



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: DA/02261/2013

THE IMMIGRATION ACTS

Heard at Bradford
On 24 April 2014

Determination Promulgated
On 29 May 2014
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Before

UPPER TRIBUNAL JUDGE CLIVE LANE

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

VINCENT GNANASIRI CYRIL

Respondent

Representation:

For the Appellant: Mr Steward, Senior Home Office Presenting Officer
For the Respondent: Ms Benfield, instructed by Pride Solicitors

DETERMINATION AND REASONS

1. The respondent, Vincent Gnanasiri Cyril, was born on 19 April 1970 and is a male citizen of Sri Lanka. I shall hereafter refer to the respondent as “the appellant” and to the Secretary of State as “the respondent” (as they respectively were before the First-tier Tribunal).

2. The appellant had appealed against a decision of the respondent dated 21 October 2013 to deport him to Sri Lanka. His appeal to the First-tier Tribunal (Judge Kelly and Dr Okitikpi) was successful under the Immigration Rules and on Article 8 ECHR grounds. The First-tier Tribunal determination was promulgated on 22 January 2014. The Secretary of State now appeals, with permission, to the Upper Tribunal.

The background to this appeal is very helpfully summarised in the First-tier Tribunal determination at [3]-[17]:

The background to the making of the decision in this appeal is both lengthy and complex. We have done our best to summarise it below. We have generally placed the events in their chronological order. We have nevertheless on occasion found it necessary to depart from the strict chronology in order to avoid unduly interrupting the individual narratives of those involved.

The appellant applied for asylum in the United Kingdom on the 27th March 1998, having (he says) entered the country illegally a week earlier. That application was refused on the 20th May 1999. The appellant did not appeal against that decision. However, the respondent appears not to have taken any steps to enforce his removal. Indeed, on the 27th May 1999, the then Secretary of State informed him that he was free to take up employment in the United Kingdom; a situation of which he took advantage, and paid tax and National Insurance on his earnings as a result.

On the 10th July 2004, the appellant married another Sri Lankan national, 'N', at the Registry Office in Kingston upon Hull. They had at that time a daughter, 'C', who was born on the 16th March 2004. Their second daughter, 'V', was born on the 1st July 2008.

On the 9th January 2007, the appellant sexually assaulted three women and a man in the street. The offences were committed within minutes of each other at a time when he was plainly very drunk. He was sentenced to a total of 12 months' imprisonment for those offences, at Hull Crown Court, on the 12th February 2007. It is that sentence that has triggered the respondent's decision to deport the appellant.

On the 12th March 2007, the respondent issued a Notice of Liability for Deportation. The appellant was not released from his sentence of imprisonment until July 2007. The respondent nevertheless now questions whether that notice was effectively served upon him whilst he was in prison. Be that as it may, on the 2nd December 2008 the respondent gave notice that the decision had been taken to deport him [see appendix 'F' of the respondent's bundle of documents]. So far as we are able to ascertain, that decision has never been formally withdrawn.

The local social services department initially forbade the appellant from returning to the family home when he was released from his sentence of imprisonment. He was nevertheless able to maintain frequent contact with both C and V during this period. In January 2009, he was permitted to resume cohabitation with his family. However, the appellant and his wife separated after only a few months.

On the 8th December 2008, the respondent issued a second Notice of Liability for Deportation, to which the appellant's representatives responded on the 1st January 2010. The reason why the respondent considered it necessary to repeat this process, bearing in mind the previous and apparently still extant deportation decision, remains obscure.

In early 2010, N moved to Barnsley whilst the appellant remained in Hull. From that time onwards, various agencies began to express concern about the state of N's mental health and the effect that it was having upon her care of C and V. On the 11th February 2011, C and V were taken into emergency police protection. This was in fact the second occasion upon which this had occurred. The first occasion had been whilst the appellant was serving his custodial sentence in 2007. There then followed a period of phased return of the children to their mother.

The respondent made a second decision to deport the appellant on the 8th September 2011. It is clear that by this time the respondent was aware of the intervention of the police and social services, following on from the incident of the 11th February 2011. However, the respondent noted that the children were at that stage living once again with their mother. Moreover, in view of the fact that neither his wife nor children were now living with the appellant, the respondent decided not to deport N but to grant her a period of 3 years' discretionary leave to remain instead. This was granted on the 18th October 2011.

On the 15th September 2011, the police were forced to take the children into emergency protection for a third time due to their mother's irrational behaviour and neglect in caring for them. On the 19th November 2011, the local authority issued applications for full Care Orders to be made in respect of C and V, and the first of a series of Interim Care Orders was made on the 21st November 2011. Thereafter, contact between the children and their parents took place upon a supervised basis at a Contact Centre. Immediately after a contact visit that took place on the 7th November 2011, C indicated she no longer wished to have contact with her mother due to her behaviour at that meeting. C indicated that she nevertheless wished to maintain contact with her father (the appellant). However, N continued to attend contact meetings with her children and to behave in a manner that was evidently upsetting them.

On the 10th January 2012, the respondent withdrew her second decision to deport the appellant (i.e. the decision made on the 8th September 2011; see paragraph 10, above).

The local authority's application for Care Orders was finally adjudicated upon by His Honour Judge Jeremy Baker QC (as he then was) on the 13th December 2012. During the course of his judgement, he made the findings of fact that we have attempted to summarise at paragraphs 10 and 12 of this determination. He also found that the appellant had been regularly been consuming alcohol to excess whilst he was living at the family home, and that he had thereafter failed to comply with the local authority's requests for assistance at a time when his wife was struggling to cope with the care of their children. Judge Baker nevertheless concluded that, "the undoubted benefits of the children's ongoing contact with the Father are of such value that the ultimate disposal of this case lies with the care of these children in the context of a placement in long term foster care so as to facilitate [this]" (paragraph 69 of the judgment). The local authority appealed against this decision on the ground that the paramount interests of C and V required that they should be placed in care with a view to adoption, rather than long-term foster care.

On the 4th March 2013, the respondent made a third decision to deport the appellant. Although we have been unable to find any record of it, we assume that this decision was subsequently withdrawn so that the position could be reviewed in light of the judgement of the Court of Appeal (below).

On the 23rd July 2013, the Court of Appeal overturned the decision of Judge Baker QC and ordered that C and V should be placed in the care of the local authority with a view to their adoption rather than long-term foster care (*Re V (Children)* [2013] EWCA Civ 913). Whilst the Court of Appeal did not doubt that the children would benefit from continuing to maintain

contact with their father, it concluded that this was outweighed by the significant detrimental effect of their mother's attempts at renewed contact, which they concluded would inevitably continue for so long as the children remained in foster care (see paragraphs 91 to 94 and paragraph 102 of the judgements). The court has now ordered that, pending their adoption, the appellant should have monthly supervised contact of 1 hour, reducing to bi-monthly contact in 2014.

On the 21st October 2013, the respondent made her fourth and final decision to deport the appellant. This decision is subject to the present appeal.

3. The appellant had also appealed to the First-tier Tribunal on asylum grounds. [35] the Tribunal found that the appellant's account of his reasons for leaving Sri Lanka had not been credible. Further, the Tribunal found that "even if we were to take the appellant's account at face value, we would not be satisfied the appellant is at risk of persecution on return to Sri Lanka." The appellant did not fall into any of the risk categories identified in **GJ and Others (post-civil war: returnees) Sri Lanka CG UKUT 00319 (IAC)**. The Tribunal found that there was "no evidential basis" for believing that the appellant would be recognised on his return to Sri Lanka as an individual who had attended at protests in London outside the Sri Lankan Embassy. None of the findings of the Tribunal in respect of the asylum grounds have been challenged by the appellant.
4. The Tribunal's analysis of the grounds under the Immigration Rules (in particular, paragraph 399) and in respect of Article 8 ECHR are summarised at [38] and following:

We have begun our consideration of the appellant's Article 8 claim by reference to the factors that are set out in paragraphs 398 and 399 of the Immigration Rules (see paragraph 28, above).

Whilst the appellant has now lived in the United Kingdom for approximately one-third of his life, his period of residence does not qualify for limited leave to remain under paragraph 399A of the Immigration Rules. We therefore turn to consider the requirements relating to family life as they are set out in paragraph 399(a).

Despite Mrs Fell's cogent arguments to the contrary, we are satisfied that the appellant has a genuine and subsisting relationship with each of his children and that this is particularly strong in relation to C. The existence of this relationship was recognised by both Judge Baker and the Court of Appeal, albeit that they attached different levels of importance to it. We are fortified in reaching this conclusion by reading the moving sentiments of love and affection that the children expressed for the appellant in the Christmas cards that they sent to him in December 2013. In our view, the existence of this relationship is unaffected by the fact that it will terminate if and when the children are placed for adoption. This is because we are required by Section 85 of the Nationality, Immigration and Asylum Act 2002 to consider the circumstances that currently prevail, subject only to those circumstances being relevant to the substance of the decision that is the subject of the appeal.

We are satisfied that although she is not a British citizen, C had lived continuously in the United Kingdom for a period of at least 7 years immediately preceding the decision. We are

also satisfied, as was the decision-maker, that it would not be reasonable in the circumstances for either C or V to leave the United Kingdom.

In paragraph 22(d) of the decision letter, dated the 21st October 2013, the decision-maker states that s/he considered that there were "other care arrangements available for C in the UK". Precisely the same wording was employed when considering the position of V, at paragraph 30(d) of the letter. However, the reference to "other care arrangements" is a misrepresentation of the wording of sub-paragraph 399(a)(ii)(b) of the Immigration Rules. This sub-paragraph in fact stipulates that there must be "no other *family member* who is able to care for the child in the UK" [emphasis added]. In view of the fact that both Judge Baker and the Court of Appeal have found that the children's mother is unfit to have contact with C and V, she is *a fortiori* unfit to care for them in the United Kingdom. Indeed, it was her very inability to care for the children that caused the police to take the children into emergency care on three occasions, and subsequently caused the local authority to seek Care Orders with a view to placing them for adoption.

In view of the above, we are satisfied that the appellant has met the requirements for consideration of discretionary leave to remain (not exceeding 30 months) under paragraph 399 of the Immigration Rules. We are therefore satisfied that the decision to deport him is not in accordance with those rules.

However, if we are wrong to hold that the appellant meets the requirements of paragraph 399(a) of the Immigration Rules, we should make it clear that we are also satisfied that there are "other factors" - not contemplated by the Immigration Rules - but which, in combination with the matters already considered, are sufficient to outweigh the public interest in deportation (see the concluding words to paragraph 398, above). In reaching this conclusion, we have considered those factors that are relevant to an Article 8 assessment in deportation cases. These are set out in paragraphs 57 and 58 of the judgement in *Uner v The Netherlands* (2007) 45 EHRR 14, and are as follows:

- the nature and seriousness of the offence committed by the applicant;
- the length of the applicant's stay in the country from which he or she is to be expelled;
- the time elapsed since the offence was committed and the applicant's conduct during that period;
- the nationalities of the various persons concerned;
- the applicant's family situation, such as the length of the marriage, and other factors expressing the effectiveness of a couple's family life;
- whether the spouse knew about the offence at the time when he or she entered into a family relationship;
- whether there are children of the marriage, and if so, their age; and
- the seriousness of the difficulties which the spouse is likely to encounter in the country to which the applicant is to be expelled.
- the best interests and well-being of the children, in particular the seriousness of the difficulties which any children of the applicant are likely to encounter in the country to which the applicant is to be expelled; and

- the solidity of social, cultural and family ties with the host country and with the country of destination.

We acknowledge that all but one of these considerations have been factored into the Immigration Rules with a view to striking the appropriate balance between the competing public and private interests that are typically engaged in a case where deportation is being considered. However, “the time elapsed since the offence was committed and the applicant's conduct during that period” does not feature in the equation under either paragraph 398 or 399. We accept that this may be because it is unlikely to be a significant factor in the general run of cases. If so, it reinforces our view that that it is an exceptional circumstance that is capable of outweighing the public interest in deportation. In the circumstances of this case, we consider that it weighs heavily against a decision to deport the appellant. It will be recalled that it is now almost exactly seven years since the appellant committed the offences (all on the same day) in question, and there is no suggestion that the appellant has re-offended since that time. Moreover, we accept the submission of Mr Chippendale that the absence of offending over a period of seven years strongly suggests that the risk of the appellant re-offending is now minimal. This in turn considerably reduces what might otherwise have been the strong public interest in deportation.

In view of the fact that the children are to be placed for adoption, there is an argument for saying that their interest in the appellant remaining in the United Kingdom is now insignificant. However, this argument ignores two important considerations. Firstly, adoption will only take place (if at all) at some indeterminate point in the future when suitable adoptive parents have been identified. In the meantime, the children are entitled (and apparently wish) to maintain their limited contact with the appellant, the benefits of which were acknowledged by the Court of Appeal. Secondly, it ignores the difficulties that the children would face in seeking to be reunited with their father upon reaching the age of majority. These difficulties arise because a deportation order will have the effect of excluding the appellant from the United Kingdom for a period of up to ten years. It is thus ironic that the respondent should have chosen to grant N a period of leave to remain on the basis of her relationship with children, who (as is now clear) are unlikely to seek contact with her in the future, whilst seeking to deport their father to whom they remain devoted.

5. A number of the grounds were rejected at the permission stage by Judge Garratt who, at [2] noted that:

The grounds appeared to be in error in suggesting that the panel misdirected themselves in law by finding that the appellant is not the subject of the provisions of the UK Borders Act 2007 for automatic deportation. The decision appealed against, dated 21 October 2013, related to removal on conducive grounds because the appellant had been convicted prior to the UK Borders Act 2007 coming into force. The panel also correctly considered the provisions of paragraphs 398 and 399 of the Immigration Rules which applied to the appeal even if deportation was on conducive grounds.

6. Likewise, Mr Steward, for the respondent, did not make any submissions to me in respect of [4] and [5] of the grounds which, in summary, assert that the Tribunal had insufficient regard to the existence or absence of “exceptional circumstances” in the facts of this appeal or to the public interest concerned with the removal of the appellant. I find that the Tribunal was well aware of the public interest and dealt with this at [45]. In any event, it is difficult to see how, if the decision of the Tribunal in respect of the Immigration Rules appeal is not flawed by legal error, the

respondent might maintain the challenge in respect of the public interest; that and other relevant factors are incorporated within the Rules themselves. Judge Garratt was of the opinion that the strongest and perhaps only properly arguable ground was that at [3]. Judge Garratt summarised this as follows:

However, it is arguable that the panel were in error in concluding that the appellant had a genuine and subsisting parental relationship with his children when the decision of the Court of Appeal, in the knowledge of the appellant's relationship with his children, was that such children should remain in care with a view to adoption.

In essence, the challenge is to the sustainability of the Tribunal's findings at [46] which I have quoted above. At the heart of this part of the appeal is the Tribunal's finding at [40] that "in our view, the existence of [the appellant's relationship with the children, in particular with C] is unaffected by the fact that it will terminate if and when the children are placed for adoption." In my view, that is an entirely legitimate finding. It is not logical simply to conclude that, because a relationship may at some point in the future come to an end, it cannot be genuine and subsisting prior to that termination. Indeed, for example, a parent's relationship with a terminally ill child would not be questioned simply because it is certain that the relationship will come to an end. It should also be borne in mind the maximum period of leave which might be given to the appellant under the Rules is 30 months whilst, in relation to Article 8 more generally, it is open to the respondent to award a period of leave to remain which would be commensurate with the adoption proceedings.

7. In summary, the Tribunal's finding in respect of the relationship between the appellant and his children is not flawed by any legal error. As a consequence, the Tribunal's decision to allow the appeal under the Immigration Rules should stand. It follows that any error which may have occurred in the Article 8 ECHR analysis would not affect the outcome of the appeal but I find that that analysis was also legally sound. At [6], the grounds take issue with the weight placed by the Tribunal [46] on the possible difficulties the children would have in seeking to find their father after they reach their majority. I consider that the Tribunal should not have attached any significant weight to that consideration; there is no evidence at the present time that they will seek to find their father in the future or, indeed, that they would be unable to do so. However, even if the panel did arguably err in law in attaching weight to that consideration, it does not undermine the reasoning of the determination as a whole and I decline to set their decision aside accordingly.

DECISION

8. This appeal is dismissed.

Signed

Date 22 May 2014

Upper Tribunal Judge Clive Lane