Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/03322/2016**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 9 March 2018	**On 4 April 2018**

Before

DR H H STOREY
JUDGE OF THE UPPER TRIBUNAL

Between

T O A
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms J Blair, Counsel, instructed by Babs & Co Legal Practitioners
For the Respondent: Mr P Nath, Home Office Presenting Officer

DECISION AND REASONS

1. In a decision sent on 30 July 2018 I set aside the decision of First-tier Tribunal Judge Callow for material error of law. The judge's error was a failure to adequately assess the two children's circumstances in light of the accepted fact that both are British citizens.

2. At the previous hearing before me Mr Avery for the respondent accepted that the appellant was entitled to benefit from the Home Office policy dealing with parents of British citizen children subject to the caveat that it had still to be established whether the recent arrest of the appellant in October 2017 meant he was caught by the criminality exception set out in that policy. He requested time for the respondent to

establish the nature and extent of the appellant's criminality in light of the fact that the appellant's trial on charges brought against him had been fixed for 24 July 2018. Accordingly, I decided to list the case for a CMR, noting that "it may well be that once details of the appellant's trial outcome are known, there will be no need for a further hearing".

3. At the CMR hearing before me there was now available from the appellant's solicitors a letter dated 31 January 2018 confirming that the appellant's trial went ahead on 31 January 2018 and the appellant was convicted of two offences – common assault and criminal damage and was sentenced to a conditional discharge for a period of six months together with costs of £330 and a victim surcharge, the total amount payable being £400. The letter notes that the conditional discharge becomes spent after six months.

4. Mr Nath requested an adjustment for the respondent to consider the evidence now to hand regarding the appellant's conviction. I refused that request as the respondent has had more than sufficient time to ascertain the outcome of the trial set for 24 July.

5. Mr Nath then submitted that I should set the case down for a further hearing, as today's hearing was listed as a CMR.

6. Ms Blair submitted that my previous direction had made clear that on receipt of the information regarding the appellant's trial and outcome, I might decide to re-make the decision without a further hearing. Ms Blair pointed out that the appellant had been of hitherto good character. The offences were clearly at the low end of the spectrum and not of the order contemplated in the Home Office guidance.

7. I have decided there was no need for a further hearing. I have sufficient information to re-make the decision now. Mr Avery had already accepted at the error of law hearing that the appellant stood to succeed in his appeal, applying the guidance given by the UT in the reported decision **SF & Others [2017] UKUT 120 (IAC)**, subject to clarification as to whether his recent arrest resulted in him being caught by the criminality proviso.

8. The appellant's recent arrest and conviction are concerning matters, but the offences were at the minor end of the criminal scale and the sentence of conditional discharge is one for which the law provides that the conviction will be spent in six months if there are no further offences.

9. As Mr Avery himself indicated at the previous hearing criminality on the lower end of the criminal scale is not such as to exclude a parent of a British citizen from the benefit of the Home Office policy. I would observe that the original interpretation of this policy was the ruling of the Court of Justice of the European Union in the case of **Zambrano** and that in Case C-304/14 **CS** the court indicated that to preclude applicants from being able to rely on the **Zambrano** ruling, there would need to be evidence that the person convicted posed a present, genuine and sufficiently serious threat to the fundamental interests of society. The appellant's offending falls very

short of such order of seriousness. Even if the Home Office policy is understood to encompass criminality of a lesser order than that identified in **CS**, it does not indicate that a parent would be precluded on the basis of a conditional discharge sentence for the two offences of relevance in this case. I therefore conclude that the appellant should receive the same outcome as the appellants in **SF and Others**.

10. For the above reasons; I conclude:

- The decision of the FtT Judge has already been set aside for material error of law.

- The decision I re-made is to allow the appellant's appeal.

Anonymity direction made.

Signed H H Storey Date: 30 March 2018

Dr H H Storey
Judge of the Upper Tribunal