Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/11347/2019

THE IMMIGRATION ACTS

Heard at the Birmingham Civil Justice Centre	**Decision & Reasons Promulgated**
On 16 December 2021 and 8 February 2022	**On 1 March 2022**

Before

UPPER TRIBUNAL JUDGE MANDALIA
and
DEPUTY UPPER TRIBUNAL JUDGE SHEPHERD

Between

MR FREDERICK STEPHANUS DOHNE
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms A Bhachu, counsel, (instructed by Tann Law Solicitors)
For the Respondent: Mr C Bates, Senior Home Office Presenting Officer

DECISION AND REASONS

Background

1. The appellant is a national of South Africa. He arrived in the United Kingdom on 20 July 2010 with leave to enter as the civil partner of a

British citizen valid until 14 September 2012. On 14 September 2012, he applied for leave to remain. His application was refused by the respondent for reasons set out in a decision dated 1 March 2013. The appellant's appeal was allowed by First-tier Tribunal Judge Parkes for reasons set out in a decision promulgated on 30 May 2013.

2. The respondent was granted permission to appeal to the Upper Tribunal. The appeal was allowed by Upper Tribunal Judge Perkins for reasons set out in a decision promulgated on 25 November 2013. Judge Perkins noted there had been two reasons for the respondent's refusal: first, there had been no documentary evidence to demonstrate that the English language requirement had been met; second, the appellant had been untruthful in having failed to disclose a criminal conviction on the application. Judge Perkins noted that the point relating to the criminal conviction fell away in the First-tier Tribunal. The First-tier Tribunal Judge accepted the appellant's conviction was spent such that he did not have to disclose it. However, overall it was unclear on what basis the appeal had been allowed by the First-tier Tribunal. Judge Perkins said the failure to produce evidence that the English language requirement of the Rules had been met was fundamental and the appeal could not possibly have been allowed under the Rules. Although the appellant could conceivably have succeeded under article 8 ECHR, the decision of the First-tier Tribunal did not explain how the appeal was allowed on that basis. Judge Perkins set aside the decision of the First-tier Tribunal and remade the decision dismissing the appeal.

3. The appellant remained in the UK. On 16 January 2017 he wrote a letter headed 'motivation' to the respondent explaining again the circumstances leading to his failure to obtain an English language certificate, and his reasons for not citing his criminal conviction on his previous application. He said he and his partner are settled in the UK, they both have jobs and pay taxes, and just needed extra time to put in an application for indefinite leave to remain. By letter dated 25

September 2017 the respondent replied and asked the appellant to set out his reasons for wanting to stay in the UK. On 6 October 2019, the appellant made a human rights claim for leave to remain in the UK on the basis of his family life with his partner Darren McGonigle. Although the claim was refused by the respondent for reasons set out in a decision dated 17 June 2019 ("the Refusal Letter"), the respondent accepted the claim amounted to a fresh claim giving rise to a right of appeal.

4. The appellant's appeal was dismissed by First-tier Tribunal Judge Hatton for reasons set out in a decision promulgated on 18 September 2019. Permission to appeal to the Upper Tribunal was granted by First-tier Tribunal Judge Keane on 16 December 2019. Following a hearing on 5 March 2020 , the decision of First-tier Tribunal Judge Hatton was set aside by Deputy Upper Tribunal Judge Chamberlain for reasons set out in her 'error of law' decision promulgated on 26 June 2020. Judge Chamberlain directed that the decision is to be remade in the Upper Tribunal. She noted, at paragraph [6], that the First-tier Tribunal judge made findings in relation to the citizenship of the appellant's partner, namely that the appellant's partner had dual British-South African nationality, and that finding had not been challenged. At paragraph [21], Judge Chamberlain directed:

> "As set out above at [6], the finding that the Appellant's partner has dual South African and British citizenship was not challenged and is preserved."

5. It is against that background that the appeal was listed for a resumed hearing before us to remake the decision. Due to the absence of a consolidated appellant's bundle, significant time was spent on 16 December 2021 ensuring the Tribunal, the representatives and the appellant had all the relevant documents, such that the appeal went part heard that day, and had to be completed on 8 February 2022.

6. The evidence before the Tribunal is set out in the following bundles:

a. The respondent's bundle

b. An appellant's bundle comprising of 324 pages (Bundle 1)

c. An appellant's bundle comprising of 33 pages received by the Tribunal on 28 February 2020 (Bundle 2)

d. An appellant's bundle comprising of 48 pages received by the Tribunal on 21 August 2020 (Bundle 3)

e. An appellant's 'supplementary bundle' comprising of 153 pages received by the Tribunal on 16 December 2021 (Bundle 4)

f. A witness statement signed by the appellant on 12 December 2021.

Remaking the decision

7. The appellant has appealed the respondent's decision to refuse his application for leave to remain, under s.82 of the Nationality, Immigration and Asylum Act 2002 on the ground that the decision is unlawful under s.6 of the Human Rights Act 1998. The appellant must satisfy us on the balance of probabilities that Article 8 ECHR is engaged. If it is, the burden shifts to the respondent to establish that the decision is proportionate.

8. We have had the benefit of hearing oral evidence from the appellant and his partner, Mr McGonigle. For the avoidance of any doubt, in reaching our decision we have had regard to all of the evidence before us whether that evidence is expressly referred to or not.

9. The appellant's relationship with Mr McGonigle is not in issue. It is accepted the relationship is genuine and subsisting. We find the appellant enjoys family life with Mr McGonigle and Article 8 is plainly engaged. We find that the decision to refuse the appellant leave to remain has consequences of such gravity as to engage the operation of Article 8. We accept that the interference is in accordance with the law, and that the interference is necessary to protect the legitimate aim of

immigration control and the economic well-being of the country. The central issue in this appeal is whether the decision to refuse leave to remain is proportionate to the legitimate aim.

The appellant's case

10. The appellant said in his fresh claim that there would be very significant obstacles to his integration into South Africa for several reasons. He states his father has passed away and his relationship with his mother has broken down largely due to her homophobic views. She would not be able to accommodate him because she lives in a small house, and she is caring for her own 89-year-old mother who has dementia. The appellant's sister now lives in Dubai and, he claims, also holds homophobic views such that they no longer speak. He claims that if returned, he would have no partner, no job, nowhere to live and no money. He claims there is high unemployment in South Africa and, due to the government policy of affirmative action, a white middle-aged male has little hope of gaining employment. He also claims Mr McGonigle is a British Citizen and has severe health problems. Mr McGonigle works full time to support them both, but the appellant is Mr McGonigle's full time carer and Mr McGonigle's would not cope without him. He said Mr McGonigle also has family in the UK with whom they are very close. It would tear the family apart if he had to leave. The appellant states he has formed a private life outside his relationship with Mr McGonigle, and has done volunteer work with MIND, Friends of Stowe Nature Reserve, and a charity zoo in Shaldon.

11. In oral evidence before us, the appellant adopted his witness statements dated 20 July 2019 (*Bundle 1, pages 5-13*), 25 February 2020 (*Bundle 2, pages 7-15*), 19 August 2020 (*Bundle 3, pages 8-12*) and 12 December 2021.

12. The appellant told us Mr McGonigle is now on a different type of insulin for which he has two daily injections. He also has a sensor in his arm to

monitor his blood glucose level. Mr McGonigle receives both the injections and monitor on prescription from the NHS. They would be available in South Africa but would cost money. The appellant said that as Mr McGonigle may be considered 'chronic', he would likely not receive insurance benefits for the first twelve months of being a member of any medical insurance, and he might also be rejected from medical aid.

13. The appellant said Mr McGonigle is not currently receiving any help for his alcohol dependence and has remained abstinent, although there was an incident around four months ago when the appellant visited a friend in Devon, and Mr McGonigle relapsed in his absence. The appellant said that Mr McGonigle also needs a shoulder replacement, but there is no planned surgery, and he has not had any treatment for the shoulder injury since he completed physiotherapy in late 2016. Mr McGonigle has also been diagnosed with a 'urethral stricture bulbar obstruction', for which he had a pre-operative assessment on 8 November 2021 and is awaiting surgery.

14. The appellant told us he and Mr McGonigle both suffer from low self-esteem and self-confidence, but neither has any current diagnoses of mental health conditions. We were told they have both received their Covid vaccinations.

15. The appellant said that Mr McGonigle has applied to renounce his South African citizenship. They have not received official confirmation of the renunciation, but Mr McGonigle has recently been unable to access the South African Home Affairs website, whereas the appellant can. The appellant said he assumes that is because Mr McGonigle's renunciation of South African citizenship has been processed and accepted. The appellant said Mr McGonigle had applied for renunciation because they have now been in the UK for ten years, and Mr McGonigle read online that it is illegal for him to have dual citizenship without informing the South African Home Office.

16. When asked why the appellant would not be able to obtain employment in South Africa, the appellant said that one third of the population there is unemployed. There is a diverse and competitive market and he has been out of his industry for 11 years. He said that all but two of his jobs in South Africa were for power tool companies. He has googled 'power tools jobs in South Africa' and there were only two available, both for employment as a sales rep. He said he is now over 50, and the job market in South Africa favours the young. There are jobs available, but it could take some time to get a job, and he might have to take a job below his qualifications and experience that would not pay enough to cover their needs. In the meantime, he claims he would have to contribute £200 towards any form of medical aid, and Mr McGonigle would not receive any benefits for 12 months. They could not afford to pay rent and meet the costs of the specific foods Mr McGonigle needs, his insulin, sensor and needles. The appellant said they would be able to access public healthcare in South Africa, but not to the same standard as in the UK. He confirmed he was made redundant from Dewalt in South Africa, even though the letter from his employers states he left the company to focus on his immigration to the UK at the end of April 2010. He said the letter said this because his employer wanted to provide a good reference and, once he left, he was restricted from working for another power tool company for a year.

17. The appellant said Mr McGonigle would not be able to work in South Africa because he no longer has a South African passport. He would have to apply for a visa, which could take up to a year to obtain, albeit he acknowledged they could apply in advance from the UK. When it was put to him that the objective evidence seemed to show that civil partners/ spouses could be granted visas which would allow them to work, the appellant said *"he has the best position he has ever had in the UK, why should he give that up at this stage for potentially maybe getting a job in South Africa because with his current skills he won't get anything similar, he would get an extremely low paid position in South Africa, he is earning*

more than the average household in UK, he wouldn't earn that kind of money there". The appellant said there is xenophobia in South Africa and Mr McGonigle will be seen as a foreigner because of his accent. It was different previously, as he was his own boss. He said Mr McGonigle has established an 'eBay store' to provide some additional income for them. He buys a pallet of goods from an auctioneer in Birmingham and sells the items. The appellant said Mr McGonigle could not run that or a similar business from South Africa, as they do not have the delivery infrastructure there, and they would be scared of being burgled as the crime rate is high.

18. The appellant accepted he could return to South Africa to apply for entry clearance as a spouse but said he would have to support himself in South Africa, and he has no support available to him given his mother's situation and her homophobic views. He confirmed his grandmother has now passed away and his mother lives alone. The appellant said that his biggest concern would be about the impact of his absence upon Mr McGonigle. He said Mr McGonigle injects himself and does not have a catheter fitted at present. He confirmed his sister, who lives in Dubai, has not expressly stated any homophobic views towards them, but he thinks she holds them.

19. Mr Darren McGonigle gave oral evidence before us remotely on 8 February 2022, having tested positive for covid. Neither party objected to us hearing his evidence remotely. Both the appellant and Mr McGonigle remained in separate rooms when we heard evidence from Mr McGonigle. Mr McGonigle adopted his witness statement dated 20 July 2019 (*Bundle 1, pages 14-19*). His oral evidence before us was largely consistent with his written evidence.

20. Mr McGonigle said that he sees a diabetes nurse every six months and has tests to check his blood sugars. His blood sugar results over the six months are used to determine whether any increase or decrease in his

insulin dose or change to his diet is required. He also has retinol screening every 6 months to see if his eyesight has changed or if any further medication is needed. As regards his current prescriptions, Mr McGonigle confirmed he is prescribed two freestyle libra sensors per month; a daily dose of 40mg of omeprazole; novorapid flexpen 100 units solution for injection (he takes as two to three injections a day) and five pre-filled pens monthly; hypodermic insulin needles 100 at a time, and Tresiba flex touch (a long-lasting insulin which he takes as one injection a day). The libra sensors are placed on his arm and measure his blood sugar readings in real time. He said the sensors are expensive and only those that meet the relevant criteria qualify for them on the NHS. He had poor control of his blood sugar in the past. He fits the sensors himself and uses his phone to track the readings. It is possible to set his phone to sound an alert if his blood sugar drops. He was unsure whether an alert can be sent to someone else. He said the alternative to the sensor would be to do 'finger-prick tests' each time he wished to check his blood sugar level. At the moment, the sensor provides about ten readings a day and if that were not available, he would have to have about ten finger-prick tests. That would be messy and painful. Mr McGonigle assumes the sensors would be available privately in South Africa but doubted they would be available in a public state hospital.

21. As regards his shoulder, Mr McGonigle said that he has had three operations and has had a plate inserted. He has been advised that if he starts having a lot of pain, he may require surgery. He said that he has now had some pain for about three years. He takes painkillers but puts up with the pain because it is a major operation, and he would rather take the pain, than take time off on sick pay as he is working to support himself and the appellant. There is therefore no planned surgery at the moment.

22. As regards the 'urethral stricture bulbar obstruction' (a blockage in the tube leading from his bladder that enables urination), Mr McGonigle

explained this occurred following a catheter being inserted as part of emergency treatment to remedy a rupture in his gullet around eighteen months ago. He is on a waiting list for a gastroscopy to check that the staple to his gullet will last. He is also on a waiting list (classed as urgent) for an operation to clear the urethral obstruction, and he had a pre-operative consultation for this in November 2021. He has not received a date for the surgery.

23. When asked about his mental health, Mr McGonigle referred to his alcohol dependence and said he has been sober for one year and eight months. As to what has assisted him in his abstinence, he initially referred to attending various residential rehabilitation centres and support groups. He then referred to the appellant, who was also previously an alcoholic, but who had stopped drinking. Mr McGonigle said the appellant's abstinence had inspired him to remain abstinent as well. He said alcoholics are always looking for an excuse to drink and if the appellant were not there, that would be a trigger for him to commence drinking again. He said it does not get easier; tomorrow will be as hard as the day he stopped and so on.

24. Mr McGonigle confirmed he is a British Citizen and said he previously also had South African citizenship. During the course of this appeal, he noticed his South African passport had expired in 2016, and he understood from something he read on a website that if you did not inform the South African authorities that you wished to retain your citizenship, you could be breaking the law. That is why he applied online to renounce his South African citizenship. He said that he did not apply to renew his South African passport because he has no intention of going back because there is nothing in South Africa for him. He could not recall whether he has received a response to his application for renunciation, but said that when they entered his expired passport details into a South African website, it said it was not a recognised passport ID number. However, when he put in the appellant's passport details (which passport

had not yet expired), he could access the website. He accepted there is nothing in the papers before us to demonstrate that the South African authorities have accepted or approved his application for renunciation of citizenship, or that his citizenship was time limited in any way or subject to any conditions. He said he would not have applied to renounce his South African citizenship if he had he not read somewhere that he may be breaking the law. He tried to contact the South African authorities before applying in order to check the situation, but it was impossible to get through. He has not made any enquiries to establish whether it may be possible for him to acquire South African citizenship again if the renunciation has been given effect.

25. Mr McGonigle was asked about the possibility of the appellant returning to South Africa to make an application for entry clearance so that he can return to the UK lawfully. He said that is a possibility he is aware of, but his understanding is that an application would be unsuccessful because the appellant would be banned from re-entering the UK for a year. In any event, they would need to pay for everything associated with the application and the appellant would have to find somewhere to live, and a job so that the costs can be met. When it was pointed out that there would be no ban on re-entry in the circumstances, he said the issue would be money; they would need to pay for two homes, and two food bills. He said it would all probably take several months if not years to deal with, and in the meantime, the absence of the appellant could act as a trigger for him to turn to drink. He confirmed he has not looked into visa waiting times for applications for entry clearance made in South Africa.

26. Mr McGonigle confirmed he has received financial support from his family for the last twelve years, but less in the way of emotional support. His mother and father live around six miles away, and his sister was in Nuneaton. He is in contact with them every couple of days.

Submissions

27. The parties' submissions are a matter of record and there is little to be gained by us setting out the submissions at length in this decision. Broadly stated, Mr Bates relied on the Refusal Letter. He submits the requirements set out in the immigration rules are not met and the refusal of leave to remain is not disproportionate. Mr Bates submits there is insufficient evidence before us to establish that on balance, Mr McGonigle's South African citizenship has been renounced. He submits there is nothing preventing the appellant and Mr McGonigle returning to South Africa together, and that background material establishes that they each would be better placed than most to find employment. Mr Bates submits the appellant could take advantage of the 'voluntary returns scheme' as a potential source of short-term financial support, and in any event, they could liquidate their assets in the UK to fund the move to South Africa. They had previously liquated their assets in South Africa to live in the UK. Mr Bates submits the appellant has failed to establish that on balance, any medical treatment required by Mr McGonigle is unavailable or inaccessible. There is no reason to assume an entry clearance application made from South Africa would be unsuccessful, provided the appellant ensures that the required evidence is available to demonstrate that the requirements set out in the Immigration Rules are met.

28. Ms Bachu relied on her skeleton argument. In terms of the couple returning to South Africa together, she submits certain conditions need to be met for a spousal/partner visa to be granted to Mr McGonigle, including a requirement to show good health. She submits that is a requirement that Mr McGonigle would not be able to meet. He would also be considered a foreigner, which would pose problems in the employment market which is more favourable to South African citizens. She submits the evidence of Mr McGonigle's renunciation of citizenship should be accepted. As regards Mr McGonigle's medical conditions, she

accepts there is no summary or medical report outlining the medical conditions diagnosed and treatment currently being received, but she submits, the GP records provided are consistent with the oral evidence. As regards the obstacles to family life continuing outside the UK, she referred to the factors mentioned by the appellant and Mr McGonigle in their evidence and said the South African government's policy of affirmative action had not been considered by the respondent. She said the evidence speaks for itself. There would be a detrimental impact upon the appellant and Mr McGonigle whether they return together, or are separated, even if temporarily, in order for an entry clearance application to be made.

29. In her skeleton argument Miss Bachu identifies the matters in issue in the following way:

a. Whether the appellant meets the Immigration Rules at paragraph EX.1(b) namely, that there are insurmountable obstacles to the appellant and his partner continuing family life outside the UK

b. Whether there are very significant obstacles to the appellant's integration for the purposes of paragraph 276ADE(1)(vi) of the Immigration Rules (private life considerations)

c. Whether there are exceptional circumstances with reference to exceptionality under GEN.3.1 and 3.2 such that refusal would amount to a disproportionate breach of article 8 ECHR; and

d. Whether by reference to the COVID 19 pandemic and/or by reason of any other compelling and/or compassionate circumstances, applying either GEN.3.2 under the Immigration Rules and/or article 8 ECHR outside the Rules, refusal of leave would result in unjustifiably harsh consequences amounting to a disproportionate breach of the appellant and his family's article 8 rights.

e. In considering these matters whether, taking into account the further evidence at pages 5-10 SB, it is accepted that the appellant's partner has renounced his South African nationality.

30. There is some overlap in the issues identified and rather than address each of the issues set out individually, we have considered the evidence as a whole to determine whether the decision to refuse leave to remain is proportionate to the legitimate aim. In our judgement a useful starting point for our consideration is whether the requirements of the immigration rules are met. In a human rights appeal, although the appellant's ability to satisfy the immigration rules is not the question to be determined, it is capable of being a weighty factor when deciding whether the refusal is proportionate to the legitimate aim of enforcing immigration control. As set out by the Court of Appeal in TZ (Pakistan) [2018] EWCA Civ 1109, compliance with the immigration rules would usually mean that there is nothing on the respondent's side of the scales to show that the refusal of the claim could be justified. At paragraphs [32] to [34], the Senior President of Tribunals confirmed that where a person meets the rules, the human rights appeal must succeed because 'considerable weight' must be given to the respondent's policy as set out in the rules. Conversely, if the rules are not met, although not determinative, that is a factor which strengthens the weight to be attached to the public interest in maintaining immigration control.

Findings and conclusions

The Immigration Rules

31. As we have set out, Judge Perkins found in his decision promulgated on 25 November 2013 that the immigration rules were not met because the English language requirement had not been met. It is uncontroversial that, even now, the English language requirement set out in Appendix FM of the immigration rules is not met. The appellant does not claim to be

exempt from the requirement and relies upon paragraph EX.1 of Appendix FM.

> "Section EX: Exceptions to certain eligibility requirements for leave to remain as a partner or parentEX.1 Appendix FM
>
> EX.1. This paragraph applies if
>
> …
>
> (b) the applicant has a genuine and subsisting relationship with a partner who is in the UK and is a British Citizen, settled in the UK, or in the UK with refugee leave, or humanitarian protection, in the UK with limited leave under Appendix EU in accordance with paragraph GEN.1.3.(d), or in the UK with limited leave as a worker or business person under Appendix ECAA Extension of Stay in accordance with paragraph GEN.1.3.(e), and there are insurmountable obstacles to family life with that partner continuing outside the UK.
>
> EX.2. For the purposes of paragraph EX.1.(b) "insurmountable obstacles" means the very significant difficulties which would be faced by the applicant or their partner in continuing their family life together outside the UK and which could not be overcome or would entail very serious hardship for the applicant or their partner."

32. The question is therefore whether there are insurmountable obstacles to the appellant's family life with Mr McGonigle continuing outside the UK. To that end, "*insurmountable obstacles*" means the very significant difficulties which would be faced by the appellant and Mr McGonigle in continuing their family life together outside the UK, and which could not be overcome or would entail very serious hardship for the appellant and Mr McGonigle. Ms Bachu submits there are such obstacles.

33. Although we find the appellant and his partner have remained broadly consistent in the evidence they have given, we find the appellant has exaggerated his claims and having considered their evidence as a whole, we do not accept that there are insurmountable obstacles to family life between the appellant and Mr McGonigle continuing outside the UK.

34. The appellant and Mr McGonigle met in September 1999 when they were both living in South Africa. They entered into a civil partnership on 26 June 2006 in Pretoria. At the time, they were living together at an address in Johannesburg. The appellant is a citizen of South Africa and

Mr McGonigle has previously lived in South Africa for a number of years where he was previously part-owner of a pub. Mr McGonigle has held South African citizenship in the past and we consider below the evidence before us regarding the renunciation of the citizenship. On any view, we find both the appellant and Mr McGonigle are plainly familiar with life in South Africa generally, its customs and cultures.

35. The appellant claims in his statements that they would have no accommodation or support network in South Africa as his father has passed away, and his relationship with his mother has broken down. In his oral evidence the appellant confirmed his grandmother has passed away so that his mother now lives on her own. We note there is a letter from the appellant's sister, Juanita Dohne, dated 8 August 2019 confirming that the appellant's relationship with his mother broke down after their father passed away in 2010, and that although the appellant's mother was fond of Mr McGonigle, she could not accept their same sex relationship. We accept, on balance, that the appellant's mother would be unlikely to allow the appellant and Mr McGonigle to stay with her, such that they would need to find alternative accommodation and that they would not be able to look to her for financial or other support. However, we do not accept the appellant and Mr McGonigle would not be able to secure employment. As reasoned below, we find they could both likely obtain employment and they would, therefore, have sufficient means to support themselves and secure adequate accommodation. They both have relevant skills and were able to live in South Africa previously, independently of the appellant's mother.

36. The appellant and Mr McGonigle both claim they would be unable to find employment in South Africa. They both claim they have been out of the country for several years and retain little of the knowledge and skills relevant to their previous work in South Africa. They claim that a government policy of 'affirmative action' would work against them as white middle-aged males, and that Mr McGonigle will be perceived as

'foreign'. Alternatively, they claim they may be able to find employment, but that it would be low paid, or pay less than the amount Mr McGonigle currently earns in the UK.

37. The appellant has two degrees from South Africa; one in Marketing Management and the other in Business Administration (information science). His witness statement details how he and Mr McGonigle previously invested in a 'Scooters pizza' franchise which opened in South Africa in 2008, but which later failed for a number of reasons including crime, the financial crisis and Mr McGonigle's mental health. The appellant's evidence is that he was employed but made redundant by a company which sold power tools, because he was in charge of the 'Dewalt' tool brand, and his employers lost the rights to distribute the brand. He claims he was unable work in a similar position for a year afterwards, due to a restrictive trade clause.

38. We note the letter from the appellant's previous employer dated 28 May 2010 does not refer to redundancy, but states that the appellant *"left the company to focus on his immigration to the UK as at the end of April 2010".* The appellant said that the explanation set out in the letter was because of the company's desire to give him a good reference. We reject the appellant's explanation. If, as the appellant claims, he was made redundant, there is no reason why his employers should not say so. It is perfectly possible for an employer to confirm a redundancy and provide a good reference by setting out the skills and abilities of the employee. The letter provided by the employer speaks of the appellant's skills and abilities and the author of the letter, the Managing Director, states he is extremely sorry to see the appellant go. The letter makes no reference to the appellant being prevented from taking up similar employment for a period of twelve months. We find that the appellant left his employment to focus upon his emigration to the UK. He arrived in the UK in July 2010 shortly after his employment ended. It is in our judgement more likely that the appellant and Mr McGonigle had decided to leave South Africa

and to continue their life together in the UK, and that is what prompted the appellant to end his employment.

39. In his evidence before us the appellant said that he had 'googled power-tools jobs' in South Africa and there were only two available, both for sales reps. He said there are jobs available, but it could take some time to get a job and he might have to take a job in a less qualified position which would not pay enough to cover their needs. The appellant has provided a copy of his CV *(Bundle 1, page 25)* in which he lists several jobs that he has had in the UK between October 2010 and November 2013, including work as a bar manager, barman, cook, shop manager, system maintenance, waiter and lifeguard. We find that he is an individual who has qualifications and a broad range of skills that he would be able to utilise upon return to South Africa. The enquiries made by the appellant regarding employment available in South Africa appear to be limited. There is no evidence before us that the appellant would be unable to utilise the qualifications, skills and experience that he has, to secure suitable employment is South Africa. His CV demonstrates that since his arrival in the UK, he is an individual that is prepared to take up whatever work he can to support himself.

40. Mr McGonigle's evidence as to why he would not be able to work on return to South Africa is less clear. We find that Mr McGonigle too has abroad range of skills and experience, that he will be able to call upon in his search for employment in South Africa.

41. Insofar as Mr McGonigle relies upon his lack of immigration status in South Africa, we pause to note that Deputy Upper Tribunal Judge Chamberlain expressly preserved the finding previously made by First-tier Tribunal Judge Hatton in the determination promulgated on 19 September 2019 that Mr McGonigle has dual South African and British citizenship. We have been invited to revisit that finding in view of the evidence of the

appellant and Mr McGonigle that, since that finding was made, Mr McGonigle has renounced his South African citizenship.

42. We accept there is evidence before us that Mr McGonigle has applied to renounce his South African citizenship. A copy of his application is in the papers before us. We do not however accept that the application has been approved or accepted such that Mr McGonigle no longer has South African citizenship. Both the appellant and Mr McGonigle accept there has been no acknowledgement from the South African authorities. We find they have assumed Mr McGonigle no longer has South African citizenship because of an attempt made to access the South African Home Affairs website. Mr McGonigle candidly accepted in his evidence that he had attempted to access the website using an expired South African passport, whereas the appellant had been able to gain access using a current South African passport. We accept, as Mr Bates submits, that it is unsurprising that Mr McGonigle did not receive the same response as the appellant, given the appellant used a South African passport that has expired. We have considered the explanation provided for making the application for renunciation of South African citizenship, but there is no evidence before us to support any of the claims made by the appellant and Mr McGonigle regarding any enquiries they made, or information received, that caused Mr McGonigle to make the application. His evidence before us in this respect was very vague. We find that the application for renunciation was in fact a cynical move to create an obstacle to his returning to South Africa.

43. If he has South African citizenship, there will be nothing preventing Mr McGonigle from working in South Africa and benefiting from everything that that citizenship provides. Even if, as he appears to claim, he no longer has South African citizenship, there is nothing in the evidence before us that establishes that Mr McGonigle would not be able to qualify for the required Visa that would enable him to work in South Africa. He is in a civil partnership with the appellant and could apply on that basis, as

is confirmed by the appellant's evidence and the article 'How to apply for a work permit in south Africa' by Cape Town Magazine dated 23 February 2018 *(Bundle 1, page 257)*, albeit it says the right to work needs to be applied for separately from the visa itself. At the hearing before us, the appellant acknowledged this is possible, albeit he said it would take time and money. A medical certificate might be required, but there is no evidence before us that such a medical certificate would not be available to Mr McGonigle, or that an application would fail on health grounds.

44. As regards the rate of unemployment in South Africa, we accept that objective evidence has been adduced to show that it is high, including a Bloomberg article published on 24 August 2021 (*Bundle 4, pages 150-153*) stating that the jobless rate was 34.% in the second quarter of 2021 and that it was likely to deteriorate further due to the impact of covid and riots in 'economic hubs'. It said, "*South African companies' ability to hire is undermined by an education system that doesn't provide adequate skills, and strict labor laws that making hiring and firing workers onerous*". Mr Bates highlighted, and we accept, that the appellant is highly educated and has skills and experience such that he would find himself in a more advantageous position to those who do not have adequate skills. The article 'Why is South Africa's unemployment rate so high?' from 14 February 2019 (*Bundle 1, pages 287-288*) also confirms that highly skilled people are more likely to find employment. The respondent's "Country Background Note South Africa Version 2.0 August 2020" ("CPIN") states that '*Economic growth has decelerated in recent years, slowing to an estimated 0.7% in 2017...Official unemployment is roughly 27% of the workforce, and runs significantly higher among black youth*." The article 'unemployment rates 'from www.stssa.gov.za adduced by the appellant (*Bundle 1, page 296)* states that "the most affected persons were women and youth' which again does not apply to the appellant and Mr McGonigle. Mr Bates also pointed to a graph in the article showing how the unemployment rate has changed between 1999 and 2020. The appellant and Mr McGonigle left

South Africa in 2010, when the unemployment rate was 23.53-24.68%. In 2020 it was 28.47%. Mr Bates asserted that the rate in 2020 was comparable to the rate in 2005, and that the worst rate on the graph is 33.47% in 2002-2003, at a time when the appellant and Mr McGonigle were both in South Africa and working.

45. The document entitled 'Master start south African workforce barometer' (*Bundle 1, pages 273-286*) gives statistics about the employment market based on surveys of what 1041 people think and perceive about the job environment. More than 80% of the sample believed the job environment was tougher in July 2018 than 10 years ago, and age was cited most often as a barrier to future employment. However, we attach little weigh to the conclusions set out in a document produced, as it is, by a company providing online learning solutions prompting people to 'futureproof' their skills by studying.

46. We have considered the concerns raised by the appellant and Mr McGonigle regarding the government's policy of affirmative action. The article 'Affirmative action in South Africa must be ended immediately' dated 25 February 2019 (*Bundle 1, pages 266-269*) calls for an end to a policy of preferential treatment of one race group over another. There is also before us an article from Cape Town magazine entitled 'Updated South African Immigration Regulation' dated 10 June 2019 (*Bundle 1, page 292-295*) which refers to applications for a general work visa needing to include a certificate from the Department of Labour confirming that "*despite a thorough search, the prospective employer could not find a South African employee with the skills and experience equivalent to those of the applicant".* However, this refers to all South Africans and not just non-white South Africans.

47. The CPIN states at 19.2.1 that *"Based on a variety of sources, the Immigration and Refugee Board of Canada (IRBC) noted in September 2018: 'Sources indicate that white South Africans do not face any specific*

challenges or threats in society, "for example, in terms of access to employment, education, health or housing". In correspondence with the Research Directorate, the Vice-Chancellor of Witwatersrand University in Johannesburg, who is also a political science professor, explained that 'In terms of accessing public health care and public education, white South Africans face the same issues that black South Africans do. However, black South Africans are burdened more because of their access to resources. For example, black South Africans do not have the same resources as white South Africans to buy private health care... correspondence with the Research Directorate, a representative from AfriForum, a non-governmental "Afrikaner interest organisation and civil rights watchdog" that aims to "protec[t] the rights of minorities" (AfriForum n.d.), stated that there is "[n]o legislation...that specifically discriminates against white South Africans" in terms of health care (AfriForum 7 Sept. 2018).

48. Overall, whilst there may be anecdotal evidence of a policy of affirmative action affecting the treatment of white people, we are not satisfied, on balance, that such a policy would impact upon the ability of the appellant and Mr McGonigle to secure employment with all the qualifications, skills and experience they have. They were able to secure employment and enjoy an income when they lived in South Africa previously. We are satisfied that even as white, middle-aged males, their chances of securing employment are higher than most, because of their educational qualifications and previous employment experience.

49. There is no doubt in our minds that the appellant and Mr McGonigle share a close and supportive relationship with Mr McGonigle's family. They have stepped in, in the past, and provided some, albeit limited, financial support. Mr McGonigle confirmed at the hearing that his family had supported him financially for twelve years and we note there is reference in the appellant's witness statement from July 2019 that Mr McGonigle's father bought them a car to help Mr McGonigle get to work. Given the

nature of that relationship, we find that Mr McGonigle's' family would be prepared to provide some financial support and, on balance, will do what they can to assist the appellant and Mr McGonigle, particularly in the short term, whilst they secure employment in South Africa.

50. We have also had regard to the evidence before us regarding the health of the appellant and Mr McGonigle and whether that, individually or cumulatively, may amount to an insurmountable obstacle to family life continuing outside the UK.

51. The appellant's evidence is that he struggles with low self-esteem and confidence. He confirmed he is not receiving any medication or treatment. We find the appellant has no diagnosed physical or mental health conditions for which he is receiving on-going treatment that would not be available to him in South Africa. He confirmed as much at the hearing. Although we accept that the appellant's immigration status and his inability to work in the UK, and to make a meaningful contribution, is likely to have contributed to his low self-esteem and self-confidence, there is nothing in the evidence before us that even begins to establish that the appellant's mental health would prevent him living a fruitful and meaningful life in South Africa. It is the country of his nationality and a country in which there would be nothing to prevent him from accessing everything available to its citizens. We find the appellant's physical and mental health would not have an impact on his ability to continue family life outside the UK.

52. As regards Mr McGonigle, it is regrettable that there is no overall summary or report concerning his health from a suitable expert. Instead, we have been provided with voluminous GP and other records which have not been referenced in the witness statements and which we are not medically qualified to properly decipher. We have however carefully considered the records before us. Some of the records have been

redacted and the reasons for the redactions or what has been redacted have not been explained.

53. After hearing the evidence of Mr McGonigle, we invited Ms Bachu to draw our attention to the medical evidence and outline to us the current conditions for which Mr McGonigle is receiving ongoing treatment and the medication that he is currently prescribed. She invited us to seek clarification from Mr McGonigle himself and we took that opportunity. Mr McGonigle confirmed that he continues to have regular check ups for his diabetes and that he underwent a 'Pre-op assessment' in November 2021 for a surgical procedure for which he is awaiting an appointment. By reference to the GP records, Mr McGonigle confirmed he receives the following repeat prescriptions:

i) Two Free Style Libre 2 sensor kits are prescribed each month

ii) 28 Omeprazole 40mg capsules (one to be taken daily) are prescribed each month

iii) Five pre-filled NovoRapid Flex Pens are prescribed monthly

iv) 100 TriCare hypodermic needles are prescribed as required

v) Eight Tresiba FlexTouch pre-filled disposable injections are prescribed as required

54. On balance, we accept Mr McGonigle has been diagnosed with, and is being treated for, diabetes and that he requires both regular medication and check-ups as he described. We have before us an undated letter from University Hospitals, Coventry and Warwickshire NHS Trust *(Bundle 4, page 54)* stating that *"Your patient was seen on 28/1/2021 whilst attending the Diabetes Department for assessment for suitability for continuation of Freestyle Libre Flash Glucose monitoring system. It has been assessed that they are achieving sustained benefit in one or more of the following criteria and therefore qualify for ongoing NHS funding..."* A box is then ticked for "*People with T1DM for whom the specialist*

diabetes MDT determines have occupational (e.g. working in insufficiently hygienic conditions to safely facilitate finger-prick testing)". There is also another letter from the same source, again undated *(Bundle 4, page 56)* , stating "*We would like to bring to your attention that the 'Freestyle Libre 2 flash glucose monitoring system' is now available on the NHS BSA Dug Tariff. From 1 January 2021, all new users will be provided with the FreeStyle Libre 2 system. There is no change to the tariff or cost impact of making this change. All existing users will also be upgraded over the company months".* That second letter appears to suggest that no specific criteria now need to be met and the 'sensor' may now be more widely available. It is entirely understandable that Mr McGonigle's current working environment is such that it would not be a suitable environment for regular fingerprick testing. That is not to say that all work environments would pose insufficiently hygienic conditions, to facilitate fingerprick testing. We accept fingerprick testing can be uncomfortable, but as Mr McGonigle acknowledges, it is an alternative to the Freestyle Libre Flash Glucose sensor, if that were unavailable in South Africa. There is nothing in the medical evidence before us that establishes that the unavailability of the sensor would have a significant impact upon Mr McGonigle's health. We accept the evidence of the appellant that a sensor is preferable in the sense that it provides an early, real-time indication of any change in blood sugar levels, but there is nothing in the evidence before us that indicates that Mr McGonigle's life would be at risk or impaired without the sensor. The sensor might well the optimal device, but many who suffer from diabetes monitor their blood sugar levels by fingerprick testing.

55. We accept Mr McGonigle has had a shoulder injury in the past for which he has had surgery. We accept that he experiences some on-going pain, but not to the extent that it prevents him working or requires further treatment at present.

56. We accept Mr McGonigle received emergency treatment for internal bleeding on 3 July 2020 and that this gave rise to a condition affecting his urethra. There is a patient case report from West Midlands Ambulance Service confirming they attended him on 3 July 2020 for gastrointestinal symptoms (*Bundle 4, page 78*). There is also an Inpatient Discharge Summary (*Bundle 3, page 15*) confirming he was discharged on 8 July 2020 stating that "*He was treated for DKA and investigated with an OGD showing haematemesis secondary to mallory-weiss tear with 1 clip being placed...we recommend repeat blood tests in 1 week to ensure they continue to resolve along with a blood test in 4 weeks to monitor Hb*". No further follow up recommendations are stated, save that he be referred to the community diabetes nurse. Entries in the GP records of a telephone consultation by Dr Sahota of Forum Health Centre on 21 April 2021 (*Bundle 4, page 15*) and a previous entry by Dr Farmah on 26 February 2021 (*Bundle 4, page 16*) appear to be consistent with the evidence of Mr McGonigle that damage was caused to his urethra by a catheter being inserted during the emergency treatment he received previously. We have in the evidence before us a letter dated 28 September 2021 (*Bundle 4, pages 41-42*) from a Mrs Shreeve of University Hospitals, Coventry and Warwickshire NHS Trust which states that *"I have arranged a flexible cystoscopy to see if he has indeed got a stricture and then he will be reviewed following this in clinic in two months' time*". We note there is later an inpatient discharge summary dated 20 October 2021 from University Hospitals, Coventry and Warwickshire NHS Trust which states he was discharged from day surgery that day, following a flexible cystoscopy, that a bulabra stricture had been found, and that no follow up was required, and no medications were prescribed.

57. Mr McGonigle said in his evidence before us that he is on a waiting list for the blockage to be cleared, and that he had a pre-operative assessment for this on 8 November 2021. We note there is a letter dated 1 November 2021 (*Bundle 4, page 100*) addressed to him providing an appointment

for a pre-operative assessment on 8 November 2021 but the letter does not state what operation is contemplated or identify what condition or department it relates to. There is also a letter dated 28 September 2021 (*Bundle 4, page 101*) making an appointment with the urology nurse virtual clinic on 30 November 2021. The medical evidence before us is unsatisfactory and whilst we accept that Mr McGonigle underwent some 'Pre-Op assessment' on 8 November 2021, we have been unable to gain any further assistance regarding the surgery that is planned, what it is for, what is involved, and the likely impact of that surgery upon Mr McGonigle in the short, medium or long term. The date upon which the surgery will be carried out is not known. Doing the best we can, we find that although Mr McGonigle requires surgery that may require a period of recouperation, the impact of that surgery is not such that it amounts to an insurmountable obstacle to family life continuing outside the UK. Whether or not the appellant is in the UK, we find Mr McGonigle will be able to have his surgery and in the fullness of time, will be able to join the appellant in South Africa.

58. We accept there are several references to alcohol abuse in Mr McGonigle's medical records. In his evidence before us, which we accept, he confirmed he is currently abstinent and not undergoing any treatment. His evidence is that being apart from the appellant could operate as a 'trigger' for him to recommence drinking. That however, is not an insurmountable obstacle to family between the appellant and Mr McGonigle continuing outside the UK, since, presumably, they would both live together in South Africa.

59. In reaching our decision we have also had regard to the appellant's claim that he would not be able to afford private healthcare without having a well-paid job. He states that public healthcare in South Africa, although available, is sub-standard and would not be able to meet his partner's needs. We have already found that the appellant and Mr McGonigle are

likely to be able to find employment such that we find, on balance, they will be able to afford medical insurance.

60. We note the appellant's witness statement of 30 July 2019 states that Mr McGonigle was admitted to a private hospital in South Africa in July 2007 when he suffered from acute pancreatitis; the appellant said a lot of spare funds were spent on Mr McGonigle's medications and ongoing treatment. His insurance contributed to some of the medical costs and without that insurance, he would have died. There is little evidence before us of the costs of medical insurance in South Africa. As regards the objective evidence relied upon, we note as follows:

a. The article 'poor health public services in south Africa' dated 29 June 2018 (*Bundle 1 pages 238-240*) makes general comment as to the poor sate of South Africa's health care system without any specific detail as to the healthcare available, whether public or private, and the cost.

b. The article 'medical aid waiting periods' (*Bundle 1, page 241)* confirms that "*If you have not been a member of a South African medical scheme for the past 90 days or longer, you are seen as a new entrant to the market, and a scheme could impose a 3-month general waiting period, as well as 12-month exclusions on pre-existing conditions. During the waiting period you will have no cover at all – not even for emergencies. Should a scheme cover emergency care during this time, it is a concession made by the scheme, and not a legal requirement".* We accept this is consistent with the evidence of the appellant of a potential waiting period before he or Mr McGonigle could join a scheme.

c. The article 'Poor state of Public hospitals in South Africa' (*Bundle 1, pages 242-244*) dated 10 June 2018 and 'Healthcare in South Africa' (undated) (*Bundle 1, pages 252-256*) from Allianzcare.com confirm that public healthcare is available but that waiting times for treatment can be long and standards of care, cleanliness and

staffing can vary. The second article states that "*The South African constitution guarantees healthcare to all, and as a result public hospitals operate on a sliding scale, meaning that low-income and unemployed individuals only pay a small fee for consultations and medications. However, expats will likely be in an income bracket well above this and will therefore be able to pay for healthcare costs out of pocket, even at public hospitals*". These articles are somewhat dated and so general as to be of little assistance. We note there is a table in the second article showing the cost of medical scheme contributions, but as we have no evidence about potential earnings, this is of little assistance.

d. The CPIN states at 9.1.1 that "The African Institute for Health and Leadership Development (AIHLD) report, Minimum Data Sets for Human Resources for Health and the Surgical Workforce in South Africa's Health System, published in 2015, stated:

> *The health system comprises the public sector (run by the government) and the private sector. The public health services are divided into primary, secondary and tertiary through health facilities that are located in and managed by the provincial departments of health. The provincial departments are thus the direct employers of the health workforce while the National Ministry of Health is responsible for policy development and coordination.*
>
> *'South Africa's Constitution guarantees every citizen access to health services (section 27 of the Bill of Rights). However, everyone can access both public and private health services, with access to private health services depending on an individual's ability to pay. The private health sector provides health services through individual practitioners who run private surgeries or through private hospitals, which tend to be located in urban areas...The majority of patients access health services through the public sector District Health System, which is the preferred government mechanism for health provision within a primary health care approach. The private sector serves 16% of the population while the public sector serves 84%...*

e. Paragraphs 9.1.2-9.1.3 of the CPIN go on to detail how "*the remaining 84% of the population to crowd into government hospitals and clinics beset by underfunding, broken equipment, and personnel shortages*" and "*South Africa has a very high standard of private medical care, comparable with the UK. Private health care can be expensive...Public medical care varies across*

South Africa, and standards of treatment and hygiene may not be the same as you would expect in the UK".

61. Although there are criticisms regarding healthcare provision in South Africa, we find the background material establishes that public healthcare is available to all, even without insurance. We do not accept the appellant's broad assertion that they would be left in South Africa without any healthcare whilst waiting to join an insurance scheme. On the evidence before us, we find that public healthcare would be available and accessible immediately upon return to South Africa and the appellant has failed to establish, on balance, that such healthcare as is available would not include adequate treatment of Mr McGonigle's conditions. Even if public healthcare would not be adequate, we find that he could afford to access private healthcare by means of employment and/or the assistance that would be available to Mr McGonigle from his family.

62. Although the appellant claims they would face discrimination or ill treatment in South Africa due to their sexuality, we do not accept that to be the position. The appellant has adduced background material in the form of an article 'South African gay couple abused and told to stay naked by police in horrific viral video' dated 8 February 2018 (*Bundle 1, pages 308-310*), which discusses one incident where a gay couple were found in the middle of a sexual encounter in a car in Pietermaritzburg and were filmed and verbally abused by the police and others. As a single incident, and one which involved an arguably uncommon set of circumstances (sexual conduct in open view in a car), it cannot be taken as evidence representing treatment of all gay people in South Africa. The other article 'Gay hate crime in South Africa' (*Bundle 1, pages 322-324*) confirms that same-sex marriage was legalised in 2017 but that discrimination still exists, particularly for gay women. The appellant gains no assistance from that article.

63. The CPIN states at 16.1.1 that "*Same-sex sexual activity between men was prohibited until 1994, when the age of sexual consent was set at 19 for all same-sex sexual activity, regardless of gender. In May 1996, South Africa became the first country in the world to provide constitutional protection to LGBT people, by making discrimination on race, gender, sexual orientation and other grounds, illegal. In 2006, same-sex marriage became legalised*". It also states at 16.3.1 that "*The Amnesty International Report 2017/18 stated: 'LGBTI people continued to face harassment, discrimination and violence*" before going on to describe several incidents featuring gay women.

64. Standing back and looking at the evidence before us holistically, individually and cumulatively, we are not satisfied that the appellant has established that there are insurmountable obstacles to family life continuing outside the UK. We are not satisfied that the appellant has established any very significant difficulties which would be faced by him and Mr McGonigle and which could not be overcome or would entail very serious hardship for the appellant or Mr McGonigle. It follows that in our judgement the exceptions set out in Section EX.1 of Appendix FM are not met.

65. We turn then to the requirements for leave to remain on private life grounds set out in paragraph 276ADE(1)(vi) of the Immigration Rules. We have considered whether there would be very significant obstacles to the appellant integrating into South Africa. The test to be applied under paragraph 276ADE is set out in Kamara [2016] EWCA Civ 813 i.e. that: *"the idea of "integration" calls for a broad evaluative judgment to be made as to whether the individual will be enough of an insider in terms of understanding how life in the society in that other country is carried on and a capacity to participate in it, so as to have a reasonable opportunity to be accepted there, to be able to operate on a day-to-day basis in that society and to build up within a reasonable time a variety of human relationships to give substance to the individual's private or family life"*

66. The appellant was born on 17 June 1971 and arrived in the UK in July 2010 when he was thirty-nine years old. He has lived here for eleven years. He says he would face significant obstacles to integration on return to South Africa for the same reasons that he said paragraph EX.1 was fulfilled, but in addition, relies in particular on the impact of having to leave Mr McGonigle behind.

67. We refer to our findings above regarding section EX.1 of Appendix FM, and there is nothing to be gained by repeating the findings that we have already made regarding the claims advanced by the appellant.

68. The appellant has at least his mother in South Africa, albeit we have found that his relationship with her has broken down. He has lived and worked in South Africa for the majority of his life. We have found he would not face significant obstacles to finding employment or accommodation, or in accessing healthcare, which we have found to be available. He speaks English which is an official language of South Africa and is highly educated, having obtained two university degrees there. He has acquired further work experience in the UK as well as experience volunteering for several organisations, so he is theoretically in a better position to find work in terms of the breadth of his experience at least. We accept that he does not currently work in the UK and is financially reliant upon his partner such that his partner would likely need to help fund the appellant's return to South Africa, his short-term accommodation, and essential needs pending employment being secured. We have found that Mr McGonigle's family has supported the couple financially in the UK, and there is nothing before us to suggest that this support would not extend to supporting the appellant were he to return alone. He could also, as Mr Bates submits, make use of the voluntary assisted returns scheme.

69. The appellant said he would struggle to reintegrate due to being separated from his partner. We have already found that there are no

insurmountable obstacles to their family life continuing outside the UK and it will be open to Mr McGonigle to join the appellant in South Africa so that they can continue their family life together. There is no medical or other evidence before us to show the appellant would be so badly affected by any separation, either in the short, medium or long term, such that his health would suffer or he would be unable to cope. He says his partner would not be able to cope, but the impact on his partner is not the question for the purposes of 276ADE(1)(vi). Appreciating it is not the same as face-to-face contact, they could remain in contact via phone and other types of electronic communication in order to provide each other with support. If Mr McGonigle is unable to join the appellant in South Africa immediately, the appellant will have the reassurance that Mr McGonigle has a loving and supportive family available to him in the UK.

70. Although the appellant may face some difficulties in settling back into life in South Africa, we find that would be short lived, while he settles back in and secures employment and accommodation. We do not consider any of these difficulties to be such that they amount to very significant obstacles to the appellant's integration. We therefore find on the balance of probabilities that there would not be very significant obstacles to the appellant integrating into South Africa, and the requirements of 276ADE (vi) are not met.

71. We have considered Appendix FM GEN.3.2 and whether there are exceptional circumstances which would render refusal of entry clearance a breach of Article 8 because such refusal would result in unjustifiably harsh consequences for the appellant and Mr McGonigle.

72. As regards any risks posed by the pandemic, both the appellant and Mr McGonigle confirmed they have received their two vaccinations and booster shots. They are therefore as protected as they can be from the virus and are in the same position in South Africa as in the UK in this regard. Whilst we note the foreign travel advice referred to in Ms Bachu's

skeleton argument as of 7 December 2021 was that non-essential travel was not recommended, she acknowledges that the situation is fluid and ever changing.

73. We have had regard to the letters before us of the relationship between the appellant and members of Mr McGonigle's family that are at pages 216 to 227 of Bundle 1. The letters speak warmly of the appellant, his relationship with Mr McGonigle, and the support the appellant has provided. The authors of the letters are clearly fond of the appellant and although the refusal of leave to remain will impact upon the appellant's ability to see them as often as they might like, we are not satisfied that the refusal of leave to remain results in unjustifiably harsh consequences for the appellant, Mr McGonigle and the wider family. Indeed we note that Mr McGonigle's sister lives in the UAE but is able to maintain a good relationship with the appellant and Mr McGonigle. The family demonstrated its ability to provide support and maintain their close relationships when the appellant and Mr McGonigle lived in South Africa previously, despite the distance.

74. It follows that in our judgment, the appellant cannot meet the requirements of the Immigration Rules.

Whether refusal of leave to remain is nevertheless disproportionate

75. We have carefully considered whether the decision to refuse the appellant leave to remain is nevertheless disproportionate. The ultimate issue is whether a fair balance has been struck between the individual and public interest; GM (Sri Lanka) v Secretary of State for the Home Department[2019] EWCA Civ 1630. In reaching our decision, we have had regard to the public interest considerations set out in s117B of the Nationality, Immigration and Asylum Act 2002. The maintenance of immigration control is in the public interest. The appellant is able to speak the English language and although he is not currently working, he has the qualifications and skills to secure employment. He is in any

event supported by Mr McGonigle. These are however nothing more than neutral factors in our assessment of proportionality.

Balancing exercise

76. The factors that we consider weigh against the appellant are:

a. The maintenance of effective immigration controls is in the public interest. We have found that the appellant does not meet the Immigration Rules. He has remained in the UK unlawfully since he became appeal rights exhausted in December 2013. The amount of time that he has been in the UK without leave far outweighs the time during which he has lived in the UK lawfully. He has made no attempt to remedy his failure to meet the immigration rules, despite knowing what the rules require.

b. Little weight should be given to a private life established by a person at a time when the person is in the UK unlawfully and little weight should be given to a private life established by a person at a time when the person's immigration status is precarious. The appellant has been in the UK unlawfully since 2013, over seven years, and some of his private life in terms of volunteering and the deepening of his connections with friends and his partner's family, have occurred during this time. He arrived in the UK lawfully, but his immigration status has always been precarious.

c. On the findings we have made, it is perfectly possible for the appellant to return to South Africa with Mr McGonigle. It is the country in which they met, entered into a civil partnership and lived for a number of years. It is in the end, a matter of choice whether Mr McGonigle accompanies the appellant were he to have to leave the UK. The appellant and Mr McGonigle may wish to continue their life together in the UK, but Article 8 does not equate to an absolute right to do so in law.

d. The impact of any separation can be reduced by Mr McGonigle visiting the appellant in South Africa and communicating by using technology in the meantime. It is equally open to the appellant to return to South Africa to make an application for entry clearance to the UK as Mr McGonigle's partner. We have no evidence before us regarding application processing times, but were such an application to be successful, any separation would be temporary. On the evidence before us we are unable to conclude that the requirements for entry clearance as a partner are bound to be met, although we do note that Mr McGonigle appears to earning enough to satisfy the minimum income requirements. The English Language requirement would have to be met and any application would need to be supported by sufficient evidence to establish that the requirements set out in Appendix FM and Appendix FM-SE are met.

e. Although the appellant and Mr McGonigle claim separation might be a 'trigger' for Mr McGonigle to relapse and turn to alcohol, Mr McGonigle has a loving and supportive family in the UK that are well placed to provide him with any support required. We acknowledge that Mr McGonigle has not reached out to his family in the past because of what he described as the 'embarrassing nature of the disease', but we have no doubt that they would be available to support him. In any event, the evidence of the appellant and Mr McGonigle is that Mr McGonigle recently relapsed whilst he has had the support of the appellant.

77. The factors that we consider weigh in favour of the appellant:

a. The appellant arrived in the UK lawfully. Although there was a period between 2013 and 2017 when he took no steps to regularise his immigration status, to his credit, he did approach the respondent in 2017 and later made a fresh claim to try and regularise his situation.

b. The appellant formed his relationship with Mr McGonigle before they arrived in the UK rather than whilst the appellant's immigration status was precarious. They have lived together in the UK and their relationship has developed and flourished with the passage of time.

c. Mr McGonigle has a good relationship with his family, who have throughout supported the appellant and Mr McGonigle. A return to South Africa would mean that the appellant, and indeed Mr McGonigle – if they choose to live together in South Africa, would be separated from Mr McGonigle's family.

78. In our final analysis, having considered all the evidence before us in the round, and although we have accepted the refusal of leave to remain will interfere with the appellant's family life and the family life of Mr McGonigle, in our judgement, the interference for the purposes of the maintenance of effective immigration control is proportionate and, it follows, lawful.

79. It follows that we dismiss the appeal.

Notice of Decision

80. We dismiss the appeal is on the basis that the refusal of leave to remain does not breach section 6 Human Rights Act 1998 (based on Article 8 ECHR).

81. No anonymity direction is made.

Signed **L. Shepherd** Date 18 February 2022

Deputy Upper Tribunal Judge Shepherd