of the 'family as a whole' as found for example at paragraph 30 of the decision letter did not engage in any apparent way to the above findings and their implications on the best interests of the children."

Looking at the decision letter (which as Mr Malik has correctly reminded us must be looked at as a whole) we bear in mind that in several paragraphs the author applied an incorrect approach, in regarding it as one of the options open to the applicant that his wife could accompany him with her children to Morocco. That is flatly contrary concession of the Secretary of State given in Sanade and others (British children - Zambrano - Dereci) India [2012] UKUT 48."

35.
It is evident from the letters that the more recent clearly disavows what had been identified by Judge Storey as an incorrect approach, namely, submitting that the applicant's wife and the children could accompany him to Morocco. The supplementary letter is thus not adding to the reasons, it is giving a different basis for the decision. This change in reasons is also put forward well into the course of litigation which, I consider, is a significant factor indicating that the supplementary letter should be viewed with considerable scepticism in assessing the legality of the initial decision and I do not accept the submission that the respondent did not, in reaching her decision, take into account a matter which

she should not have taken into account, that is, the suggestion that the applicant's wife and partner could go to Morocco.

36.
Further, while the respondent has stated she has taken into account the best interests of the children, there is no sufficient indication that she has taken into account the level of the harm caused when balancing that against the public interest. Given that the best interests of the children are the central concern, this is indicative of a flaw in the respondent's consideration of this issue.

37.
In addition, there is no proper indication that the respondent has taken into account the impact on the children of their mother's diminished ability to care for them, the central issue identified by the Upper Tribunal when granting permission. It was not taken into account in the initial letter and while the supplementary letter refers to the fact that the mother may be able to access help if her condition deteriorates, there is no sufficient consideration that her consequent inability to care for the children further impacts on them in addition to the effect of the applicant being deported. The submission that the respondent is not under a duty to identify expressly each and every piece of information is not an answer to this, given that the letter in question was written to address this precise issue identified by the Upper Tribunal.

38.
I accept that there had been some consideration of article 8 issues in the litigation leading up to the decision of the Court of Appeal, but there is no indication that this took into account the particular issues identified by the Upper Tribunal as causing concern when they granted permission or raised in the submissions made to the respondent. It must also be borne in mind that the fact-finding exercise on article 8 in the litigation leading up to the Court of Appeal preceded that by a number of years and it is not at all clear that the effect of the applicant's deportation would have (as indicated in the report of Mr Horrocks) on the partner, the children, and on the children due to the effect on the partner were considered. That is, given the manner in which the case developed and progressed, perhaps inevitable.

39.
It follows from this that I am satisfied that the respondent's consideration of the application was unlawful in that it did not take the correct approach, took into account irrelevant factors and failed properly to take into account the relevant factor of the secondary impact on the children flowing from their mother's inability properly to care for them. There was no proper or anxious scrutiny.

40.
The respondent has not sought to demonstrate that the claimed error was immaterial, or submitted that there could rationally only be one outcome.

41.
For these reasons, I find that the respondent's decision to certify the application as clearly unfounded was unlawful and I quash it.