Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/01703/2020

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
22nd April 2022	**27th July 2022**

Before

UPPER TRIBUNAL JUDGE RIMINGTON

Between

MISS A R
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms J Fisher, counsel
For the Respondent: Ms H Gilmore, Home Office Presenting Officer

DECISION AND REASONS

I have imposed an anonymity order owing to the sensitive nature of the information included in the decision.

1. The appellant, a citizen of South Africa born on 12th December 1992, appealed against the decision of the Secretary of State dated 16th January 2020 to refuse her application for leave to remain pursuant to Article 8 of the European Convention on Human Rights ("the ECHR"). This decision follows a resumed hearing after the decision of First-tier Tribunal Judge Boyes promulgated on 1st April 2020, dismissing the appellant's appeal was set aside.

2. The basis of the appellant's claim was that there were very significant obstacles to her re-integration into South Africa under the Immigration Rules ("the Rules") and secondly, even outside the Rules, that the respect for her family life meant that it would, under the ECHR, be disproportionate to require her to leave the United Kingdom owing to unjustifiably harsh consequences of her return. The appellant first entered the United Kingdom in December 2017 on a visit visa valid from 12th November 2017 to May 2018. She made her application, 'in time' for leave to remain on the basis of family and private life on 18th November 2019.

3. The Secretary of State's refusal letter set out that the appellant had not lived in the United Kingdom for 20 years and did not accept that there would be very significant obstacles to her integration into South Africa if she were required to leave the United Kingdom. She had provided no evidence that family members or friends would not be able to assist her on return to South Africa where she had resided until the age of 26 years old. It was decided that there were no exceptional circumstances.

4. At the resumed hearing before me the appellant confirmed that she was living with her mother in Preston and that it was her mother who was renting the home. She told us that the mother came to the United Kingdom in 2015 and had visited her once or twice in South Africa a year since that time. During the court hearing the appellant was very distressed and was deeply anxious at the thought of emotional abuse from her father in South Africa and being separated from her mother. She was candid that she had worked in South Africa but found it very difficult to obtain work. There was family in South Africa, but she did not have a close relationship with them. She told the court that she had Turner's Syndrome which had been diagnosed at the age of 6. Her mother had sent money to her in South Africa to help with her essential needs in the sum of approximately £500 a month. This was because she was not earning enough money to be able to live.

5. Her mother UR also gave evidence that she had lived her life in South Africa and then discovered that she was eligible for British citizenship (because she had been born in Swaziland during the British protectorate). She told the court that the appellant could not live with her father because of the abuse (and from whom she had separated many years ago) and she could not send her daughter 'back to that'. Her daughter's salary was never enough to cover her living expenses and she supplemented them. Emotionally the appellant would be broken if she had to return.

6. Ms Gilmour submitted that the mother had been a victim of historic injustice but there was a distinction between that and historical injustice. The law in relation to the British Nationality Act 1981 by virtue of the Nationality and Borders Bill 2022, (now the Nationality

and Borders Act ("the NB Act 2022")) in relation to the appellant had not yet been passed in relation to historic registration. There were no very significant obstacles to the appellant's return to South Africa and preference was not a factor.

7. Ms Fisher submitted that the introduction of the Nationality and Borders Act 2022 would affect proportionality and change the weight to be accorded within the article 8 balancing exercise and the weight to be accorded to Section 117 of the Nationality, Immigration and Asylum Act 2002. The terms of the new Act stipulated that men and women be treated equally in terms of registration. This should be taken into account in the proportionality exercise. The submissions on this issue were made substantially on paper and I explore the submissions made below. She submitted that where a historic injustice was causative of the delay in an application for status that an appellant would already have made but for that injustice the balance of proportionality was reversed, **Patel v ECO (Mumbai)** [2010] EWCA Civ 17 [15]. Further, if all that is relied on in the public interest side of the balance are the interests of immigration control, then 'the weight to be given to the historic injustice will normally require a decision in the appellant's favour', **Ghising and others (Gurkhas/B.O.C.s – historic wrong weight)** [2013] UKUT 567 (IAC) [60].

Analysis

8. I accept that the appellant has lived for less than 20 years in the UK and that her residence here has been precarious. She entered on a visit visa with an expiry date of November 2019. That said, she made an in-time application for leave to remain.

9. Paragraph 276(1) ADE (vi) stipulates that the immigration rules are satisfied where an individual "... is aged 18 years or above, has lived continuously in the UK for less than 20 years discounting any period of imprisonment, *but there would be very significant obstacles to the applicant's integration into* the country to which he would have to go if required to leave the UK".

10. **Secretary of State v Kamara** [2016] EWCA Civ 813 held that "integration" calls for a broad evaluative judgment of whether the individual will be enough of an insider in terms of understanding how life in that other country is conducted and a capacity to participate in it, have a reasonable opportunity to be accepted, operate on a day-to-day basis and to build up within a reasonable time a variety of human relationships'.

11. Both the appellant and her mother attended court to give evidence and their evidence was consistent, plausible and credible.

12. I note that the appellant lived in South Africa from birth (with her mother) and came to the UK in 2019 to see her mother following her departure after obtaining British citizenship. The appellant was schooled and has worked in South Africa although apparently subsidised by her mother. She gave evidence that after her mother came to the UK, she sent the appellant approximately £500 per month for her living expenses. Her mother also confirmed that she had sent money because her salary was never enough to cover her living expenses. She confirmed she had no close relationship with any family in South Africa. She is distanced from her father and the brother works abroad on yachts. There was evidence in the bundle of his contract. His witness statement confirmed his itinerant lifestyle and confirmed the level of violent incidents.

13. I also accept as self-evident, and from the medical documentation, that the appellant experiences Turner Syndrome which affects her day-to-day life and because of which she had received long term bullying. As the mother explained and I accept her evidence (as consistent, candid and open) that her daughter was particularly vulnerable because of her stature, and I accept she experiences anxiety as a result and would find it more difficult to obtain work owing to discrimination. The appellant also displayed a particular anxiety about living in South Africa because of the violence a cousin had received from a burglary in her own home, and I accept that the appellant would be particularly vulnerable to violence owing to her very diminutive size. I accept the mother's evidence that the appellant had struggled from a young age because of her genetic medical condition and that her mother had been supporting the appellant since the appellant's childhood as a direct result of her Turner's syndrome condition. Her GP confirmed in writing that the appellant experienced Turner's syndrome and their minister of religion in South Africa testified in writing to family's situation including the reliance of the appellant on her mother throughout her life due to her Turner's syndrome condition. I also note the history of the family's domestic abuse situation for which there was independent written evidential support in various written statements including that of Ms D Wood, a special needs teacher who confirmed that the mother had supported the family alone and of the risks to the appellant should she return to South Africa. Tuner's Syndrome according to the written information in the bundle from the NHS and the Mayo Clinic confirmed the genetic condition was associated with a myriad of difficulties including mental health, (for which it is evidenced that the appellant has received counselling in the United Kingdom), hearing and vision loss as well as social interaction and relationship difficulties. The evidence indicated that the appellant had experienced serial bullying throughout her life. I consider these circumstances to constitute very significant obstacles to the appellant's return.

14. Even if I am wrong about significant obstacles, I have proceeded to a consideration of article 8 outside the rules. Applying the five-stage test in **Razgar v SSHD** [2004] UKHL 27 I accept in this instance that there is an article 8 protected family life between the appellant and her mother. Although they are both adults, I am guided by **Kugathas v Secretary of State for the Home Department** [2003] EWCA Civ 31 and note the encapsulation of the law on family life between adults in **Jitendra Rai v ECO [2017]** EWCA Civ 320 at [17].

15. **Jitendra Rai** paragraphs 36 and 37 confirmed that there is no requirement to find exceptionality when establishing whether there is Article 8 family life. The threshold for support is "real" or "committed" or "effective" and will include financial and emotional dependence. When considering whether family life is established, there is no requirement for some extraordinary, or exceptional, feature of dependence as a “necessary determinant of the existence” of family life between mother and daughter. It is clear that the appellant’s mother provides housing, financial and emotional support to the appellant. The appellant and her mother live together, and evidently had family life in South Africa before the mother’s departure in 2015. The appellant is both emotionally and financially dependent on her mother who is working in the United Kingdom as a British citizen. I accept that the mother underwent domestic abuse and together with the medical condition experienced by the appellant, this would only strengthen the bond between mother and daughter. I accept that the appellant had family life with her mother in South Africa and this has continued in the United Kingdom.

16. The threshold for interference with family or private life is low and thus the engagement of Article 8 and is satisfied here. I accept that removal of the appellant would indeed interfere with the appellant’s and her mother’s family life. In the event, as I had indicted above that I am wrong about the satisfaction of the immigration rules, the decision would be prima facie in accordance with the law and the rules are necessary or for the protection of the rights and freedoms of others in upholding immigration system.

17. I therefore turn to the last stage of **Razgar** and assess proportionality. In considering, however, whether there are "exceptional circumstances", outside the immigration rules, the applicable test is whether refusing leave to remain would result in "unjustifiably harsh consequences", **R (Agyarko)** [2017] UKSC 11.

18. The immigration rules set out the position of the Secretary of State for the purposes of Article 8 and are a starting point when considering the balancing exercise under Article 8. Ms Gilmour did not dispute any of the evidence put forward by the appellant and her mother but stated that preference should not be given sway.

19. The argument, however, was raised that the mother and thus the appellant had suffered an inherent and historic injustice in that the mother had been prevented from registering as a British citizen effectively on the grounds of sex. There was in effect historic sex discrimination the effects of which were lasting and had had a direct effect on the appellant. The argument was that the appellant may well have been in the UK as a child because her mother would have come over to the United Kingdom much earlier when the appellant would have accompanied her as a child.

20. The amended grounds of appeal set out that the appellant's mother was born in Swaziland, a former British protectorate, on 2nd May 1960. The appellant's great grandfather was born in the UK and his daughter, the appellant's grandmother, was born British by descent. It was submitted that under Section 5 of the British Nationality Act 1948, which set out citizenship by descent, that if the appellant's mother's *paternal* grandfather, who was born in the UK, rather than her *maternal* grandfather (as it was) or if the 1948 Act had referred to parent rather than father, she would have been born a citizen of the United Kingdom and Commonwealth and would have retained that status on Swaziland's independence and she would have been a British citizen on 1st January 1983 *prior* to the appellant's birth. Knowing that she was British would have given her different options throughout her life and would have given her children further options. There had been attempts to rectify the historic injustice on gender grounds and the first attempt was Section 4C of the 1981 British Nationality Act, which came in force from 30th March 2003. As such, children born abroad to British citizen mothers from 1st January 1983 onwards were automatically born British by descent under the 1981 British Nationality Act.

21. The appellant's mother, however, did not become entitled to register under this change in 2002 because she was born before 7th February 1961 and was already over 18 on 7th February 1979 and, as explained, it was her grandfather, not her mother who was born in the UK and the line passed maternally.

22. Further amendment to Section 4C introduced on 13th January 2010 by Section 45(3) of the 2009 Borders, Citizenship and Immigration Act, provided that people born before 1961 could also qualify to be registered.

23. The mother therefore gained the right to register to become a British citizen, which she did in 2015. This was not publicised. If she had applied straight away and it had been granted before 12th December 2010 and before the appellant was 18, the children could have applied for entry clearance to come to the UK with their mother.

24. If the mother had been British (either automatically or through registration) when the appellant was born in Durban on 12th

December 1992, she and the appellant would have had the option of travelling to the UK and her mother would have been able to come to the UK as a person with the right of abode and the appellant, as a minor child, would have been able to apply for entry clearance to accompany her. I note from the witness statements that the appellant's father was absent from when she was 3 years old (1995).

25. The Secretary of State in reply, accepted the appellant's interpretation of previous nationality legislation but did not accept that the appellant's immigration status was as a result of any previous alleged historic injustice and that this would have any weight in the proportionality assessment. It was submitted that the appellant was relying on nothing more than a hypothetical scenario. The appellant's mother did not apply to be registered as a British citizen until 2015 and there was no evidence that she would have registered, uprooted her children and brought them to the UK. The appellant's claim that she would be entitled to register as a British citizen following the potential implementation of the 2021 Nationality and Borders Bill was again hypothetical.

26. The Supreme Court in **The Advocate General for Scotland v Romein [2018]** UKSC 6 confirmed that the requirement under the 1948 Act to register the birth of a child to a parent who was a British citizen by descent at a British Consulate within one year was discriminatory and this point was to be rectified by the current Nationality and Borders Act 2022, which has now been enacted. The NB Act 2022 corrects the historical inability of mothers to transmit citizenship.

27. Although I accept that there would have had to be an application made on behalf of the child, the appellant, this was not even an option available to the mother at the time the appellant was born in 1992. The law allowing the mother to register as a British citizen was not amended until January 2010 and thus there was only a 10-month window until the appellant reached her majority. I accept that as soon as the mother discovered the option to register for British citizenship she did so. The mother nevertheless had to go through the process of registration rather than having been deemed British from birth. British citizenship and the options available to the mother and her child, the appellant, were denied to the mother through discrimination and historic injustice.

28. On 28th June 2022 Sections 6 and 8 of the Nationality and Borders Act (previously referred to in the written submissions as clause 5 and 7) were brought into force. Section 6 provides a general power of registration in cases of historic injustice and Section 6 relates to amendments to the British Nationality Act 1981 for disapplication of historical registration requirements and Section 8 provides for citizenship and registration in special cases. Subsequent to the hearing I invited the parties to make submissions in relation to the

enactment of the Nationality and Borders Act 2022. The submissions made by Ms Fisher largely reiterated the submissions made in writing. Those by Ms Gilmour confirmed that although enacted there was no indication of when the regulations would be implemented and even so the appellant's application would be speculative. The relevant sections of the Act are now in force.

29. The explanatory notes for Section 6 state as follows:

> *Section 6*
>
> *"113 Overview: This clause amends sections 4C and 4I of the British Nationality Act 1981 ('the 1981 Act'), so that the requirement for a person's birth to have been registered within 12 months at a British consulate is to be ignored when assessing whether they would have become a citizen of the UK and Colonies under the British Nationality Act 1948 ("the 1948 Act"), had women and unmarried fathers been able to pass on citizenship at the time of their birth.*
>
> *"114 Background: Under the 1948 Act, citizenship could normally only be passed on for one generation to children born outside of the UK and Colonies. However, paragraph 5(1)(b) of the 1948 Act permitted it to be passed on to a further generation if the child was born in a foreign country and their birth was registered within a year at a British consulate. The child of a British mother or unmarried British father could not be registered, because they were unable to pass on citizenship at that time. This Clause amends the 1981 Act, so that applications under section 4C (British mothers) and section 4I (unmarried fathers) will not be refused solely because the requirement to register the birth within a year has not been met. This reflects the decision in the case of the Advocate General for Scotland v Romein.*

30. Indeed the provision of Section 8 in the Borders and Nationality Act enables the appellant herself to apply for registration as a British citizen. The initiation of this case took place prior to the enactment of the NB Act 2022. The explanatory notes for the NB Act 2022 are as follows:

> *Section 8*
>
> *Introduction*
>
> *The Government's Explanatory Notes to the Bill for this Act (for discussion of the nature and status of the Notes see Key Legal Concept: **Explanatory Notes**) say as follows:*
>
> *"126 **Overview:** This clause creates new registration provisions which allow the Secretary of State to grant British citizenship and/or British overseas territories citizenship to adult applicants if, in the Secretary of State's opinion, the person would have been or would have become a British citizen and/or a British*

overseas territories citizen ('BOTC') had it not been for: historical unfairness in the law; an act or omission of a public authority; or other exceptional circumstances relating to the person's case.

...

"128 This clause allows for the grant of British citizenship and/or British overseas territories citizenship to a person who does not meet the existing naturalisation or registration requirements and is intended to benefit those who would have qualified for automatic acquisition of citizenship or who would have met the naturalisation or registration requirements, were it not because of, for example, unintended consequences caused by historical legislation or the result of the act or omission of a public body.

"129 ***Subsections 1 and 2*** *insert new sections 4L and 17H creating registration provisions which allow certain adults to be registered as British citizens and/or BOTCs. Under these provisions, British citizenship and/or British overseas territories citizenship may be granted where in the Secretary of State's opinion, the person could have been* ***or become a British citizen*** *and/or BOTC but for past unfairness in the law (including where men and women were unable to pass on citizenship equally, and unmarried fathers could not pass on citizenship), an act or failure to act by a public authority,* ***or exceptional circumstances*** *relating to the person's case. Subsections 4L(4) (sic) and 17H(4) allow the Secretary of State to take into account whether the applicant is of good character where applicable."*

31. Section 4L of the British Nationality Act 1981 from 28th June 2022 reads as follows:

4L Acquisition by registration: special circumstances

(1) If an application is made for a person of full age and capacity ("P") to be registered as a British citizen, the Secretary of State may cause P to be registered as such a citizen if, in the Secretary of State's opinion, P would have been, or would have been able to become, a British citizen but for—

(a) historical legislative unfairness,

(b) an act or omission of a public authority, or

(c) exceptional circumstances relating to P.

(3) For the purposes of subsection (1)(a), "historical legislative unfairness" includes circumstances where P would have become, or would not have ceased to be, a British subject, a citizen of the United Kingdom and Colonies or a British citizen, if an Act of Parliament or subordinate legislation (within the

meaning of the Interpretation Act 1978) had, for the purposes of determining a person's nationality status—

(a) treated males and females equally,

(b) treated children of unmarried couples in the same way as children of married couples, or

(c) treated children of couples where the mother was married to someone other than the natural father in the same way as children of couples where the mother was married to the natural father.

(4) In subsection (1)(b), "public authority" means any public authority within the meaning of section 6 of the Human Rights Act 1998, other than a court or tribunal.

(5) In considering whether to grant an application under this section, the Secretary of State may take into account whether the applicant is of good character.

32. Although it was suggested by the Secretary of State that it was merely hypothetical that the mother would have come to the UK and brought the appellant with her as a child, the mother was, nonetheless, deprived of that right to apply for her dependent to settle with her, and I note that she separated from the father many years ago. Proportionality, in the jurisprudence of the ECHR on article 8(2), is the yardstick of what is necessary in a democratic society. In this case the appellant's mother had been the subject to gender discrimination which had ongoing ramifications. The **Secretary of State v NH (India)** [2007] EWCA Civ 1330 which related to British Overseas Citizens, identified that historic gender discrimination can be a factor in proportionality even where it is the adult child that is affected. Even though it was argued by the Secretary of State in this case that it was not certain that the mother would have uprooted and brought the child to the UK, that argument could have been a similar argument in **NH (India)** but was not pursued. In that case too, the appellant's mother only had a *right to apply* for the child to come the UK.

33. The relationship between mother and appellant was, in this case, of long standing, having commenced at the appellant's birth and only temporarily disrupted by the decision of the sponsor to move to the UK. The witness statement of the mother confirmed that she divorced her husband in 1997 and brought the children up alone after the father left when the appellant was 3 years old. Indeed the final order of divorce dated 7th January 1997 confirms that the mother gained custody.

34. The appellant confirmed that the appellant was subjected to controlling behaviour and abuse from her father. The appellant remains single and childless, and I accept that the appellant has continued to be both emotionally and financially dependent on her

mother. There is a strong family life. I consider the history and context of the appellant's status to be relevant in the balancing exercise.

35. The points made by Ms Fisher in relation to the weight to be given to historic injustice have some force and I do consider this appeal to have elements of historic injustice rather than historical injustice because of the class of person affected **Patel (historic injustice; NIAA Part 5A)** [2020] UKUT 351(IAC). There has belated recognition by the United Kingdom government that a particular class of persons was wrongly treated, in immigration terms, in the past; and that this injustice has been recognised by the Nationality and Borders Act 2022. As set out in the headnote of **Patel**.

> *'The fact that the injustice exists will be uncontroversial. It will be generally recognised. It will apply to a particular class of persons. Unlike cases of what might be described as "historical injustice", the operation of historic injustice will not depend on the particular interaction between the individual member of the class and the Secretary of State. The effects of historic injustice on the immigration position of the individual are likely to be profound, even determinative of success, provided that there is nothing materially adverse in their immigration history'.*

36. There was nothing materially adverse in the appellant's immigration history.

37. I find that it would not be reasonable to expect the mother to return to South Africa. Her witness statement set out that she herself was too old at 60 to adapt to the life in South Africa where she would not be able to find work. She would have to leave her job as a carer in the UK. Additionally she stated that she would find it very difficult to live in a country where she would feel extremely unsafe because no matter the domestic protective safeguards installed to prevent intruders, burglaries and attacks were shown to be rife. Her anxieties are evident and, of course, the mother is a British citizen and entitled to remain.

38. Albeit **Jitendra Rai** considered that Section 117 B (2) and (3) of the Nationality, Immigration and Asylum Act 2002 had no relevance in situations of historic injustice, the appellant can speak English and there is no indication that she has accessed public funds. I accept that she was reliant on her mother for housing and financial support. Those factors are neutral. Section 117B (4) states:

> *(4) Little weight should be given to—*
>
> *(a) a private life, or*
>
> *(b) a relationship formed with a qualifying partner,*
>
> *that is established by a person at a time when the person is in the United Kingdom unlawfully.*

(5) Little weight should be given to a private life established by a person at a time when the person's immigration status is precarious.

39. The relationship between sponsor and appellant is, self-evidently, of long standing, having commenced at the appellant's birth. It was temporarily disrupted by the decision of the sponsor, to remove to the United Kingdom. Although little weight should be accorded to private life if an individual's status is precarious, I have found that the appellant has family life with her mother, and she has not been in the UK unlawfully having entered as a visitor and having applied for leave prior to the expiry of that leave. Although not determinative, the comparative statistics on the crime situation in South Africa demonstrate a bleak picture; the attack on a cousin, who was burgled and tied up at gun point in her own home in South Africa, generated anxiety attacks in the appellant and heightened her anxiety on the possible separation from her mother. The appellant is a single female with very small stature, and I take her vulnerability into account. A statement from NW, a serving police officer with the Durban Metro Police dated 4th March 2020 confirmed that the crime rate had increased 'at an alarming rate' and the appellant herself was 'at extreme risk' owing to 'her diminutive size, being a woman on her own'.

40. In considering the factors as a whole and balancing the strength of the relationship, the medical condition of the appellant, and the historic injustice, together with that the appellant has entered and remained in the United Kingdom lawfully at all times I find the decision to remove the appellant in all the circumstances is unjustifiably harsh that the appellant's Article 8 rights would be breached by removal and the decision to refuse her leave is disproportionate.

41. I therefore allow the appellant's appeal.

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

Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, the appellant is granted anonymity. No-one shall publish or reveal any information, including appellant/respondent, likely to lead members of the public to identify the appellant/respondent. Failure to comply with this order could amount to a contempt of court.

Notice of decision

The appeal is allowed on human rights grounds (article 8).

Signed Helen Rimington Date 27th July 2022

Upper Tribunal Judge Rimington

Fee Award

I make no fee award owing to the complex nature of these protracted proceedings.