



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: DA/01129/2014

THE IMMIGRATION ACTS

**Heard at Field House, London
On Tuesday 2 April 2019**

**Determination Promulgated
On Thursday 4 April 2019**

Before

**MRS JUSTICE JEFFORD
(SITTING AS AN UPPER TRIBUNAL JUDGE)
UPPER TRIBUNAL JUDGE SMITH**

Between

**MS
[Anonymity direction made]**

Appellants

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms G Loughran, Counsel instructed by Wilson solicitors

For the Respondent: Ms S Cunha, Senior Home Office Presenting Officer

Anonymity

Rule 14: The Tribunal Procedure (Upper Tribunal) Rules 2008

An anonymity order was made by the First-tier Tribunal. As this is an appeal involving children and the Appellant is said to be vulnerable, it is appropriate to continue that order. Unless and until a tribunal or court directs otherwise, the Appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify her or any member of his family. This direction applies, amongst others, to both parties. Failure to comply with this direction could lead to contempt of court proceedings.

DECISION AND REASONS

1. This appeal came before us as a case management review following a remittal by the Court of Appeal. The remittal was with the consent of both parties and is confirmed by an order dated 20 December 2018 (“the Order”). The Order is accompanied by a statement of the parties’ reasons for the concession.
2. The appeal to the Court of Appeal is from the decision of Upper Tribunal Judge Kopieczek promulgated on 17 May 2016 (“the Decision”). By the Decision, Judge Kopieczek upheld the decision of First-tier Tribunal Judge Omotosho promulgated on 21 October 2015 which dismissed the Appellant’s appeal. Judge Kopieczek concluded that there was no error of law in the First-tier Tribunal’s decision. By the Order, the Court of Appeal set aside the Decision and remitted the appeal for reconsideration by this Tribunal in accordance with the statement of reasons. Following the Order, the appeal was listed but because of some confusion concerning the directions issued to the parties, the hearing was only for a case management review.
3. Ms Loughran asked that, rather than making directions for the appeal to be re-heard in the Upper Tribunal, we should remit it to the First-tier Tribunal. Her reasons were that it was now over three years since the First-tier Tribunal’s decision. The appeal involves children who are now older and whose interests will require to be reconsidered afresh. She submitted that the extent of fact-finding brought the appeal within the ambit of the Joint Practice Statement of the First-tier Tribunal and Upper Tribunal concerning the disposal of appeals in this Tribunal. Ms Cunha confirmed that she had no objection to that course.
4. We pointed out to the parties, however, that the effect of the Order was only to set aside the Decision and it did not also set aside the First-tier Tribunal decision. Accordingly, the appeal before us was at the stage of an error of law hearing and, in order to remit the appeal, we would need to be satisfied, following reconsideration of the original grounds of challenge to the First-tier Tribunal decision, that it was appropriate to set aside the First-tier Tribunal decision for error of law.
5. Ms Loughran drew our attention to the statement of reasons. The main reason for remittal was that, following the Supreme Court’s judgment in KO and others v Secretary of State for the Home Department [2018] UKSC 53, the issue whether the Appellant’s deportation would have an unduly harsh effect on her children required to be revisited. The First-tier Tribunal’s assessment is not obviously flawed for failure to follow the approach advocated by the Supreme Court in those cases; for example, this is not a case where the First-tier Tribunal Judge followed the Upper Tribunal’s decision which was overturned by the Supreme Court in KO.

6. However, Ms Loughran also drew our attention to the basis on which permission was granted by the Court of Appeal as follows:

“Granted solely on the issue as to whether there had been proper consideration of whether it would be “unduly harsh” for the Appellant’s children to remain in the United Kingdom without her.

The FFFJ dealt with this very briefly in paragraph 147 in which it was said that there was no credible evidence that it would be unduly harsh for the children to remain in the UK without their mother.

She did not explain why she did not accept the evidence of the social worker or arguably give proper consideration to the best interests of the children.”

7. We identified those reasons as relating to the Appellant’s ground four as appeared before Judge Kopieczek. In light of the grant of permission to appeal on that basis, and the reasons given in the statement of reasons agreed between the parties, we therefore find an error of law in the First-tier Tribunal Judge’s decision on that ground.
8. As we note above, having set aside the First-tier Tribunal Judge’s decision, the parties sought a remittal of the appeal to the First-tier Tribunal. Having regard to the Joint Practice Statement to which we refer, and the passage of time since the First-tier Tribunal’s decision, we are satisfied that it is appropriate to remit given the extent of the fact finding which will be required in order to reconsider the appeal. Although we make no direction in this regard, we also note that, due to the passage of time, the First-tier Tribunal may wish to convene a case management review hearing following remittal to consider whether further directions are required. Ms Loughran also asked that her availability be taken into account when the appeal is relisted as she has represented the Appellant throughout (and it is suggested that the Appellant is vulnerable due to mental health issues). That is a matter for the First-tier Tribunal.

DECISION

We are satisfied that the First-tier Tribunal decision of Judge Omotosho promulgated on 21 October 2015 involves the making of a material error on a point of law. That decision is therefore set aside. We remit the appeal to the First-tier Tribunal for rehearing before a Judge other than Judge Omotosho.

Signed
Upper Tribunal Judge Smith



Dated: 3 April 2019