IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-005429

First-tier Tribunal No:
HU/54206/2021
IA/10769/2021

THE IMMIGRATION ACTS

Decision & Reasons Promulgated
On 22 March 2023

Before

UPPER TRIBUNAL JUDGE RIMINGTON
DEPUTY UPPER TRIBUNAL JUDGE KEITH

Between

A S M
(ANONYMITY ORDER MADE)

Appellant

and

The Secretary of State for the Home Department

Respondent

Representation:
For the Appellant: Ms Panagiotopolou, instructed by Legal Rights Partnership
For the Respondent: Ms Lacointe Home Office Presenting Officer

Heard at Field House on 7 March 2023

Order Regarding Anonymity

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 the name or address of the appellant, likely to lead members of the public to identify the

appellant or members of his family. Failure to comply with this order could amount to a contempt of court. This order is imposed owing to the intimate medical details disclosed.

DECISION AND REASONS

1. The appellant is an 82-year-old South African national. He suffers with significant heart problems as evidenced by the medical reports from Dr Dwyer, a cardiologist, in South Africa and in 2020 the appellant was advised not to travel. Nonetheless he and his wife, a British national, decided to have a last holiday with their family in the United Kingdom and he, on a visit visa valid to 12th May 2021, and his wife travelled to the United Kingdom on 20th December 2020. In November 2020, the South African covid variant emerged in the United Kingdom and from December 2020 the United Kingdom was subjected to significant lockdowns. As a result, the appellant had difficulty in returning to South Africa (he and his wife had intended to return in May 2021), and he remained in the UK and made an 'in time' application for leave to remain on 6th May 2021 on family and private life grounds.

2. The application was refused, however, on 22nd July 2021 under Appendix FM of the Immigration rules under rule E-LTRP.2.1 because the appellant was in the UK as a visitor.

3. The appellant appealed under Section 82 of the Nationality Immigration and Asylum Act 2002 (as amended). When the matter came before the First-tier Tribunal, the judge dismissed the appeal. He found that the appellant had not satisfied the immigration rules, specifically, EX.1 and further the refusal was not in breach of the appellant's article 8 rights. There were no unjustifiably harsh consequences on return.

4. From June 2021 the appellant's wife and sponsor had secured employment but she had not, at the time of application, the required level of minimum income of £18,600. The judge found inter alia at [58] that there was no up to date evidence of income and stated, 'I cannot find on the balance of probabilities that the sponsor remains employed in the UK'.

5. An application for permission to appeal was made, inter alia, on the basis that the judge procedurally erred by failing to take into account when addressing the income of the sponsor that she was still working. There was specific evidence from the witnesses that the wife had continued to work and was working at the time of the hearing before the First-tier Tribunal (August 2022). It was asserted that the judge misunderstood the basis on which the appellant put his case. The judge had found correctly that the appellant could apply 'in country' because of the Coronavirus concession and should have considered thus the remaining provisions of the partner rule under E-LTRP.2.1. Contrary to the judge's decision, it was <u>not</u> the respondent's case that the wife was not employed at the date of the hearing. The finding that the appellant was

not financially independent, was not explored at all during the hearing and the determination of this factor and approach was contrary to TK (Burundi) [2009] EWCA Civ 40, at [20], whereby the judge was obliged to consider the explanation for any failure to produce evidence.

6. Further the judge had erred in the assessment of article 8 because (i) there was no weight 'prescribed' by article 8, (ii) the judge had failed to consider the evidence the wife was working when finding a lack of financial independence and thus the appellant's right to family life was outweighed (iii) the judge failed to conduct a balance sheet exercise and include all relevant factors such as his ancestry and the related discrimination on grounds of age.

Decision on First-tier Tribunal determination.

7. Without delving into the further criticisms of the determination it appeared that the judge decided from the outset and see [20] that the sponsor and witness did not give objective evidence and that was the context in which the evidence was approached. The judge paid no heed, when finding a lack of financial independence under Section 117B, to a relevant fact that the sponsor had found employment and had continued to work and was earning above the minimum income requirement. That would have implications for the point we raise below in relation to considering the claim under article 8.

8. The judge observed that there was no documentary evidence but did not raise any queries on that matter with the parties. It was asserted that had that point been raised it could have been dealt with by the production of payslips and evidence from the sponsor. We note the judge criticised the appellant in the determination for failure to produce evidence when he was legally represented but failed to take into account that there was evidence that the sponsor had work and continued to work, not least the witness statement of his daughter. That was not explored. We considered that to be material error and we set aside the decision of the First-tier Tribunal and directed that the matter should be remade in line with the standard directions served and pursuant to Section 12(2)(a) of the Tribunals Courts and Enforcement Act 2007 (TCE 2007) and section 12(2) (b) (ii) of the TCE 2007.

9. We explored with the legal representatives, the issue of remaking particularly as we considered that the judge had erred procedurally. The appellant and his family wished the matter to be determined forthwith and Ms Lacointe had no objection. We determined that the appeal would be heard de novo save that the finding at [41] that there was an intention to return to South Africa. We adjourned the matter to 2pm to allow Ms Lacointe time to read the documentary evidence which was provided in hard copy form as she had difficulty in accessing the material electronically. This included the evidence we admitted under Rule 15(2)A for the resumed hearing. That evidence included further documentary and medical evidence.

Analysis

10. We note that the appellant could not comply with the immigration rules, particularly Appendix FM-SE because *at the date of application* the appellant had not provided the requisite details of her income for example six months payslips and bank statements. However as held in MM Lebanon **[2**017] UKSC 10 at [83], when considering the financial threshold 'it may, of course, have a disproportionate effect in the particular circumstances of an individual case'. In terms of article 8 the immigration rules are not a strait jacket.

11. At the resumed hearing we accepted further evidence in the form of payslips which showed the sponsor's income at 31st March 2022 of £21647.33 for the tax year 2021 to 2022. The P60 for the tax year end to April 2022 reflected that amount, there was a letter from the employer, wage slips showing the salary and concomitant entries into the sponsor's TSB bank account. Ms Lacointe did not have any further questions of the sponsor and daughter in law who both adopted their updated statements.

12. We conclude on the basis of the documentary evidence before us which included wage slips, that the sponsor remains in employment with the Royal Benevolent Agricultural Institute ("RBAI") earning approximately £26316 per annum. In her updated statement she confirmed that her salary was now just over £27,000. The sponsor had commenced work in June 2021 and continues to work. We accept that she has sufficient income to support her husband the appellant. The financial threshold in the immigration rules is £18,600. Additionally, the couple are living with the appellant's daughter and son in law (the stepdaughter of the sponsor) and are thus suitably accommodated. We accepted the sponsor's oral evidence. We found her evidence consistent with the financial documentary evidence and thus credible. She also told us she had paid the medical expenses for the appellant, and he had not relied on the National Health Service during their time in the United Kingdom. She of course as a British citizen is entitled to access the NHS.

13. At the close of the hearing Ms Lacointe accepted that on reviewing and hearing the written and oral evidence that should the appellant return to South Africa to make a further application, it would very likely be successful (there were no suitability issues). She accepted that the requirement for the appellant to return was essentially procedural.

14. We approach the five-stage test set out in Razgar v SSHD [2004] UKHL 27. We accept that the appellant has a family life (established well before arriving in the UK) particularly with his British citizen wife. There is an evident bond between the appellant and his daughter and bearing in mind he now lives with the daughter (and she paid his medical bills in South Africa) we accept that there is likely to be family life with his daughter as well. She is involved in offering him personal care. To expect the appellant to return to South Africa at his age, even on a temporary basis, would interfere with his family life; there is a low

threshold for interference. We accept, on the face of it, that the refusal was in accordance with the law and for a legitimate reason that is, for the maintenance of immigration control in order to preserve the rights and freedoms of others.

15. We turn to an assessment of proportionality.

16. The immigration rules set out the position of the Secretary of State to which weight must be attached. On the one hand the appellant has not satisfied the immigration rules because the requisite financial documentation was not provided at the date of application.

17. The application was previously refused by the Secretary of State on the basis of his application as a visitor although it was accepted the appellant met the suitability requirements. It was accepted by Ms Lacointe, we consider very fairly, that the finding of the First-tier Tribunal could be preserved that as a result of the difficulties with Covid the appellant was permitted to make a 'switch' application as a spouse from with the UK (effectively waiving E-LTRP.2.1). Under the Immigration Rules it is generally considered that no in country spousal applications are permitted if an individual arrives on a visit visa.

18. Ms Lacointe accepted, in view of the evidence, that any application would now be successful (independently of EX.1) and the requirement to return to make an application was purely procedural; this, in our view, lessens the weight to be given to the Secretary of State position. The finding of the First-tier Tribunal that there was a concession that he was permitted to make such an application in country and our finding that the appellant could now satisfy the financial requirements lends us to agree that the requirement for the appellant to return to make an application was purely a procedural matter.

19. We turn to Section 117B of the Nationality Immigration and Asylum Act 2022 which sets out:

> *"(1) The maintenance of effective immigration controls is in the public interest.*
>
> *(2) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are able to speak English, because persons who can speak English—*
>
> *(a) are less of a burden on taxpayers, and*
>
> *(b) are better able to integrate into society.*
>
> *(3) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are financially independent, because such persons—*

(a) are not a burden on taxpayers, and

(b) are better able to integrate into society.

(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."

20. The appellant speaks English. Financially the appellant is not dependent on the State, his sponsor wife earns over the minimum threshold, and he lives with his son. His wife pays for his medical bills and thus he is not dependent on the NHS. We appreciate these factors are 'neutral' in terms of Section 117B. The appellant's status is precarious but when he made the application, he was not an overstayer and as indicated above his relationship with his wife (who is a qualifying partner) was formed well before entry to the UK. We are not persuaded that Sections 117B (4) or (5) are applicable here.

21. We have noted that the appellant is in poor health. A letter from Dr Dawe dated 9th November 2021 confirmed that the appellant had a background of dilated cardiomyopathy, left ventricular systolic dysfunction , mild aortic vale stenosis, mildly atheromatous coronary arteries and recurrent left total hip periprosthetic joint infection. Dr James Gamble Consultant Cardiologist from the John Radcliffe Hospital confirmed on 10th November 2022 there would be additional strain on the appellant's heart from flying and a 'significant risk' associated with a long-haul flight. We accept that over the years since his entry his health has deteriorated. There would be increased risk attendant on him flying although we make no finding as to his actual 'fitness to fly'. The appellant came here in poor health, but we also accept his reasons for doing so and that it was his intention was to return. A return ticket had been booked and it is the case that Covid rampaged from early 2021 onwards which would affect the appellant's ability to return. It was only after this time and in June 2021 that his wife secured work. Bearing in mind the appellant's age, it is not surprising that his health has deteriorated in the years since 2020.

22. Although we were encouraged to find that discrimination, on grounds of age, should be a factor in the appellant's case because he was precluded from obtaining an ancestry visa owing to his inability to work, we consider that this has only a limited role in contributing weight in the appellant's favour. This aspect of the appeal was not fleshed out

by the appellant's representative. That said the appellant has long standing links with the UK as his grandfather and his father were both British subjects.

23. It would be conceivable that the appellant could return to South Africa to apply for a visa, but his wife could not return with him otherwise she would lose her job. We are reminded that she is a British citizen. She told us and we find credible that she was unable as a more elderly person to obtain work in South Africa and, she said, in the context of the BEE policy. We enquired whether the daughter could return to assist with any visa application but note that she is expected to support her husband on their working farm and, on the basis of the medical evidence, she herself suffers from depression. We were provided with no timeframe as to how long it would take to determine an application in South Africa.

24. Both the sponsor and the daughter were distraught at the prospect of their husband/father returning alone to South Africa and it is evident to us their article 8 rights would be impinged, further to Beoku-Betts v SSHD [2008] UKHL 9 in the event of his return.

25. The Court of Appeal in Alam v Secretary of State [2023] EWCA Civ 30 at [113] held that '*Chikwamba is only relevant if the Secretary of State refuses an application on the narrow procedural ground'* but in view of the particular circumstances as we have outlined, we find that the procedural requirement for the appellant to return would be manifestly unreasonable and the consequences of return, would be unjustifiably harsh. On adopting a balance sheet approach, overall we conclude that the decision to remove the appellant would be disproportionate.

Notice of Decision

The Judge erred materially for the reasons identified. We set aside the decision pursuant to Section 12(2)(a) of the Tribunals Courts and Enforcement Act 2007 (TCE 2007) and remake the decision under section 12(2) (b) (ii) of the TCE 2007 and allow the appeal of ASM on human rights grounds.

Helen Rimington
Judge of the Upper Tribunal Rimington
Immigration and Asylum Chamber

17.3.2023