Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: UI-2022-000679**
HU/01577/2021

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On the 20 July 2022 (hybrid hearing)	**On the 12 September 2022**

Before

THE HON. MR JUSTICE MORRIS
(SITTING AS A JUDGE OF THE UPPER TRIBUNAL)
UPPER TRIBUNAL JUDGE STEPHEN SMITH

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

CJ (SOUTH AFRICA)
(ANONYMITY DIRECTION MADE)

Respondent

Representation:
For the Appellant: Mr S. Whitwell, Senior Home Office Presenting Officer
For the Respondent: Mr J. Dingley, Ison Harrison Solicitors

DECISION AND REASONS

1. It is well established that where a person facing deportation is prosecuting contact proceedings concerning children before the Family Court, it may be a breach of the European Convention on Human Rights ("the ECHR") for their removal to be enforced before the resolution of the family proceedings. The Secretary of State's practice is usually not to

remove or deport those who are engaged in contact proceedings involving children until their final determination.

2. This appeal concerns the reconciliation of that principle, and the Secretary of State's practice, with the statutory public interest considerations concerning the deportation of foreign criminals contained in Part 5A of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act").

Factual background

3. The Secretary of State appeals against the decision of First-tier Tribunal Judge O'Hanlon ("the judge") promulgated on 7 November 2021[1] in which he allowed the appeal of the Respondent, whom we shall call "the claimant", against a decision of the Secretary of State dated 2 November 2020 to refuse his human rights claim. The appeal was brought under section 82(1)(b) of the 2002 Act.

4. The claimant is a citizen of South Africa. He faces deportation pursuant to the automatic deportation regime contained in the UK Borders Act 2007 ("the 2007 Act"), on account of his two year sentence of imprisonment, following a plea of guilty, for sexual assault and assault occasioning actual bodily harm. The claimant committed what was described by the sentencing judge as a "sustained and persistent violent and sexual attack in the presence, in part, of your children" on his wife, who was left "battered and bruised with marks all over her body and bleeding…" The offence had a "devasting psychological impact" on the victim, and on the children the claimant has with her: A, born in 2011, and B, born in 2014. The sentencing judge made a restraining order prohibiting the claimant from contacting the victim, or A or B, directly or indirectly, save for child contact purposes.

5. The claimant is currently engaged in proceedings before the Family Court to determine contact arrangements with his children. By an order of that court, he is permitted limited, indirect contact with A and B on an interim basis, pending a full assessment by CAFCASS, and the final determination of those proceedings.

6. It was common ground before the First-tier Tribunal that the Secretary of State would not remove the claimant from the United Kingdom during the currency of the contact proceedings. By a letter dated 29 October 2021 entitled "Supplementary Consideration", the Secretary of State quoted the following extract from paragraph 3 of headnote to *MH (pending family proceedings-discretionary leave) Morocco* [2010] UKUT 439 (IAC):

> "It is the respondent's practice (consistent with the Human Rights Act 1998), not to remove or deport parent(s)/parties when family or other court proceedings are current…"

[1] The decision states that it was promulgated on "7 November 2021", but the hearing took place on 23 November 2021, and the judge signed the decision on 30 November 2021, so we presume that it was more likely to have been 7 December 2021, although nothing turns on this.

The letter continued:

> "There is no intent on the part of the Secretary of State to depart from that position in your case"

7. The Secretary of State contested the claimant's appeal before the First-tier Tribunal on the basis that, although he would not be removed during the currency of the contact proceedings, it was necessary to address the substance of his human rights claim through the lens of section 117C of the 2002 Act in any event. The presenting officer before the First-tier Tribunal submitted that the claimant's offence was serious, and, as a "medium offender" (that is, an offender sentenced to a term of imprisonment of between one and four years), he would have to demonstrate that his deportation would be "unduly harsh" on A or B, or that that there were "very compelling circumstances" over and above the exceptions to deportation. There were no Article 8 private life barriers facing the claimant upon his return to South Africa.

8. The judge recorded the Secretary of State's submissions as to the impact of the ongoing contact proceedings in the following terms, at paragraph 36(l):

> "So far as the question of compelling circumstances are concerned, it is necessary to take into account the position in the family law proceedings. Deportation is in the public interest. The [claimant] and his children have been separated for two years and at present are taking only 'baby steps' in terms of reintroduction. The case law referred to does not state that it is mandatory to proceed in the manner suggested in *MH* and [*MS (Ivory Coast) v Secretary of State for the Home Department* [2007] EWCA Civ 133], the wording used is that removal in those circumstances 'may violate Article 8' and 'may breach Article 6'."

9. Mr Dingley, who also appeared before us, submitted to the judge that until the family proceedings had concluded, it was not possible to assess whether the claimant's removal would breach his Article 8 rights. The Secretary of State's undertaking not to remove the claimant was not a sufficient basis to conclude that his Article 8 rights would be respected; if the appeal was dismissed, the claimant would be removable. It was not possible to conclude that the claimant's removal would be proportionate, in light of the continued uncertainty surrounding his circumstances. Mr Dingley submitted to the judge that the appeal should be allowed on the basis the claimant would be granted discretionary leave pending the conclusion of the family proceedings, consistent with *MH* and *MS*.

The decision of the First-tier Tribunal

10. The judge reached number of findings of fact which prefaced his application of the authorities outlined above. He found that the claimant had instituted family proceedings with a view to increasing his contact with his children. Although his contact with the children was "strictly limited", it had increased from exclusively written contact, as at the

outset, to pre-recorded video recordings. The claimant hoped to work towards some form of direct contact with his children in due course. The application to the Family Court was a genuine attempt on the part of the claimant to improve the nature and quality of his contact with his children. The judge accepted that the approach in *MH* was discretionary rather than mandatory, in light of the operative reasoning being permissive ("*may* violate Article 8…"; "*may* breach Article 6…"). He had been invited by the presenting officer to proceed "to determine the substantive case" but held that he would not be able to take into account any findings of the Family Court, since they had not yet been reached. See paragraphs 42 to 45. The judge concluded in these terms, at paragraph 46:

> "Having taken all relevant factors into account, I find that in accordance with *MH*, the removal or potential removal of the [claimant] whilst he is in the process of seeking a Family Law Court order may breach his rights pursuant to Article 8 and Article 6 ECHR as it would prejudice the outcome of the Family Court proceedings as the [claimant] may be denied the possibility of further meaningful involvement in those proceedings. I also find that the ultimate determination of the Family Law Court regarding the extent of any contact which his children might have with him would be a matter to be taken into account in the ultimate determination of whether the [claimant] should be deported."

11. The judge allowed the appeal with specific reference to the headnote of *MH* at paragraph 4, observing that the appeal had been allowed on the basis that the Secretary of State would grant a period of discretionary leave to the claimant, for a duration to be determined by the Secretary of State.

Grounds of appeal

12. The Secretary of State has appealed to this tribunal on the basis that it was an error for the judge to allow the appeal absent an express finding that the claimant enjoys a genuine and subsisting relationship with A and B, that he failed to have regard to paragraphs 399 and 399A of the Immigration Rules, and that he "effectively made a freestanding decision on Article 8 outside the Immigration Rules."

13. Permission to appeal was granted by Upper Tribunal Judge Sheridan on the basis that the judge arguably erred by failing to apply section 117B and 117C of the 2002 Act, and by relying on authorities that pre-dated the introduction of Part 5A of that Act.

Submissions

14. Mr Whitwell submitted that the decision omitted any consideration of the public interest in the deportation of foreign criminals, in breach of section 117C(1) of the 2002 Act. He relied on *SR (subsisting parental relationship – s117B(6)) Pakistan* [2018] UKUT 334 (IAC) at paragraph 14, which

summarises *Secretary of State for the Home Department v VC (Sri Lanka)* [2017] EWCA Civ 1967. In *VC*, the Court of Appeal held that a parent with limited "non-caring" contact could not demonstrate the presence of a genuine and subsisting relationship with the child. Mr Whitwell also relied on paragraph 30 of *SR*, where, in the course of remaking the decision under appeal, Upper Tribunal Judge Plimmer held that there was no prospect in the foreseeable future of the nature and extent of the contact between that appellant and the child increasing. Judge Plimmer found that there was no evidence, for the purposes of paragraph E-LTRPT.2.4.(b) of Appendix FM of the Immigration Rules, that the appellant played an "active role in the child's upbringing", in light of the limited contact arrangements. Returning to the decision of the judge below, Mr Whitwell submitted that there was simply no consideration of the public interest in the removal of this foreign criminal, or any consideration of Part 5A of the 2002 Act at all. The judge failed to address *RS (immigration and family court proceedings) India* [2012] UKUT 00218 (IAC).

15. Mr Dingley relied on the claimant's rule 24 notice. He submitted that the judge would have had Part 5A of the 2002 Act firmly in mind, in light of the submissions made by each party pursuant to it. See the summary of the Secretary of State's submissions in the judge's decision at paragraph 36; at (h): "whether the deportation would be unduly harsh"; at (i): "whether the deportation would be unduly harsh"; at (j): "…is a factor in assessing the unduly harsh criteria."; at (k): "there would be no very significant obstacles to his integration…"; at (l): "so far as the question of compelling circumstances are concerned." His eventual conclusion was consistent with the need for there to be "very compelling circumstances", submitted Mr Dingley. The very compelling circumstances arose from the need for the claimant's continued presence in the United Kingdom pending the contact proceedings.

THE LAW

16. Article 8 ECHR provides:

> "1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

17. Section 32 of the 2007 Act defines those, such as this claimant, who have been sentenced to a period of imprisonment of at least 12 months as a "foreign criminal". Pursuant to subsection (5), the Secretary of State must make a deportation order in respect of a foreign criminal. There are a

number of exceptions contained in section 33, of which the only relevant exception is "Exception 1", namely that "removal of the foreign criminal in pursuance of the deportation order would breach – (a) a person's [ECHR] rights…" (see section 33(2)(a)).

18. To determine whether Exception 1 in section 33 of the 2007 Act applies, it is necessary to have regard to the public interest considerations contained in Part 5A of the 2002 Act.

19. Section 117C(1) of the 2002 Act provides that the deportation of "foreign criminals is in the public interest" for the purposes of determining the proportionality of deportation under Article 8(2) ECHR. The claimant satisfies the definition of foreign criminal for the purposes of this section because he is not a British citizen and has been convicted of an offence which led to a period of imprisonment of at least 12 months: see section 117D(2) of the 2002 Act.

20. Section 117C makes provision for exceptions to the public interest in the deportation of foreign criminals in the terms set out below:

> "(4) Exception 1 applies where—
>
> (a) C has been lawfully resident in the United Kingdom for most of C's life,
>
> (b) C is socially and culturally integrated in the United Kingdom, and
>
> (c) there would be very significant obstacles to C's integration into the country to which C is proposed to be deported.
>
> (5) Exception 2 applies where C has a genuine and subsisting 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.
>
> (6) In the case of a foreign criminal who has been sentenced to a period of imprisonment of at least four years, the public interest requires deportation unless there are very compelling circumstances, over and above those described in Exceptions 1 and 2."

21. It is now well established that section 117C(6) applies to a so-called "medium offender", even though the drafting suggests that it applies only to a foreign criminal sentenced to a term of imprisonment of at least four years, so that such an offender might establish either section 117C(5) or section 117C(6): see *NA (Pakistan) v Secretary of State for the Home Department* [2016] EWCA Civ 662 at paragraphs 25 to 27.

22. Ordinarily, any assessment of "very compelling circumstances" would be informed and calibrated by the extent to which an appellant is able to meet Exceptions 1 and 2 in section 117C. However, that is not to say that in cases where neither exception is engaged, the very compelling circumstances test will be devoid of merit; a foreign criminal may point to

"features falling outside the circumstances described in those Exceptions… which made his claim based on Article 8 especially strong" (*NA (Pakistan)* at paragraph 29). Moreover, as held in *NA (Pakistan)* at paragraph 38, "the Secretary of State and the tribunals and courts will have regard to the Strasbourg jurisprudence when applying the tests set out in our domestic legislation." In *HA (Iraq) v Secretary of State for the Home Department* [2022] UKSC 22, the Supreme Court underlined the centrality of an Article 8 proportionality analysis to the "very compelling circumstances" assessment pursuant to section 117C(6): see paragraph 51.

The impact of ongoing contact proceedings involving children on deportation

23. In *MS (Ivory Coast) v Secretary of State for the Home Department* [2007] EWCA Civ 133, the Court of Appeal addressed the impact of ongoing contact proceedings concerning children on the removability of a prospective deportee. Addressing the decision of the Asylum and Immigration Tribunal ("AIT") under appeal, it said, at paragraph 24:

> "The AIT was referred to *Ciliz v The Netherlands* [2000] 2 ELR 469 where the European Court of Human Rights (ECt.HR) made clear that Article 8 was likely to be engaged in circumstances such as those in the present case. The AIT was therefore not surprised to hear that the Home Office policy was not normally to remove those involved in continuing family proceedings about children."

24. The position of the Home Office in *MS (Ivory Coast)* was summarised at paragraph 27:

> "That no removal directions had been given and they were not going to give any so long as the contact proceedings were prosecuted with due diligence."

25. The issues in *MS (Ivory Coast)* were whether the Article 8 rights of the appellant in those proceedings were adequately protected by the undertaking conceded by the Home Office that she would not be removed while the family proceedings were pending, or whether she should be given leave to remain pending the resolution of the family proceedings. At paragraph 70, the court held that the question to be determined was "whether the appellant's Article 8 rights would be violated by a removal when the case was before it, i.e. when the contact application was outstanding." It summarised the principle in the following terms, at paragraph 72:

> "The appellant was entitled to have determined whether removal from the United Kingdom with an outstanding contact application would breach s 6 of the Human Rights Act 1998. That question was capable of resolution one way or the other. What was not appropriate was to leave her in this country in limbo with temporary admission and the promise not to remove her until her contact application has been concluded. Temporary admission is, as we have explained, a status given to someone liable to be detained pending removal. If the appellant had a valid human rights claim she is not liable to

> be detained pending removal. And if she has not, she ought to be removed. If she is entitled to discretionary leave to remain she ought to have it for the period the Secretary of State thinks appropriate, together with the advantages that it conveys; and if not she ought not to."

26. The operative conclusion reached by the court was at paragraph 75:

> "It was not open to the AIT to rely on the Secretary of State's assurance or undertaking that the appellant would not be removed until her contact application had been resolved. Nor was it appropriate to speculate upon whether there might be a violation of Article 8 on different facts at some point in the future. Had the AIT decided the Article 8 point in the appellant's favour she should have been granted discretionary leave to remain… This could have been for quite a short period, whatever was regarded as sufficient to cover the outstanding contact application. It would have been open to the appellant later to apply for the period to be extended should the circumstances so warrant."

27. *MS (Ivory Coast)* was considered in *MH (pending family proceedings-discretionary leave) Morocco* [2010] UKUT 439 (IAC). The headnote summarises the *ratio* of *MS (Ivory Coast)* and the Secretary of State's practice not to remove persons pending the resolution of contact proceedings. It addresses the approach of the tribunal in such cases in the following terms:

> "4. Where such a case arises before the Tribunal it is usual for the appeal to be allowed pursuant to Article 8 ECHR , rather than for the proceedings to remain within the Tribunal system to be adjourned, perhaps more than once. The respondent will normally then grant a short period of discretionary leave bearing in mind any relevant facts found by, or observations of an Immigration Judge. It is for the respondent to decide on the period of leave in each case.
>
> 5. Where an application for contact (or a residence order, or for other relief) is successful then a parent/party may make application for further leave to remain in the UK. If unsuccessful, then it will be for the respondent to consider what steps to take in relation to that individual."

28. *RS (immigration and family court proceedings) India* [2012] UKUT 00218 (IAC) was a panel presided over by McFarlane LJ, as he then was. It provided further practical guidance concerning *MS (Ivory Coast)* and *MH* at paragraph 43; a judge should consider whether the likely outcome of family proceedings would be material to the immigration proceedings, whether there are compelling public interest reasons to exclude the claimant from the United Kingdom irrespective of the family proceedings and the best interests of the child, and whether any family proceedings had been instituted to delay or frustrate removal. It also held that a judge should consider the degree of the claimant's previous interest in contact with the children concerned, the timing of the contact proceedings, the

commitment with which they have been progressed, when a decision is likely to be reached, and whether there are any materials that can be made available to identify pointers to where the child's welfare lies. At paragraph 44, *RS* held:

> "Having considered these matters the judge will then have to decide:
>
> i) Does the claimant have at least an Article 8 right to remain until the conclusion of the family proceedings?
>
> ii) If so, should the appeal be allowed to a limited extent and a discretionary leave be directed?
>
> iii) Alternatively, is it more appropriate for a short period of an adjournment to be granted to enable the core decision to be made in the family proceedings?
>
> iv) Is it likely that the family court would be assisted by a view on the present state of knowledge of whether the appellant would be allowed to remain in the event that the outcome of the family proceedings is the maintenance of family contact between him or her and a child resident here?"

The Tribunal went on, at paragraph 45, to highlight the potential difficulties of being "in limbo".

29. In *Secretary of State for the Home Department v GD (Ghana)* [2017] EWCA Civ 1126, the Court of Appeal held that the Secretary of State is not bound by an order of the Family Court. The President of the Family Division concluded his concurring judgment in these terms:

> "50. The fact that, in law, the Secretary of State is not bound by an order of the Family Court, as it now is, or of the Family Division, does not, of course, mean that she can simply ignore it. As Hoffmann LJ said in *ex p T*, 297,
>
> > 'Clearly, any order made or views expressed by the [family] court would be a matter to be taken into account by the Secretary of State in the exercise of his powers. If he simply paid no attention to such an order, he would run the risk of his decision being reviewed on the ground that he had failed to take all relevant matters into consideration.'
>
> 51. Be that as it may, the fact is – the law is – that the Secretary of State when exercising her powers of removal or deportation is not bound by any order of the Family Court or of the Family Division and that the Secretary of State, if she wishes to remove or deport a child or the child's parent, does not have to apply for the discharge or variation of any order of the Family Court of Family Division which provides for the child or parent to remain here."

DISCUSSION

The principle: reconciling MS (Ivory Coast), MH and RS with Part 5A of the 2002 Act

30. *MS (Ivory Coast)*, *MH* and *RS* all pre-date the insertion of Part 5A of the 2002 Act by the Immigration Act 2014. Part 5A now places the principle that the deportation of foreign criminals "is in the public interest" on a statutory. How should that apparent statutory imperative be reconciled with the approach in those authorities?

31. Mr Whitwell confirmed that the Secretary of State does not submit that the underlying requirements of the ECHR have changed since *MS (Ivory Coast)*, *MH* or *RS*. He also confirmed that the enactment of Part 5A of the 2002 Act has not changed the Secretary of State's normal practice not to remove prospective deportees during the currency of contact proceedings.

32. In our judgment, the point of principle concerning the reconciliation with Part 5A and the *MS (Ivory Coast)*, *MH* and *RS* considerations may be dealt with as follows. The statutory considerations established by Part 5A, in particular those applicable to the deportation of foreign criminals contained in section 117C, do not prevent a court or tribunal from taking into account the factors contained in *MS (Ivory Coast)*, *MH* and *RS.* The considerations in *MS (Ivory Coast)*, *MH* and *RS* are capable of amounting to "very compelling circumstances" for the purposes of section 117C(6). As *HA (Iraq)* confirms at paragraph 51, the "very compelling circumstances" assessment under section 117C(6) is to be conducted by reference to the underlying requirements of Article 8 ECHR, including the applicant's family situation, any children concerned, and their best interests. Where those factors militate in favour of the conclusion that, until the resolution of the contact proceedings, it would unlawful under section 6 of the Human Rights Act 1998 for an appellant to be removed, that will constitute "very compelling circumstances over and above those described in Exceptions 1 and 2", pending the resolution of the contact proceedings.

33. Of course, the requirements of the ECHR are not such that *all* foreign criminals should be permitted to remain in the United Kingdom pending the resolution of contact proceedings before the Family Court: nothing in this decision should be seen as contrary to the guidance to that effect in *RS*. But where, following consideration of the guidance in *RS,* a judge decides that the requirements of the ECHR are such that the individual concerned should be permitted to remain to that limited extent for those specific reasons, that will amount to be very compelling circumstances and the public interest will not – for the time being at least – require the deportation of the foreign criminal.

34. In such circumstances, a judge should allow an appeal on Article 8 grounds on the basis that, pursuant to section 117C(6), there are very compelling circumstances over and above Exceptions 1 and 2.

35. There have been further changes to the statutory framework governing appeals brought under Part 5 of the 2002 Act since *MS (Ivory Coast)*, *MH* and *RS*. In *MS (Ivory Coast)*, the Court of Appeal observed at paragraph 70 that the tribunal had the jurisdiction to direct the length of discretionary leave necessary to reflect the Article 8 considerations involved, under

section 87 of the 2002 Act, which was entitled "Successful appeal: direction". Section 87 was repealed on 20 October 2014 by the Immigration Act 2014: see Schedule 9, paragraph 37. A tribunal may no longer give such a direction.

36. It follows that the implementation of decisions of the tribunal is a matter for the Secretary of State. It is important for judges to respect the institutional competence of the Secretary of State in that respect and not purport to give a direction in line with *MS (Ivory Coast)* or *RS*. However, it will generally be helpful for a judge to observe that the appeal is being allowed on the basis that the Secretary of State need only grant a period of leave to the appellant for so long as is necessary for the contact proceedings to be resolved, after which the position may be reassessed in light of the finally determined contact arrangements. It will then be for the Secretary of State to decide how to give effect to the judge's decision.

37. We conclude with two observations.

38. First, attempting to reach findings concerning whether Exception 2 applies *before* the resolution of contact proceedings may be premature. But in some cases, it will be clear that, irrespective of the best interests of any children concerned, the public interest is in favour of the deportation of the individual concerned. This will be an inherently fact-sensitive analysis.

39. Secondly, it is nothing to the point that the Secretary of State may have undertaken not to remove the individual concerned pending the resolution of contact proceedings, as submitted by Mr Whitwell. This point is dealt with at paragraph 72 of *MS (Ivory Coast)*, which we quote at paragraph 25, above.

40. Drawing this analysis together, we can summarise the position in the following terms:

    a. The general approach in *MS (Ivory Coast)*, *MH* and *RS* relating to the need for an appellant to be permitted to remain in the United Kingdom in order to prosecute family proceedings remains applicable. In particular, a tribunal considering this issue should address the questions at paragraphs 43 to 45 of *RS*, other than the questions paragraph 44(ii).

    b. However, a tribunal should not purport to allow the appeal to a "limited extent" nor give a direction that a period of discretionary leave should be granted to the appellant in accordance with paragraph 44(ii) of *RS*. The only option now open to the tribunal on an appeal under Part 5 of the 2002 Act is to allow or dismiss the appeal. The power to give a direction for the purpose of giving effect to its decision previously contained in section 87 of the 2002 Act was repealed by the Immigration Act 2014 on 20 October 2014.

c. In an appeal against the refusal of a human rights claim, where a tribunal concludes that the appellant has an Article 8 ECHR right to remain at least until the conclusion of family proceedings concerning the appellant's children, that is likely to merit a finding that there are "very compelling circumstances over and above those described in Exceptions 1 and 2" for the purposes of section 117C(6) of the 2002 Act, and the appeal should usually be allowed in express reliance on that subsection.

d. It is likely to be helpful for the tribunal to observe that, although implementing allowed appeals is a matter for the Secretary of State, the requirements of the Article 8 are only likely to necessitate the granting of such period of leave as is sufficient to enable the family proceedings to be determined.

e. When the family proceedings are resolved, the appellant and the Secretary of State may each reassess their respective positions in light of the final contact arrangements, as determined by the Family Court.

THE INDIVIDUAL APPEAL

41. It is necessary to address the following matters:

a. Whether the judge failed to engage with the public interest in the deportation of foreign criminals pursuant to section 117C(1) of the 2002 Act;

b. Whether the judge erred by failing to take into account the 'non-caring' contact arrangements the claimant currently has with A and B, pursuant to *VC (Sri Lanka)*, as summarised in *SR*; and

c. Whether the judge erred by not considering *RS*.

The first issue: section 117C and the public interest in the deportation of foreign criminals

42. We accept that the judge did not, in terms, state that the deportation of foreign criminals is in the public interest in the course of reaching his operative conclusion. However, we do not consider this to have been an error for two reasons.

43. First, the judge plainly had the public interest in the deportation of foreign criminals in mind. He was fully cognisant of the Secretary of State's case on that issue, as encapsulated in the decision letter dated 2 November 2020 (see paragraph 36(a)), as set out in the "Supplementary Consideration" dated 29 October 2021 (see paragraph 26), and in the Secretary of State's submissions at the hearing (see paragraph 36(b) and following), which were replete with references to the statutory considerations contained in section 117C.

44. At paragraph 26, the judge summarised the Secretary of State's Supplementary Consideration, and included the following extensive outline of paragraph 25 thereof with emphasis added:

> "Case law recognised that the outcome of family proceedings is capable of being 'material to the immigration decision' but that there is, equally, scope for there to be '**compelling public interest reasons to exclude the claimant from the United Kingdom irrespective of the outcome of the family proceedings or the best interests of the child**'. **The respondent maintained the position that the appellant's deportation is a proportionate measure in the light of the nature and severity of his offending**, not a course of action which is to the detriment of the best interests of the appellant's children and that the approach in *GD (Ghana)* would apply in the event of the family court finding in favour of the appellant resuming direct access to his children."

The "case law" in paragraph 25 of the Supplementary Consideration was *RS.*

45. Secondly, the proceedings before the judge were in atypical procedural and substantive territory. Both parties before the First-tier Tribunal were agreed on one central matter: the claimant would not be removed until the conclusion of the family proceedings. The focus of the dispute before the judge was the procedural and substantive mechanism to reflect that common ground. As the judge correctly identified at paragraph 40, the central issue was that encapsulated by *MH*, relating to the potential breaches of Article 6 (right to a fair trial) and Article 8 ECHR through the removal of the claimant before the final determination of the family proceedings.

46. In our judgment, the judge had the public interest in the deportation of foreign criminals firmly in mind. Since even the Secretary of State recognised that the claimant could not be removed pending the resolution of the family proceedings, it is hardly surprising that the express focus of the judge was the application of the criteria in *MS* and *MH,* rather than the public interest in the deportation of foreign criminals.

The second issue: whether the judge erred by failing to adopt the approach in VC (Sri Lanka)

47. *VC (Sri Lanka)* concerned a deportee in relation to whom there was already a final order in the family proceedings. VC's two children were subject to placement for adoption, with arrangements for very limited contact with VC in the meantime, which would cease once an adoptive placement was found. The First-tier Tribunal allowed VC's appeal against the refusal of his human rights claim, and the Upper Tribunal dismissed the Secretary of State's appeal. The Court of Appeal allowed the Secretary of State's onward appeal. It was against that background that the Court of Appeal held that VC's case under the version of paragraph 399 of the Immigration Rules then in force "falls, as it were, at the first hurdle in that it was not possible on the facts as they were at the time of the decision to

hold that he had a 'genuine and subsisting parental relationship'…" (see paragraph 43).

48. In our judgment, *VC's* case is not authority for the general proposition that a prospective deportee with no current contact with his or her children is not entitled to the protection of Article 8 while contact proceedings are pending. *VC* concerned a human rights claim made against the background of a final adoption order, with the only remaining step in the family proceedings being the location of a suitable permanent placement. By contrast, these proceedings are squarely in *MS (Ivory Coast)* and *MH* territory; at the date of the hearing before the judge (and, as far as we are aware, at the date of the hearing before us), the family proceedings are yet to be resolved. The judge did not fall into error by failing to approach the pending family proceedings as though they were finally determined; indeed, it would have been an error for him to have done so.

49. Mr Whitwell relied on Judge Plimmer's case-specific approach to remaking the decision in *SR*, specifically paragraphs 30 and 31. Those paragraphs are simply an example of the broader principles enunciated in that decision being applied to the evidence in those proceedings and are not authority for any individual proposition.

The third issue: did the judge err by failing to consider RS?

50. By way of a preliminary observation, we reject Mr Whitwell's submission that the judge did not consider *RS*; the judge referred at paragraph 20(ii) to the earlier directions issued made in the case requiring the Secretary of State to conduct a "meaningful review" of the claimant's case by reference to *RS*. Moreover, at paragraph 26 of the decision, he summarised the consideration then given to *RS* in the Secretary of State's Supplementary Consideration (see paragraph 44 above).

51. Two of the central considerations required by the guidance at paragraph 43 of *RS* were resolved in favour of the claimant by virtue of the Secretary of State's undertaking not to remove the claimant until the resolution of the family proceedings. The family proceedings were likely to be material to the immigration proceedings (paragraph 43(i)) and, in light of the Secretary of State's undertaking, there were no compelling reasons to exclude the claimant from the United Kingdom irrespective of the outcome of the family proceedings or the best interests of A and B (paragraph 43(ii)). It was not necessary for the judge to dwell on these points.

52. Pursuant to paragraph 43(iii) of *RS*, the judge had to consider whether the contact proceedings had been initiated by the claimant in order to delay or frustrate removal, rather than to promote the welfare of A and B. The judge dealt with that consideration in express terms:

> "42. I find on the basis of the evidence before me that the [claimant] has instituted Family Court proceedings with a view to increasing his contact with his children. It is the case that the [claimant's] contact with his children is strictly limited but it would appear that it has increased from the previous

> written contact to a level where pre-recorded video recordings are provided and the [claimant] is hoping to work towards some form of direct contact with his children in due course.
>
> 43. I find on the basis of the evidence which I have seen that the [claimant's] application to the Family Law Court is a genuine attempt on his part to improve the nature and quality of his contact with his children."

53. Those findings of fact have not been challenged by the Secretary of State. They were entirely consistent with the considerations the judge had to take into account under the guidance in *RS*. In reaching those findings, the judge would have had the claimant's submissions recorded at paragraph 37(g) in mind: the claimant had previously enjoyed a strong relationship with his children and both he and the children's mother (that is, the victim of his crimes) were seeking to reintroduce him to the children. The claimant accepted that it would take time in order gradually to increase his contact with the children, but the order of the District Judge dated 28 July 2021 recognised the prospect of increased contact being possible. The claimant's aspirations were not fanciful, and the judge was entitled to approach this issue in that way.

54. Finally, the judge recalled that the requirements of Article 8 did not mandate him to allow the appeal on an interim basis (see paragraph 44). He had been invited by the Secretary of State's presenting officer to decide the substantive appeal. He declined to do so, for the reasons given at paragraph 45:

> "As no decision has yet been made by the Family Court, if I were to proceed to determine the substantive case as so invited to do by the presenting officer, I would not be able to take into account any findings of the Family Court in the proceedings which have been instituted by the [claimant]."

55. In our judgment, the judge was entitled to approach his analysis in that manner. As submitted by Mr Dingley, had the judge attempted to perform a substantive analysis of the claimant's prospective deportation, he would have been constrained to do so on a footing that would have entailed a degree of speculation, and which would have been contrary to the guidance in *RS*. As a "medium offender", if the claimant can establish that his deportation would be "unduly harsh" on A or B, his deportation would not be in the public interest. Such a finding could, in principle, be a realistic prospect, depending on the final contact arrangements, and the best interests of A and B. For this reason, there is no merit to the criticism in the grounds of appeal that the judge failed expressly to consider paragraphs 399 and 399A of the Immigration Rules. Those paragraphs correspond to Exceptions 2 and 1 respectively. It was open to the judge to conclude that, consistent with *MS (Ivory Coast)*, *MH* and *RS,* the requirements of Article 8 were such that it would be unlawful under section 6 of the Human Rights Act 1998 for the claimant to be removed before the determination of the contact proceedings concerning his children.

56. Properly understood, the gravamen of the Secretary of State's complaint is that the judge followed the guidance in *MS (Ivory Coast)*, *MH* and *RS*. He did not fall into error by doing so.

Conclusion

57. Drawing this analysis together, the judge was entitled to conclude that the requirements of Article 8 ECHR were such that it would be disproportionate to remove the claimant until the resolution of the family proceedings. We accept that it may have been helpful for the judge expressly to state that he considered the need for the claimant to remain in the UK pending the family proceedings to amount to "very compelling circumstances" under section 117C(6) of the 2002 Act, but no material error arises from the fact he did not do so.

58. The decision of the First-tier Tribunal did not involve the making of an error of law. This appeal is dismissed.

Anonymity

59. We maintain the order for anonymity made by the First-tier Tribunal. It is appropriate to do so in order to maintain the anonymity of the family proceedings, and, in any event, in light of the automatic anonymity enjoyed by the victim of the claimant's sexual offending.

Notice of Decision

The decision of Judge O'Hanlon did not involve the making of an error of law such that it must be set aside.

The appeal of the Secretary of State is dismissed.

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

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

Signed Stephen H Smith Date 3 August 2022

Upper Tribunal Judge Stephen Smith