Upper Tribunal
(Immigration and Asylum Chamber) Appeal Numbers: HU/09766/2018
EA/07683/2016

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 27 November 2018	**On 06 June 2019**

Before

THE HONOURABLE MR JUSTICE JONATHAN SWIFT
(SITTING AS A JUDGE OF THE UPPER TRIBUNAL)
UPPER TRIBUNAL JUDGE GLEESON

Between

THI [D]
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr P Nathan, Counsel, Gulbenkian Andonian Solicitors
For the Respondent: Mr T Wilding, Home Office Presenting Officer

DECISION AND REASONS

This is the decision of the Tribunal.

The appellant, Thi [D], is a Vietnamese national. She is the subject of a deportation order made on 17 August 2015. The order was made under Section 32 of the UK Borders Act 2007 and was consequent on her conviction in May 2013 for conspiracy to conceal and/or convert criminal property. In

January 2014 the appellant was sentenced to three years' imprisonment for that offence.

This appeal arises out of two decisions of the Secretary of State. The first is a decision of 13 June 2016 to refuse the appellant's application for a derivative residence card. That decision was made under regulation 18A of the Immigration (EEA) Regulations 2006. Regulation 18A has, with effect from 1 February 2017, been overtaken by a corresponding provision in the Immigration (EEA) Regulations 2016. That provision is in materially the same terms as regulation 18A of the 2006 Regulations. The reasons in the proceedings below were formulated by reference to regulation 18A, and for sake of consistency between this judgment and the First-tier Tribunal's judgment, we will follow the same course. The second decision was made on 16 April 2018 and refused the appellant's claim to remain in the United Kingdom on human rights grounds. We will first address the claim made in respect of the EEA Regulations.

The appellant's application under the EEA Regulations was made on the grounds that she was the primary carer for her daughter [Rl]. [Rl] was born on 9 October 2015.

By Regulation 18A(1) the following is provided:

> "The Secretary of State must issue a person with a derivative residence card on application and on production of -
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> (a) a valid national identity card issued by an EEA state or a valid passport; and
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> (b) proof that the applicant has a derivative right to reside under Regulation 15A."

Regulation 15A is a somewhat extended provision but in summary, a person has a derivative right to reside for so long as she satisfies the criteria stated at any of paragraphs 2, 3, 4A or 5. For present purposes, the relevant paragraph is paragraph 4A, which applies to an applicant if she is the primary carer of a British national who resides in the UK and would be unable to reside in the UK if the applicant were required to leave. Primary carer is also a defined term – see regulation 15A(7). An applicant is a primary carer of another person if she is a direct relative or a legal guardian of that person, and has primary responsibility for the person's care or shares the responsibility with one other person who is not an exempt person. An exempt person is someone who has a right to reside in the UK under the 2006 Regulations other than under regulation 15A itself or has a right of abode under Section 2 of the 1971 Act or has indefinite leave to remain – see regulation 15A(6)(c).

The Secretary of State rejected the appellant's application. He concluded that the applicant was a joint carer for [Rl], together with her partner, Mr [TV] ([Rl]'s father), but went on to conclude that Mr [V], a British citizen, was an exempt person. The Secretary of State concluded there was no sufficient evidence that the appellant was the sole primary carer. He stated that to be considcered a

primary carer he would expect evidence to show that [Rl] lived with the appellant, that the appellant made all day to day decisions in respect of her child's health, education and so on, and that the appellant was financially responsible for her child. The Secretary of State's conclusion was that since [Rl] lived with both her parents, in the absence of evidence to the contrary he was entitled to conclude that the appellant shared responsibility for [Rl]'s care, together with Mr [V].

The appellant appealed that decision to the First-tier Tribunal. The appeal was dismissed and the decision was promulgated on 23 August 2018. We should add that by this time the appellant and Mr [V] had had a further child, [Rd], who was born on 11 August 2017.

When considering the appeal under the EEA Regulations the First-tier Tribunal Judge, Judge Hussain, said the following at paragraphs 39 and 40 of the judgment:

> "39. In my view, the Secretary of State was plainly right in finding that the appellant is not a primary carer because living with her partner who was the other parent of the child in question, it cannot be said that she has primary responsibility for that child. In my view, it is inescapable that the appellant and her partner are jointly responsible for their child's care but the partner is clearly an exempt person because being a British citizen, he clearly has the right of abode in the UK by virtue of Section 2 of the Immigration Act 1971: subparagraph 6(c)(ii) applies.
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> 40. In view of the above, I find that the Secretary of State was right in concluding that the appellant was not entitled to a derivative reside residence card. ..."

In this appeal the appellant contends that that decision was contrary to the evidence before the Tribunal which explained the division of labour between Mr [V] and the appellant. Put shortly, that evidence was to the effect that Mr [V] worked to provide the resources the family needs, while the appellant remains at home to look after the children. The appellant also relies on the judgment of the Court of Justice in **Chavez-Vilchez**, **[2018] QB 103**, and further, the appellant has referred the Tribunal to the judgment of the Court of Appeal in **Patel v The Secretary of State for the Home Department [2018] 1 WLR 5245**.

Mr Nathan, who appears for the appellant, accepts that in light of the judgment of the Court of Appeal in **Patel** his appeal in respect of the EEA Regulations decision cannot succeed. However, I think I should say a little more to explain the circumstances of why that is so. The starting point in respect of derivative rights of residence is the judgment of the Court of Justice in **Zambrano [2012] QB 265**. In that case the parents were Columbian nationals living in Belgium. Two of their three children were Belgian nationals. The question referred to the Court of Justice was essentially whether the parents could gain a right of residence from their dependent minor children. The conclusion on that point was at paragraph 45 of the judgment of the court and was as follows:

> "On the other hand, a refusal to allow the parent, whether a national of a member state or a national of a non-member country, who is the carer of a child to whom Article 18 EC and Directive 90/364 grant a right of residence, to reside with that child in the host member state, would deprive the child's right of residence of any useful effect. It is clear that enjoyment by a young child of a right of residence necessarily implies that the child is entitled to be accompanied by the person who is his or her primary carer and accordingly that the carer must be in a position to reside with the child in the host member state for the duration of such residence."

In **Zambrano** both parents were non-EU nationals. What then of the situation where one parent is an EU national and the other is not? The case law following **Zambrano**, as reviewed by the Court of Appeal in **Patel**, distinguished between situations where if the non-EU parent were required to leave, the EU national dependent child would be forced to leave the EU, and situations in which that child might choose to leave. For example, in **Harrison v Secretary of State for the Home Department [2013] 2 CMLR 23** Elias LJ stated as follows at paragraph 63 of his judgment:

> "There is really no basis for asserting that it is arguable in the light of the authorities that the **Zambrano** principle extends to cover anything short of a situation where the EU citizen is forced to leave the territory of the EU. If the EU citizen, be it child or wife, would not in practice be compelled to leave the country if the non-EU family member were to be refused the right of residence, there is in my view nothing in these authorities to suggest that EU law is engaged. Article 8 Convention rights may then come into the picture to protect family life as the Court recognised in **Dereci**, but that is an entirely distinct area of protection."

The appellant in this appeal seeks to rely on the judgment of the Court of Justice in **Chavez-Vilchez**. In our view, the significance of the judgment in that case is to be seen in the context of the circumstances in which the reference to the Court of Justice was made. The case concerned eight claims. Common to the circumstances of each was that the parents lived apart; the mother was responsible for the day-to-day care of the child; the father was either entirely absent or had only limited contact. Paragraphs 32 to 34 of the judgment of the court are material:

> "32 The referring court seeks to ascertain whether the applicants in the main proceedings, who are all nationals of third countries, may, as mothers of a child who is a Union citizen, derive a right of residence under Article 20 TFEU in the circumstances specific to each individual case. The referring court considers that, in that event, the individuals concerned could rely on the provisions of the Law on social assistance and the Law on child benefit that allow foreign nationals who are staying lawfully in the Netherlands to be treated as Netherlands nationals, and to be entitled, where appropriate, to receive social assistance or child benefit under that legislation; that entitlement not being subject to a requirement that the IND decide to grant them a residence permit or a document certifying that they are staying legally.

> 33 In the opinion of the referring court, it is apparent from the judgments of 8 March 2011, *Ruiz Zambrano* (C-34/09, EU:C:2011:124), and of 15 November 2011, *Dereci and Others* (C-256/11, EU:C:2011:734), that the applicants in the main proceedings would acquire under Article 20 TFEU a right of residence in the Netherlands, derived from the right of residence of their children, who are Union citizens, provided that those children are in a situation such as that described in those judgments. It is necessary, in each of the disputes in the main proceedings, to determine whether the circumstances are such that those children would be obliged, in practice, to leave the territory of the European Union if the right of residence was refused to their mothers.
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> 34 The referring court seeks to ascertain, in those circumstances, what importance is to be given, in the light of the Court's case-law, to the fact that the father, a Union citizen, is staying in the Netherlands or in the European Union, as a whole."

It is clear that the court was not being asked by the referring Dutch court to undertake any significant review of the principle in **Zambrano**. Rather, the cases concerned one specific matter, the significance of the fact that the EU national parent, in each case the father, lived either in the Netherlands or in another EU Member State. This point was reflected in the questions referred to the court, which were stated at paragraph 39 of the judgment. Those questions were as follows:

> "1. Must Article 20 TFEU be interpreted as precluding a member state from depriving a third country national who is responsible for the day-to-day and primary care of his/her minor child, who is a national of that member state, of the right of residence in that member state?
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> 2. In answering that question, is it relevant that it is that parent on whom the child is entirely dependent, legally, financial and/or emotionally and, furthermore, that it cannot be excluded that the other parent, who is a national of the member state, might in fact be able to care for the child?
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> 3. In that case, should the parent/third country national have to make a plausible case that the other parent is not able to assume responsibility for the care of the child, so that the child would be obliged to leave the territory of the European Union if the parent/third-country national is denied a right of residence?'"

The answer to questions 1 and 2 was given at paragraph 72 of the judgment of the court in the following terms:

> "In the light of the foregoing, the answer to the first and second questions is that Article 20 TFEU must be interpreted as meaning that for the purposes of assessing whether a child who is a Union citizen would be compelled to leave the territory of the European Union as a whole and thereby deprived of the genuine enjoyment of the substance of the rights conferred on him by that article if the child's third country national parent were refused a right of residence in the member state concerned, the fact that the other parent, who is a Union citizen, is

> actually able and willing to assume sole responsibility for the primary day-to-day care of the child is a relevant factor, but it is not in itself a sufficient ground for a conclusion that there is not, between the third-country national parent and the child, such a relationship of dependency that the child would indeed be so compelled were there to be such a refusal of a right of residence. Such an assessment must take into account, in the best interests of the child concerned, all the specific circumstances, including the age of the child, the child's physical and emotional development, the extent of his emotional ties both to the Union citizen parent and to the third country national parent, and the risks which separation from the latter might entail for the child's equilibrium."

The Court's answer to the third question is at paragraph 78 of the judgment, but that answer is not material for present purposes.

The answers to questions 1 and 2 are material. In the context of the cases before the Court of Justice, where the fathers were EU nationals but not living with the mothers, it was (said the Court) relevant to consider whether the father was willing and able to assume sole responsibility for care. That was relevant, but not determinative. The overall question remained whether the relationship of dependency between the child and the non-EU parent was such that if that parent was required to leave the EU the child would also be compelled to leave.

We do not consider that the judgment of the Court of Justice in **Chavez-Vilchez** marks any material departure from the **Zambrano** principle. We are comforted by the fact that when the Court of Appeal considered the same matter in **Patel** the court reached the same conclusion. This is clear from paragraphs 25 to 26 of the judgment of Irwin LJ, who stated as follows.

> "25. It seems clear therefore that the underlying principle in *Zambrano* is undisturbed by *Chavez-Vilchez*, albeit that in the case of a child dependent on one parent who is a third country national with no right of residence, the State must ensure a careful process of enquiry. However, the third-country national bears the evidential burden of establishing that the child citizen will, in practice, be compelled to leave the EU, unless rights of residence are granted to the (principal) carer parent.
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> 26. As always with CJEU authority, the context must be borne in mind when looking at the conclusions of the Court. In *Chavez-Vilchez*, the reference came before any final decision by the referring court. The Dutch court was looking for guidance. There were no crisp findings of fact in respect of the eight different cases. However, the assumption which runs through the cases, whether the EU citizen father assisted with child care or not, was that the EU citizen parent would remain in the Netherlands whatever the outcome of the case. None of these cases were family units with parents living together. In each case the context was: if the non-EU citizen mother leaves and the EU citizen father remains, will the EU citizen child be compelled, in practice, to leave?"

How then does this fit with regulation 15A(7)? That regulation is formulated in terms of responsibility for care of the relevant person and whether the applicant for the derivative right of residence has primary responsibility or shares that responsibility equally with another person. In a situation where parents are living with their child, and between them do the things necessary for the child's practical and financial welfare, it is no misuse of language to say that they share responsibility for care of the child. That is a sensible starting point. Where such a situation exists, we do not see that a conclusion – again as a matter of ordinary language – that there is shared responsibility, will necessarily be affected by the specific division between the parents of day to day household responsibilities, for example responsibility for staying with the child or the responsibility to earn the money necessary to support the household. The simple fact that in a two parent household one parent works and the other does not, does not indicate either that the working parent lacks responsibility for decisions relating to the child's health, education or welfare, or that the non-working parent lacks responsibilty for the child's financial welfare. There is nothing in the judgment of the Court of Justice in the **Chavez-Vilchez** that requires any different approach – see the way in which the Court has expressed itself at paragraph 72 of its judgment.

Paragraph 72 of the judgment is to the effect that there then must be an overall assessment of the position, including the extent of the emotional ties to the EU citizen parent and to the third country national parent. This is the proper approach to the application of Regulation 15A(7). Mr Nathan's submission is that the judgment of the Court of Appeal in **Patel** takes a different approach to that in the judgment of the Court of Justice in **Chavez-Vilchez**. We do not consider that there is any difference of approach between the two Courts. See for example, the approach adopted by the Court of Appeal in **Patel** to the specific cases that were before it:

> "75. In both Shah and Bourouisa there is impressive evidence of the strength of family life, and of the determination of the British citizen mother (in each case) to stay with the family unit and move abroad, if the husband and father must leave. Every sensible person would wish to honour such an impulse. However, recognition of that does not alter the fact that however hard such a choice may be, it is a choice, not a necessity, not compulsion. In my judgment the evidence in each of these two cases is clear that were the British parent to remain, they would be able to care for the children concerned perfectly well. The child citizen would be under no compulsion to leave the EU."

In the present case, we do not consider the evidence before the First-tier Tribunal required any departure from what we have described as the sensible starting point. The First-tier Tribunal was entitled to conclude as it did, that the appellant and her partner shared responsibility for the care of [Rl] and [Rd]. The First-tier Tribunal accepted as correct the in-principle approach taken by the Secretary of State – that is to say that when parents live together with their children they will, in the absence of evidence to the contrary, share responsibility for the children's health and welfare. Mr Nathan points out that at the time of the hearing before the First-tier Tribunal the appellant was still

breast-feeding [Rd]. Mr Nathan informs me that [Rd] (age 14 months) is still being breast-fed as at the date of this hearing. We do not consider that that alters that the approach to whether or not the appellant has primary responsibility for [Rd]'s care for the purposes of Regulation 15A. Only the mother can breastfeed, but that is not *per se* a determinative matter for the purposes of whether there is entitlement to a right of residence in the United Kingdom under regulation 15A. The notion of responsibility for a person's care, in that regulation, entails an holistic evaluation. An evaluation of a settled state of affairs having a degree of permanence will be the most reliable guide to whether a derivative right of exists. In this instance there was nothing that required the First-tier Tribunal to reach any other conclusion than the one it did – that the appellant and Mr [V] shared responsibility for the care of their children.

For these reasons the appeal against the EEA Regulations decision must be dismissed. For sake of completeness we reject Mr Nathan's submission that while his appeal would succeed on the basis of the judgment of the Court of Justice in **Chavez-Vilchez**, it must fail in light of the judgment of the Court of Appeal in **Patel**. On any analysis of either authority, the decision of the First-tier Tribunal discloses no error of law.

The second appeal before the Tribunal is against the Secretary of State's decision on human rights grounds. This is the decision set out in the letter dated 16 April 2018. The point that was before the First-tier Tribunal and is contested in this appeal too also arises out of the appellant's family's circumstances. As we have already mentioned, the appellant lives with her partner, Mr [V]. They live with Mr [V]'s son [S], who was born on 14 November 2003, with their daughter [Rl], born on 9 October 2015, and their son [Rd], born in August 2017. Both [Rl] and [Rd] were born after the Notice of Intention to Deport, which was dated 12 March 2014.

The ground of appeal concerns the claim to remain in the United Kingdom on human rights grounds, relying on the Article 8 rights of her children. This requires consideration of Section 117C of the Nationality, Immigration and Asylum Act 2002. The material provisions are subsection (3) and subsection (5):

> "(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.
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> …
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> (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."

Before the First-tier Tribunal the appellant contended that the effect of her deportation would be unduly harsh on her children and on her partner, Mr [V]. The First-tier Tribunal accepted that the appellant shares family life with her own children, and her partner, and with her stepson [S]. However, the Tribunal

concluded it would not be unduly harsh for [S] to remain in the United Kingdom without the appellant; and that it would not be unduly harsh for [Rl] to remain in the United Kingdom without the appellant. The Tribunal concluded it would be unduly harsh for [Rd] to remain in the United Kingdom without the appellant, but it would not be unduly harsh for [Rd] to live with the appellant in Vietnam. Finally, Tribunal concluded that it would not be unduly harsh for either [S] or [Rl] to live in Vietnam with the appellant; and that it would not be unduly harsh for Mr [V] to live in Vietnam with the appellant.

The appellant's grounds in this appeal are threefold. The first is that the Tribunal did not consider the impact on the children of the finding that the appellant should go to Vietnam with [Rd], and possibly also [Rl], while leaving [S] in the United Kingdom with his father. The appellant says that this is an error on the part of the Tribunal by reference to the judgment in **Beoku-Betts v Secretary of State for the Home Department [2009] 1 AC 115**. In that case the House of Lords accepted the submission that where an appellant alleged that removal would be in breach of his Article 8 rights it was right for the purposes of determining that Article 8 claim to take into account the effect of his removal on family members even though those other family members were not themselves party to the proceedings. Thus, whether the interference consequent upon removal was disproportionate depended on a consideration of the position of the family in the round.

There is no doubt as to that principle of law but we do not consider that it assists the appellant in this case. The ground is directed at the Tribunal Judge's observation at paragraph 55 of his decision:

> "55. The points made above appear to be fairly self-evident and one may have thought not requiring an expert opinion on. However I have taken those into account and in my view the negative impact of the appellant's deportation from this country can be mitigated by the two younger children going to live with the appellant, the step-child remaining in this country with his father and both he and the father travelling to Vietnam from time to time to see the appellant."

That paragraph followed from his consideration at paragraph 54 of various points made in the psychiatrist's report as to the impact of removal on the various different family members. In our view, paragraph 55 is no more than a view on what might happen. It was not in any sense any form of direction by the First-tier Tribunal Judge. Further, section 117C(5) is itself a form of statutory recognition of the **Beoku-Betts** principle in that it focusses attention on the effect of deportation on partners and children. In this case, it is clear that the First-tier Tribunal Judge did not fail to have regard to the impact that the appellant's removal might have on other family members nor did he fail to have regard to the impact that the removal of the appellant, perhaps with her son [Rd], might have on family members that remained in the United Kingdom.

We turn next to the third ground of appeal, which concerns what is the correct approach to the notion of unduly harsh for the purposes of Section 117C(5). This is the subject of the judgment of the Supreme Court in **KO (Nigeria)**

[2018] 1 WLR 5273. As we read that judgment, the conclusions were as follows.

First, that unduly harsh meant a degree of harshness beyond that which would necessarily be involved for any child faced with the deportation of a parent.

Second, that when assessing undue harshness, it was not appropriate to balance the parent's criminality against the interest of the child. Rather, the assessment of unduly harsh depends on consideration of the effect on the child of the deportation of the parent.

Third, what amounts to undue harshness is a question of fact and assessment for the First-tier Tribunal. Therefore, there is no single rule or set of rules that can be applied to resolve every set of circumstances. It is, however, notable that the Supreme Court approved the description by this Tribunal in its decision in **MK (Sierra Leone) v Secretary of State for the Home Department [2015] INLR 563**, where the Tribunal stated as follows:

> "By way of self-direction, we are mindful that 'unduly harsh' does not equate with uncomfortable, inconvenient, undesirable or merely difficult. Rather, it poses a considerably more elevated threshold. 'Harsh' in this context, denotes something severe, or bleak. It is the antithesis of pleasant or comfortable. Furthermore, the addition of the adverb 'unduly' raises an already elevated standard still higher."

Fourth, given the treatment by the Supreme Court of the particular cases before it, it is notable (a) that there is no rule that it would be unduly harsh to require a British national to live outside the UK, (b) that the existence of undue hardship is not to be equated with failing to take the course of action that would be in the best interests of the child, and (c) that the individual circumstances of the child or the other person concerned are likely to be the matters that will be of particular significance when deciding whether the impact of the deportation would be unduly harsh. However, these three points are simply examples. The general description of the nature of undue harshness in **MK** is likely to be the only thing which will be a reference point across all cases.

How then does this apply to the present case? The answer to this question encompasses both the third ground of appeal – that the First-tier Tribunal took a wrong approach in law – and the second ground of appeal, that there was a failure to give reasons for the conclusions stated at paragraph 44 of the judgment (that is to say, the conclusion that it was not unduly harsh for [S] or [Rl] in the event that the appellant was required to leave the United Kingdom, and the conclusion that it would not be unduly harsh for any of the children to live with the appellant in Vietnam).

The point emerging from the material paragraphs of the Secretary of State's determination was that he concluded there were no specific matters suggesting that the impact of the appellant's deportation would be outside the range of what might be described as 'ordinary' harshness.

The First-tier Tribunal considered the matter afresh. It is important to read that decision in the round. We consider that, looking at the decision in the round, it is clear that the Tribunal Judge had proper regard to the witness statements that were before him and to the oral evidence given by those who made those statements. We note in particular what is said by the Tribunal Judge between paragraphs 29 and 32 of his judgment. It is also significant to read the material passages of his judgment, paragraphs 43 and 44, together with what he says at paragraphs 54 and 55, here too referring to the psychiatric evidence that was before him as to the likely impact of the appellant's removal from the United Kingdom.

We have considered the witness statements that were before the First-tier Tribunal Judge. It does not seem to us that there is anything in those statements to indicate that there were any matters that might genuinely be ones placing the circumstances of this case in the category of undue harshness. Nor is there anything in the judgment of the First-tier Tribunal to indicate that the judge took a wrong approach in law to the question of what unduly harsh means. Reading the judgment as a whole, we are satisfied that the First-tier Tribunal applied those words by reference to their ordinary meaning, and in accordance with the description given by this Tribunal in **MK (Sierra Leone)**. We are conscious of the fact that the task of this Upper Tribunal is to identify and correct errors of law. On matters which are essentially matters of factual evaluation, such as the question of undue harshness, it is important that the judges of this Tribunal do afford due respect to the evaluations of First-tier Tribunal Judges.

Returning to this case, we see nothing in the conclusion set out by the judge that indicates any error of principle in his approach. For those reasons, the appeal against the human rights decision is also dismissed.

Notice of Decision

The appeal is dismissed.

No anonymity direction is made.

Signed

Mr Justice Swift
Date. 21 December 2018