Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/02261/2013

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 23 August 2018	**On 26 September 2018**

Before

THE HONOURABLE LORD BECKETT
(SITTING AS A JUDGE OF THE UPPER TRIBUNAL)
UPPER TRIBUNAL JUDGE PERKINS

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

[V C]
(ANONYMITY DIRECTION MADE)

Respondent

Representation:
For the Appellant: The appellant appeared in person
For the Respondent: Mr E Tufan, Senior Home Office Presenting Officer

DECISION AND REASONS

1. Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 we make an order prohibiting the disclosure or publication of any matter likely to lead members of the public to identify the respondent's (also called "the claimant's") children. Breach of this order can be punished as a contempt of court. We make this order because the children are subject to orders of the Family Courts and there is no legitimate public interest in

their identity. This is no longer a protection claim and we see no reason to anonymise the identity of the respondent.

2. The case has a complex history as is implied by the appeal concerning a decision of the Secretary of State as long ago as 21 October 2013. We do not think it helpful to say too much about the earlier events. It will not illuminate this decision and could easily add to the confusion. Suffice it to say that the appeal was successful before the First-tier Tribunal and the Secretary of State's challenge was dismissed by the Upper Tribunal but the Court of Appeal set aside that decision. There was a reserved judgment handed down on 30 November 2017 and an order setting aside the decision of the Upper Tribunal, dealing with costs and saying at paragraph 3:

> "The respondent's (VC's) appeal against the appellant's (Secretary of State's) decision to make a deportation order dated 31 October 2013 be remitted to the Upper Tribunal for that Tribunal to remake the decision on the respondent's appeal pursuant to Section 12(2)(b)(ii) of the Tribunals, Courts and Enforcement Act 2007, following, if appropriate, the hearing of further evidence."

3. In short we are dealing with an appeal on human rights grounds against a decision of the Secretary of State to deport him. The Secretary of State was the appellant in subsequent proceedings. Hereinafter we identify the respondent as "the claimant".

4. It is quite clear that the First-tier Tribunal allowed the appeal on human rights grounds and because the decision was not in accordance with the Immigration Rules. The First-tier Tribunal promulgated its decision on 19 January 2014 which was before the changes to the statutory grounds of appeal introduced in October 2014. In his original Notice of Appeal to the First-tier Tribunal the claimant relied on discursive grounds in support of his appeal against the "non-asylum decision". We must consider the non-asylum appeal with reference to the rules in force at the date of decision.

5. The claim brought on asylum grounds was emphatically rejected. That part of the decision has never been challenged by the claimant. There is nothing in the Court of Appeal's order that revives the dismissed asylum claim. We confirmed with the parties at the hearing that there was no protection claim before us and the claimant did not in his submissions and evidence suggest that he would risk serious ill treatment in Sri Lanka although he made it plain that he had no wish to return there.

6. For completeness we note that our file was linked to a file numbered DA 00597 2013 that also related to this claimant. It appears to relate to the same decision but in any event was withdrawn before the First-tier Tribunal on 29 July 2013. We mention it to confirm that we have not overlooked it. We are satisfied that it is irrelevant to our deliberations.

7. The Court of Appeal's judgment in this case is reported as **Secretary of State for the Home Department v VC (Sri Lanka) [2017] EWCA Civ 1967**.

8. The relevant rules are set out in the Secretary of State's decision. There is no doubt that his deportation would be conducive to the public good because he has been convicted of an offence for which he has been sentence to 12 months imprisonment. The rules permit a person liable to deportation to remain on human rights grounds only when there is "a genuine and subsisting parental relationship with a child under the age of 18 years" or with a partner and other conditions apply (see paragraph 399 of HC 395) or where the person has been "lawfully resident in the UK for most of his life" and other conditions apply (see paragraph 399A) or there are "very compelling circumstances over and above those described in paragraphs 399 and 399A".

9. The leading judgment of the Court of Appeal, by McFarlane LJ, concluded that at the time of the First-tier Tribunal hearing the claimant could not be in a "subsisting parental relationship" with his children. It is quite obvious that the claimant's family life in the United Kingdom has been profoundly unhappy. It included a violent relationship with his wife and their children going into the care of local authority with a view to their adoption. Their mother, the claimant's wife, was not allowed to see the children at all but the claimant had some very limited contact which clearly benefitted the children.

10. We set out below paragraph 42 of the Court of Appeal's judgment which clearly requires us to conclude that there was no subsisting parental relationship at the time the decision was made. The Court said:

> "For the reasons put forward by Mr Cornwell, it was, in my view, not possible for the circumstances of this case to come within the requirements of paragraph 399(a) of the Rules. On the basis of the Court of Appeal's analysis of the family history, [VC] had played only a minimal role in the care of his children and, even when living at the family home, he had on a regular basis rendered himself unable to act as a parent as a result of heavy drinking and abusive behaviour. By the time of the Secretary of State's decision to deport him, any vestiges of a 'parental relationship' with the children had long fallen away and had reduced to their genetic relationship coupled with the most limited level of direct contact which was intended to cease altogether on adoption. Mr Cornwell is correct to stress the words 'genuine', 'subsisting' and 'parental' within paragraph 399(a). Each of these words denotes a separate and essential element of the quality of relationship that is required to establish a 'very compelling justification' [per Elias LJ in *AJ (Zimbabwe)*] that might mark the parent/child relationship in the instant case as being out of the ordinary."

11. At paragraph 43 the court continued:

> "I am also persuaded that the [Secretary of State] is correct in submitting that for paragraph 399(a) to apply the 'parent' must have a

> 'subsisting' role in personally providing at least some element of direct parental care to the child. The phrase in paragraph 399(a)(ii)(b) which requires that 'there is no other family member who is able to care for the child in the UK' strongly indicates that the focus of the exception established at paragraph 399(a) is upon the loss, by deportation, of a parent who is providing, or is able to provide, 'care for the child'. This provision is to be construed on the basis that it applies to a category of exceptional cases where the weight of public policy in favour of the default position of deportation of foreign criminals will not apply."

12. Finally the judgment anticipated the possibility of the claimant's role changing. The proposal for adoption did not work out quite as planned and the Court of Appeal explained at paragraph 12:

> "The circumstances at the time of the FTT and Upper Tribunal hearings were that although no adopted placement had been found, the local authority was still pursuing a plan for adoption. This court has now been told that the search for adopters did not bear fruit and, as a result, on 1 October 2015, the placement for adoption orders were revoked and replaced by special guardianship orders with respect to the two children in favour of their former foster parents. Although there is no formal order for contact between the children and [VC], it is understood that some occasional contact takes place under the supervision of the special guardians. It is accepted that this appeal falls to be determined on the basis of the facts and plans for the children as they were at the time of the two Tribunal hearings. If the appeal is allowed, the case will have to be remitted for redetermination in the light of current circumstances."

13. That is now our task. We have to apply Part 5A of the Nationality, Immigration and Asylum Act 2002. We are informed by Section 117C(1) that the deportation of foreign criminals is in the public interest. We are also told at sub-section (2) that the more serious the offence committed by the foreign criminal the greater the public interest in deporting of that criminal. Nevertheless unless the criminal has been sentenced to four years or more there are two exceptions recognised by statute. Exception 1 applies where the claimant has been lawfully resident in the United Kingdom for most of his life. He was born in 1970 and entered the United Kingdom in 1998. He is now 48 years old and has lived in the United Kingdom for 20 years. This claimant has not been lawfully resident in the United Kingdom for most of his life and clearly does not apply. Exception 2 applies where the claimant "has a genuine and subsisting parental 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".

14. It is also possible that there may be "very compelling circumstances" which should lead to the appeal being allowed.

15. The papers show that the claimant arrived in the United Kingdom irregularly and claimed asylum in March 1998.

16. The claimant gave evidence before us. We say immediately that we found him an extremely candid witness. He answered questions in a straightforward manner and showed no tendency to exaggerate his case. Understandably, because he was representing himself, he had not produced any written evidence to support his case but when pressed he was able to substantiate some of his claims by reference to records on his mobile phone. This is an imperfect way of receiving evidence as it could not easily be copied for the file and was not disclosed before the hearing but we gave the evidence the weight that we thought appropriate.

17. The claimant confirmed that he had no close personal relationships in the United Kingdom except with his daughters. He had no life partner. He was living in the United Kingdom supported by the charity and good wishes of his immediate family who sent him money. He had been in the United Kingdom since arriving in 1998. He said that his father had died. His mother lived in Sri Lanka and the family had had a farm.

18. He had not given a lot of thought to what he would have to do in the event of his return. He did not want to have to go back to Sri Lanka. He had learned a lot and had tried to establish himself in the United Kingdom.

19. It would have been helpful to have had some independent evidence about the claimant's relationship with his daughters. Nevertheless we were impressed with his apparent candour and his failure to exaggerate the relationship even though he knew it would have been hard for us to have checked his claims. He told us that he saw the girls about once a month. When pressed he produced conversations on his mobile phone and these can be characterised as indicating that contact did indeed take place *about* once a month, but less rather than more frequently, and came about by his asking permission of the long terms foster parent. The replies suggested that the carer was willing in principle to facilitate contact but that she set the terms and the claimant politely complied. We were shown photographs on the phone of the claimant with his daughters and also with the carer and the carer's grandson. We appreciate that photographs can only show gestures at a moment in time but it all confirmed the account of the girls being genuinely pleased to see their father and their carer regarding the occasions as essentially congenial. Their carer would not readily facilitate contact if it was detrimental to the girls' welfare.

20. However the claimant also accepted that he paid no governing role in the lives of the children. He made no decisions about their education for example and he paid nothing towards their maintenance. He did spoil them with treats when he saw them, in accordance with his limited means, but that was the extent of his support.

21. As far as we are aware "parental relationship" is not precisely defined and may not be precisely definable. We do realise that under the terms of Section 117C(5) there has to be a relationship that is both "subsisting" and "parental". The relationship is subsisting. We have no reason to think

that it will not go on at least for the foreseeable future, that the girls are fully aware of their father's identity and that his limited involvement in their lives is positive. It has clearly not been a parental relationship for some time and we find nothing in the change in local authorities' plans which changes the relationship to make it parental. The claimant has no guiding role and contact remains infrequent even though we accept that it has increased. It follows that we are not persuaded there is a subsisting parental relationship now for the purposes of the rules or Section 117C(5).

22. However even if we are wrong about this we would find the effect of his removal would not be unduly harsh. The girls clearly know their father but they could have some contact with him from outside the United Kingdom. That would not be as good as seeing him but they could keep in touch and there is nothing before us to suggest that not seeing him would have a particularly distressing or harmful effect upon them.

23. We do find that the best interests of the children lie in preserving the status quo so that their father remains in the United Kingdom and continues to play a modest but meaningful part in their lives but their best interests are a primary rather than determinative consideration. This claimant cannot succeed in his appeal because of his relationship with his children.

24. We do not suggest that there is a viable family business in Sri Lanka that could seamlessly absorb the claimant in the event of his return. However he has some contact with the country. We have no doubt that he would find a way of managing but we do not suggest that this would be straightforward or easy.

25. The claimant had been in trouble for motoring offences and had been cautioned for battery. As far as we are aware the only convictions for serious matters are the matters leading to the deportation decision. It is not appropriate to say too much about the offences once it is apparent, as is the case here, that they are sufficiently serious to attract deportation. However sexual assaults are always serious and we are mindful that the more serious the offence the greater the public interest in deportation. The offences were all committed within a short period of time whilst the claimant was very drunk. Two of the offences involved his slapping the buttocks of a man and a woman. We do not trivialise or condone them in anyway by saying that they are not examples of the most serious kind of sexual assault. The third offence, against a woman, was a much more serious attack. The claimant pushed her against metal railings and groped her and left her distressed not only by what had happened but by what she feared might happen. The fourth offence involved grabbing another woman by her breasts and buttocks. The claimant declared in vulgar language his intention to have sexual intercourse with her. The offence has the particularly unattractive quality of being committed against a victim who suffered from multiple sclerosis and had difficulty walking.

26. He was sent to prison for two concurrent terms of eight months and two of twelve months. He also had to sign the sex offender's order.

27. We asked ourselves rhetorically what reasons there were for allowing him to remain in the United Kingdom on human rights grounds. Clearly he had established a private and family life in the United Kingdom although it was all established when he was in the United Kingdom in pursuit of an unmeritorious claim for asylum or leave to remain on human rights grounds or without any kind of leave at all. Clearly the claimant can speak good English. There is evidence that at least for a short time he attended a local church. This does weigh in favour of his remaining because it shows some integration and even contribution to the community but it does not count for much.

28. Other than his relationship with the children, which we have considered in more detail above, we find nothing weighty or potentially weighty in favour of his remaining.

29. We must consider the delay. These offences are now more than ten years ago which is a long time but they happened and it cannot be said that the public interest in his deportation is diminished. This is not a case, as occasionally happens, where the Secretary of State has shown no interest in deportation which might imply that the public interest for some reason was not particularly strong. Delay here has been the consequence of working out the appeal system. It is not the claimant's fault that he was successful before the First-tier Tribunal but that does not give him a right to remain in the United Kingdom.

30. It follows that there is nothing in his relationship with the children that means deportation should be avoided for their sakes or at all. Neither can it be said that the conditions in Sri Lanka are so difficult that he could not return there. There is nothing else in the claimant's case.

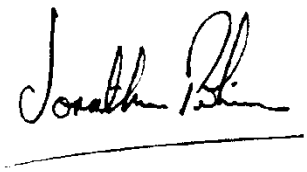
31. We do, before making a final decision, just step back and reflect a little. We do not know all the ins and outs of the plainly traumatic private and family life the claimant has experienced. We do recognise that he has been in the United Kingdom for many years. He is clearly able to speak English because he addressed us in English perfectly competently at the hearing. We accept that he would be industrious if that were open to him. The fact is that Parliament has decided that the deportation of foreign criminals is in the public interest and there is nothing we can see that would justify any different decision in this case.

32. In short, although removing the claimant will interfere with his, and with his daughters' private and family lives the removal is for a proper purpose, lawful and proportionate.

33. We therefore dismiss the claimant's appeal under the rules and the law.

Notice of Decision

The claimant's appeal against the Secretary of State's decision to deport him is dismissed.

Signed 

Jonathan Perkins

Judge of the Upper Tribunal Dated 24 September 2018