Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/01024/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 27 August 2019	**On 11 September 2019**

Before

UPPER TRIBUNAL JUDGE ALLEN

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

Q B
(ANONYMITY DIRECTION MADE)

Respondent

Representation:
For the Appellant: Mr T Melvin, Senior Home Office Presenting Officer
For the Respondent: Ms G Loughran, Counsel instructed by Wilson Solicitors LLP

DECISION AND REASONS

1. This is an appeal against a decision of the Secretary of State on 2 June 2014 to make a deportation order against the appellant (as I will refer to him).

2. There is a history of which I will not go into all the detail. There have been two previous occasions on which appeals have been allowed. In relation to the most recent one that formed the subject of a further appeal by the Secretary of State to the Upper Tribunal in which I was sitting with Lord Beckett and the decision of the First-tier Tribunal was set aside and the matter then was listed for rehearing.

3. There is a preliminary point of significance in this case and that is a consequence of the conclusions of the Supreme Court in KO (Nigeria) [2018] UKSC 53 in relation to the issue of how undue harshness to a child is to be evaluated.

4. The First-tier Tribunal in this case had concluded that there would be undue harshness for the children, in particular in relation to the appellant's stepson who suffers severely from autism, and this was the key point upon which the panel focused in its examination of the findings of the First-tier Tribunal in this case, in particular at paragraphs 52 to 54 where referring to the First-tier decision it was said:-

> "52. There is a reference to 'criminal immigration history' but we see no reference, in this section of reasoning, to the appellant having entered the United Kingdom unlawfully and having apparently been here on no lawful basis between January 2004 and January 2010 which, on the face of it, would be relevant to a consideration of immigration history. At para 21 there was a reference to illegal entry and a failed asylum claim, but not the gap of six years. Those references were to the Secretary of State's submissions. There is no indication of the weight, if any, given to those circumstances in making the ultimate decisions.
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> 53. Whilst references to 'previous convictions' are to be found within the determination (at paras 21 and 25) the context persuades us that they are references to the five convictions which led to a total sentence of imprisonment for 30 months. We see no reference to the claimant's previous conviction for cannabis cultivation which, on the face of it, would be relevant to a consideration of criminal history being taken into account in making the 'unduly harsh' judgement.
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> 54. The sentencing judge's remarks refer to that earlier conviction, as did at least one of the appellant's statements. Had there been reference to the circumstances of the offences as explained in the sentencing remarks, as opposed to the bare fact of the sentence length, it would have been easier to be satisfied that there was an informed and careful assessment of the relative strength of the public interest"

and then the Tribunal went on to refer to Ali and factors relevant to very compelling circumstances, failure to refer to exception 1, circumstances which might have significant weight, but not satisfied that due consideration was given to the public interest and the deportation of a foreign criminal fully within the scope of Section 117C(3) and therefore the decision was set aside.

5. The argument made on the appellant's behalf now as set out in Ms Loughran's skeleton is that this now has to be seen in light of what was said by the Supreme Court as I say in KO (Nigeria) where it was confirmed that the consideration of unduly harsh does not require a balancing of relative levels of severity of the parent's offence other than it is inherent in the distinction drawn by the section itself regarding length of sentence does not require very compelling reasons. As a consequence it is argued following from the decision of the Presidential Panel in AZ [2018] UKUT 245 (IAC) that it is open to the Tribunal in very exceptional circumstances to remake the error of law decision. That was a matter I think that had

been subject to some uncertainty prior to AZ, but it is clearly decided in that case that if the case is a very exceptional one then it is open to the Tribunal to revisit the error of law decision.

6. The Tribunal did not set out what is meant by "very exceptional circumstances", no doubt wisely because it is a matter that really has to evolve through the case law rather than it being sought to lay down guidelines, and it was in a sense an example of a case where there were not very exceptional circumstances and perhaps therefore also not a very good opportunity to provide guidance.

7. Ms Loughran refers to "very exceptional circumstances" in that there is the long history of the proceeding including two appeals before the First-tier, both of which were set aside by the Upper Tribunal given the changes in the law which at least now since the change in the law comes from the Supreme Court we may say the decision is settled, and I think one might add to that that if the position is sufficiently clear that there is an error of law, then that could not be said to be irrelevant, putting it perhaps not at its highest, to the question of very exceptional circumstances. If it is sufficiently clear that the First-tier Tribunal did not err as a matter of law and that there had been subsequent changes in the law that make that clear, then that must be relevant I think to the issue of very exceptional circumstances. It makes little sense in the abstract for the Upper Tribunal to continue to maintain that there was an error of law in the decision if it is clear that as a result of the change in the law that decision was not flawed by error of law, and it is to my mind sufficiently clear from the paragraphs in the earlier decision of the Upper Tribunal to which I have referred that the error of law that it found in the First-tier Tribunal's decision was in relation to matters which, as we now know in light of KO (Nigeria), do not amount to errors of law. That was the basis upon which the decision was overturned and the circumstances are in my view such as to make it necessary to conclude that the error of law finding by the panel earlier on is to be set aside and as a consequence the decision of the First-tier Tribunal allowing this appeal must therefore stand.

Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of his family. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed Date 3 September 2019

Upper Tribunal Judge Allen