Upper Tribunal
(Immigration and Asylum Chamber)

Thakrar (Cart JR; Art 8: value to community) [2018] UKUT 336 (IAC)

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 2 July 2018	
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Before

THE HON. MR JUSTICE LANE, PRESIDENT

Between

SARDABAI MANSUKHLAL GIRDHARLAL THAKRAR
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr J Dixon, instructed by KTS Legal Ltd
For the Respondent: Mr P Duffy, Senior Home Office Presenting Officer

(1) The fact that an application for permission to appeal involves the assertion that a person's removal from the United Kingdom would violate his or her human rights does not, without more, engage that part of the second appeal criteria, which allows permission to appeal (or permission for a 'Cart' judicial review) to be granted, on the basis that removal constitutes a 'compelling reason' for the appeal to be heard. If the position were otherwise, the second appeal criteria would lose their function as a restriction on the power to grant permission to appeal in immigration cases.

(2) Before concluding that submissions regarding the positive contribution made by an individual fall to be taken into account, for the purposes of Article 8(2) of the ECHR, as diminishing the importance to be given to immigration controls, a judge must be satisfied that the contribution is very significant. In practice, this is likely to arise only where the matter is one over which there can be no real disagreement. One touchstone for determining this is to ask whether the removal of the person concerned would lead to an irreplaceable loss to the community of the United Kingdom or to a significant element of it.

(3) The fact that a person makes a substantial contribution to the United Kingdom economy cannot, without more, constitute a factor that diminishes the importance to be given to immigration controls, when determining the Article 8 position of that person or a member of his or her family.

(4) If judicial restraint is not properly maintained in this area, there is a danger that the public's perception of human rights law will be significantly damaged.

DECISION AND REASONS

A. Introduction

1. The appellant, a citizen of Kenya born in July 1948, appealed to the First-tier Tribunal against the decision of the respondent on 23 October 2015 to refuse the appellant's human rights claim.

2. The appellant entered the United Kingdom as a visitor from Nairobi on two occasions in 1999 and once in each of 2005 and 2007.

3. In 2008, the appellant obtained from the British High Commission in Mumbai, India further entry clearance as a visitor. She used this entry clearance to enter the United Kingdom on 13 July 2008, until 9 January 2009.

4. On 7 January 2009, the appellant submitted an application for indefinite leave to remain as a dependent relative (mother) of a settled person in the United Kingdom. The respondent refused that application and the appellant's resulting appeal to the Asylum and Immigration Tribunal was dismissed on 18 August 2009.

5. The appellant appears to have become appeal rights exhausted on 22 March 2010. Since that time, she has lived in the United Kingdom unlawfully.

B. Refusal and appeal

6. On 15 October 2015, the appellant submitted an application for leave to remain on Article 8 grounds. This was refused without a right of appeal on 26 November 2013.

She then made an application for settlement, together with a human rights claim which was refused in a letter of decision dated 5 April 2016.

7. In the letter of decision, the respondent noted the submissions that had been made by the appellant. This included the assertion that she had established strong family connections and family ties in the United Kingdom "notably with your son and his wife resident with you at [address] In your representations dated 26/10/2015, you also claim to have a daughter residing in the United Kingdom and that you have 18 siblings all resident in this country. You claim to have no family members in Kenya."

8. The decision letter continued by noting that the appellant had provided letters from her United Kingdom doctor, written in 2008 and 2013, stating that she suffered from depression, high blood pressure, high cholesterol, long term insomnia and vitamin D deficiency.

9. The respondent concluded that the appellant's application did not fall within the scope of the Immigration Rules. Accordingly, the respondent gave consideration to whether the appellant's removal from the United Kingdom would breach her Article 8 rights, or those of her family. The clear thrust of the letter was that the respondent did not consider Article 8 could avail the appellant.

10. In her grounds of appeal to the First-tier Tribunal, the appellant referred to the death of her husband, during a family holiday in India in 2008. She said that she was "brought by her children to the United Kingdom on 7/7/2008 as a family visitor". The grounds stated that the appellant "then left the UK accompanying her son and made a genuine attempt to resettle back in Kenya. Unfortunately things were not in her favour and all turn futile as she could not stay longer as she was unable to bear the deceased husband's absence in Kenya. The appellant therefore with her son returned to the UK in November 2008."

11. The grounds then made reference to the asserted vulnerability of the appellant; her dependency on her son and daughter; the absence of relatives in Kenya and India; a "genuine attempt" being made "to resettle back in Kenya" which "proved futile"; and all close/extended family members were in the United Kingdom.

12. A further explanation of why the appellant could not return to Kenya was given as follows:-

> "8. The appellant cannot return back to Kenya as Kenya is no longer her home. She is maintaining that her home was wherever her husband were to be and now that he has passed away and there is nothing left for her there in Kenya. Similarly, although she is an Indian origin she has no life in India to return too as she has been residing in Kenya, alongside her husband, for the last 39 years (sic)."

13. Further reference was then made to the appellant's asserted need for long term care, to be provided by her son and daughter in the United Kingdom.

C. The decision of First-tier Tribunal Judge Eldridge

14. The appellant's appeal was heard by First-tier Tribunal Judge Eldridge, sitting at Hatton Cross in February 2017. In a decision promulgated on 6 March 2017, Judge Eldridge dismissed the appellant's appeal.

15. The judge noted that he had before him a bundle, which extended to 190 pages. He also heard oral evidence from the appellant, her son Mr Thakrar, her daughter, Mrs Madhvani, two of the appellant's sisters and the appellant's then 16½ year old granddaughter. It is common ground that the judge also heard evidence from the appellant's grandson, although the judge did not refer to this in the decision. Before me, Mr Dixon rightly did not seek to make anything of this omission. As we shall see, Mr Dixon's attack on the judge's decision was somewhat broader.

16. At paragraph 12 of his decision, the judge said this:-

> "12. Although I had a great deal of evidence and the Appellant relied upon 190 pages of documents, essentially there is comparatively little that is factually in dispute in this appeal. On that basis I find the following facts:
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> ► the Appellant is a 68-year old national of Kenya;
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> ► in June 2008 her husband died whilst they were in India and she returned to Kenya;
>
> ► she came to this country on a family visit in 2008 and returned to Kenya with her son with a view to her settling back into the country and his return to this country;
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> ► she found it difficult to cope on her own and she came back to the United Kingdom, still on the valid visa for a further visit in late 2008;
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> ► she has remained in this country thereafter and without leave since January 2009;
>
> ► she has her son and daughter living in this country;
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> ► she lives with her son but every other week speds (sic) most of the week living with her daughter and her two children, who are aged 12 and 16;
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> ► she has health problems but helps look after her son's house – he has no partner or child;
>
> ► on the week she is with the daughter she helps her by assisting with the children and cooking in particular – including fetching children from school when she can;
>
> ► she has sisters and brothers living in this country and many other relatives (including, of course, grandchildren) and none now lives in Kenya;

- this includes relatives through her late husband's side of the family;
- for many years she and her husband rented a house in Kericho in Kenya but she has had nothing to do (sic) that property for the last 8 years;
- the great majority of her friends from Kenya are also now living in the United Kingdom;
- all her relatives are British citizens or certainly settled in this country for immigration purposes."

17. At paragraph 13, the judge rejected the contention, contained in the statement of the appellant's son, that she required long term care to do everyday personal household tasks. The judge said that this "does not accord with the evidence I received in court. I accept that the appellant does struggle to undertake some tasks but she is clearly of great assistance to both her son and her daughter and grandchildren and she is able to care for herself and her personal needs, as she told me in cross-examination. She cooks but finds cleaning the house now to be difficult but she can look after the children."

18. At paragraph 14, the judge noted that there was only "very limited documentary evidence concerning her health". All the judge had was the two doctor's letters of 2008 and 2013, written by Dr Kansagra who, the judge noted, "is part of the extended family living in this country".

19. Although the judge had found that the appellant's son exaggerated the appellant's health issues, he otherwise found him to be a credible witness. The judge accepted that the appellant would be financially supported, if allowed to remain in the United Kingdom.

20. The judge was in no doubt that the appellant could not satisfy the requirements of the Immigration Rules relating to adult dependent relatives. He did not accept that there was no one in Kenya left whom the appellant knew. She could return to the temple at which she worshipped in Kenya. The family had the means to support her financially in another country.

21. Given his findings regarding the exaggeration of the appellant's health issues, the judge was not satisfied that the appellant needed to be in the United Kingdom in order for those issues to be adequately addressed.

22. Turning to paragraph 276ADE of the Immigration Rules, the judge examined whether there would be "very significant obstacles" to the appellant's integration in Kenya. In so doing, the judge had regard to the judgment of the Court of Appeal in SSHD v Kamara [2016] EWCA Civ 813. At paragraph 23, the judge found that the appellant had lived for a very long period in Kenya and had a home in the same place there for at least twenty years. Although she had not been back for over eight years, she had been living within an expatriate family; as a Kenyan national of Indian origins she still spoke the language which "must have served her well over her life with her husband in Kenya"; and she would be able to understand how society in

Kenya worked. Although "as a single woman in her late 60s life would not be as easy as when she was married and younger … with the assistance of the financial support and encouragement from the family in the United Kingdom, over time she has an ability to participate once more in life in that country and to re-establish or build up relationships".

23. At paragraph 24, the judge noted that the concept of "very significant obstacles" had been examined by the Upper Tribunal in MK [2015] UKUT 00223. That case had also considered the relevance of the expression "unduly harsh". The judge concluded at paragraph 24 by saying:-

> "Return to Kenya after so long a period and leaving her family is undesirable from the point of view of the family and the Appellant and will, as I have said, present difficulties. I do not consider, however, that the obstacles to integration are "very significant" within the terms of the Rule."

24. The judge then turned to Article 8. His findings were as follows:-

> "27. The Appellant's two grandchildren are both under 18 and are British citizens and living in the United Kingdom. Section 55 of the Borders, Citizenship and Immigration Act 2009 requires the Secretary of State taking an immigration decision and a judge determining an immigration appeal against such a decision, to have regard to the need to safeguard such children and promote their welfare.
>
> 28. I see no evidence to suggest that the Appellant's removal from the United Kingdom would lead to any safeguarding issues regard either child. The evidence available to me suggests they are living within a loving family unit and would continue to do so. They must do so in the weeks their grandmother does not visit. Emotionally, I fully accept that they are very attached to their grandmother, who plays [an] important part in their lives. Her removal would be a source of great regret to them I am sure but with a large and loving family, I do not consider that it would be significantly damaging to their longer term welfare.
>
> 29. In any assessment of issues of private or family life I must have regard to the considerations set out in Part VA of the 2002 Act. Section 117B establishes that the maintenance of effective immigration controls is in the public interest. This is an Appellant who has abused immigration control by overstaying the entry clearance given to her by about 8 years. Immigration control is primarily expressed through the Immigration Rules and she cannot meet the requirements of the Rules.
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> 30. I have accepted that she is financially dependent, although that is with the assistance of her family. On the other hand, I have no evidence before me to assess her level of ability in the English language. At best, however, these are but neutral factors.
>
> 31. Importantly, in my judgement section 117B(4) establishes that little weight should be given to a private life established by a person when that person is in the United Kingdom unlawfully. Of course, her private life with her family and friends was established significantly before she came to this country but if it has

developed further it has been by living here without leave since early 2009. I consider that this is relevant in the assessment of the nature of her relationships and life in this country.

32. Return to Kenya of a lady in her late 60s with some health problems and all her family (and assuredly an attentive and loving family) living in the United Kingdom is not comfortable to contemplate. The fact remains, however, that I have found there are not very significant obstacles to her integration into the country of her nationality. I have also found that she does not require the degree of personal care suggested and that the needs that she does have should be capable of being met with the financial support of the family here. This will not be through family members directly but by paying for such services as are needed.

33. Viewed from the point of view of the Appellant and her family the consequences are harsh but the State has a right to set immigration controls in the public interest. Those interests are not merely economic but also in terms of good regulation. These are strong interests. Viewed economically it should be stated, that even although I was satisfied that at the moment the Appellant's health needs are met privately, in the reasonably settled order of these things, that may well not be the case in the future.

34. In weighing the strong public interests of the State against the private interests of the Appellant, notwithstanding the fact that she will face some difficulties on return and that my decision will be a sadness to many family members, I conclude that the Respondent's decision was proportionate and not a breach of the duty owed to the Appellant or her family under Article 8 of the European Convention."

D. The grounds of application for permission to appeal

25. The appellant's grounds of application for permission to appeal submitted that the First-tier Tribunal Judge had failed to have regard to the best interests of the grandchildren as a "primary consideration", contrary to ZH (Tanzania) [2011] 2 AC 166. So far as financial independence was concerned, the grounds contended that being financially independent was not the sole issue in the circumstances of the present case:-

> "10. The Appellant's son's business employs 40 persons with a turnover of around £950,000. Arguably, therefore the public interest is even further diminished: if financial independence (not being a burden is relevant) then so should being a financial net contributor and arguably all the more so.
>
> …
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> 11. It is submitted that the fact that the Appellant's family are clear and overwhelming net contributors to the UK economy is a relevant factor to be taken into account in Article 8 terms. It is trite law that Article 8 encompasses the rights of all family members. There is no reason in principle why the

> contribution made by the family to society and to the economy should not be factored into the balancing exercise in terms of proportionality … It constitutes a very distinct value to the community. The FtT Judge has erred in leaving out of account the net contribution of the Appellant's family. Further and in any event, this is an issue which constitutes arguably an important and novel point of law upon which guidance is required."

26. The third and final ground contended that the judge had made no findings on the issue of whether the appellant "had been the victim of crime in Kenya on two occasions. The FtT judge said that he found the Appellant's son to be essentially credible and yet made no findings on this issue. The appellant herself confirmed this".

27. The grounds submitted that being the victim of crime was plainly a relevant factor to take into account, whether under the Rules or under Article 8.

E. Refusal of permission to appeal

28. First-tier Tribunal Judge Mark Davies refused permission to appeal, in a decision dated 18 September 2017. He considered that the grounds to which I have referred amounted simply to a disagreement with the judge's findings.

29. The appellant then applied to the Upper Tribunal for permission to appeal. In a detailed decision dated 22 November 2017, Upper Tribunal Judge Smith refused permission to appeal.

30. Upper Tribunal Judge Smith was not persuaded that the criticism of the way in which the First-tier Tribunal Judge had dealt with the best interests of the children disclosed an arguable error of law on his part. She observed that the judge's reference at paragraph 27 of his decision to "safeguarding" simply repeated the wording of section 55(1)(a) of the Immigration and Asylum Act 1999, concerning the respondent's obligations in respect of children, in the immigration context. Furthermore, the point at which the judge had undertaken his "best interests" assessment was unarguably correct. He had done so "after considering whether the appellant can meet the Rules and before turning to look at Article 8 outside the Rules".

31. Upper Tribunal Judge Smith then considered the significance of the contribution which the appellant's son makes to the United Kingdom economy:-

> "As the grounds rightly indicate, there is no question of the Appellant's family going to live with her in Kenya. As such, the contribution which her son makes to the UK is not relevant to the public interest: it will continue. The question of whether a sponsor is a benefit to the UK economy is not a factor which figures in the public interest matters to which regard is to be had in Section 117. The Appellant may prefer that it was but it is not. Nor can I see how the Appellant's family's contribution to the UK economy has any relevance to the Article 8 claim. The Judge has considered the impact

on the family … but the interference with the [appellant's] family and private life is in the context of the removal of the Appellant from the UK; their earning capacity has no relevance to their own Article 8 rights in that context … ".

32. Finally, Upper Tribunal Judge Smith pointed out that paragraph 12 of the appellant's grounds was incorrect, in suggesting that financial independence was at best a neutral factor. Although the Upper Tribunal Judge did not identify the relevant passage in the judgments of the Court of Appeal in Rhuppiah v Secretary of State for the Home Department [2016] EWCA Civ 803, where the point is made plain, it is helpful for me to do so:

> "62. The same reasoning applies in relation to section 117B(3). Contrary to the appellant's argument, it does not provide that if you were financially independent it is in the public interest that she be granted leave to remain. It only indicates that it is a negative factor, potentially capable of justifying her removal from the UK compatibly with Article 8, if she is not financially independent. Again, under the scheme of Part 5A, the fact that a person is financially independent is a neutral factor." (Sales LJ)

33. Upper Tribunal Judge Smith recorded that Judge Eldridge had "unarguably properly considered the issue whether there would be very significant obstacles to the appellant's integration in Kenya" and that ground 3 was "merely a disagreement with the judge's conclusion".

F. Judicial review of Upper Tribunal Judge Smith's refusal of permission to appeal

34. The appellant sought a judicial review of Upper Tribunal Judge Smith's refusal of permission to appeal. The grounds of application run to 67 paragraphs. The following features of these grounds are of particular note:-

(a) Emphasis was placed on the appellant having been a victim of crime: "It was primarily as a result of the experience of being a victim of crime which led to a material loss of morale and confidence which then necessitated her being brought back to the UK … ";

(b) The financial contribution made by the appellant's family to the United Kingdom was said to be a feature that engaged the "second appeals" test (see paragraph 38 below):

> "55. It is submitted that the fact that the Appellant's family are clear and overwhelming net contributors to the UK economy is a relevant factor to be taken into account in Article 8 terms. It is trite law that Article 8 encompasses the rights of all family members. There is no reason in principle why the contribution made by the family to society and to the economy should not be factored in to the balancing exercise in terms of proportionality: the degree to which other family members contribute is as relevant as the degree to which their rights are impacted. Indeed, in light of the public interest factor in protecting the public purse, there is every

> reason why the family's net contribution should be factored in. It constitutes a very distinct value to the community. The FTT Judge has erred in leaving out of account the net contribution of the Appellant's family. Further and in any event, this is an issue which constitutes arguably an important and novel point of law upon which guidance is required.";

(c) The grounds raised an issue that had not featured in the applications for permission to appeal; namely, whether the First-tier Tribunal Judge should have treated the appellant's private life as a matter of little weight, given that it had been established in the United Kingdom while she had been here unlawfully. Extensive reference was made to the judgment of Sales LJ in Rhuppiah;

(d) Conversely, the grounds completely ignored Upper Tribunal Judge Smith's response, based on Rhuppiah, to the submission that financial independence could amount to more than a neutral factor, in terms of section 117B(3).

35. Permission to bring judicial review was granted by a High Court Judge on 16 February 2018. He said it was arguable that the First-tier Tribunal Judge's:-

> "evaluation was so wrong as to amount to an error of law. One might ask: how much more claimant (sic) would the claimant's circumstances have to be to tip the balance? It could be argued that a decision such as this drains the balancing exercise of any meaningful content.
>
> The consequences of removal would be so momentous for the claimant that I can safely say that there is a compelling reason for an appeal to be heard."

36. The High Court's characterisation of the appellant's case as the *ne plus ultra* of adult dependent relative claims went far beyond the grounds of challenge to the First-tier Tribunal's decision. Wide-ranging though they were, those grounds had not attempted to advance the argument that the First-tier Tribunal Judge had erred in law, in that only one outcome of the appeal was possible; namely, to allow it.

37. As Walker J held in R (G & H) v Upper Tribunal [2016] EWHC 239 (Admin) and as the Upper Tribunal has more recently pointed out in Shah ("*Cart*" Judicial Review: Nature and Consequences) [2018] UKUT 51 (IAC); [2018] Imm AR 707, a "Cart" judicial review involves determining whether the Upper Tribunal arguably erred in law in rejecting the grounds which accompanied the application for permission to appeal to it against the First-tier Tribunal's decision and, if so, whether the second appeal criteria are met.

38. So far as the second appeal criteria[1] are concerned, there are two points to observe regarding the High Court's view that the consequences of removing the appellant

[1] (a) that the proposed appeal would raise some important point of principle or practice, or
(b) that there is some other compelling reason for the Upper Tribunal to hear the appeal.

would be "so momentous … that I can safely say there is a compelling reason for an appeal to be heard".

39. First, all appeals to the First-tier Tribunal against the respondent's refusal of a human rights or a protection claim involve the prospect of removal: see section 82(2)(a) and (b)(i), 84(1) and 113(1) of the Nationality, Immigration and Asylum Act 2002. The prospect of forced removal from the United Kingdom is an inherently serious matter; but all the more so if, as will almost always be the case, it is being contended that removal would violate the United Kingdom's obligations under the Refugee Convention or the ECHR.

40. It therefore cannot be correct that the so-called second limb of the second appeal criteria is always engaged in these circumstances. If it were, then those criteria would lose their function, as a restriction on the power to grant permission to appeal in immigration cases.

41. Secondly, on this issue also, the High Court judge went beyond what the appellant was seeking to argue. The grounds accompanying the judicial review application did not attempt to categorise the consequences of removal as a reason why the second limb of the second appeal criteria was engaged. Rather, the grounds concentrated on the first limb, which is that the proposed appeal "would raise some important point of principle or practice".

42. Insofar as the High Court Judge who granted permission did so on the basis that there were particular features of the appellant's case that made it engage the second limb, he proceeded from his own view of the inability of the respondent to resist the Article 8 case of a widow who had for eight years been embedded with her British family, whilst in breach of immigration law.

G. The appeal in the Upper Tribunal

43. In the light of the grant of permission to appeal, which followed the grant of judicial review and the quashing of Upper Tribunal Judge Smith's refusal, I have to decide whether there are errors of law in the decision of the First-tier Tribunal Judge, such that his decision requires to be set aside.

(a) The appellant as the victim of crime in Kenya

44. The First-tier Tribunal Judge was criticised for not taking account of the fact that the appellant had twice been the victim of crime, whilst in Kenya during 2008. I have no hesitation in rejecting this criticism. Indeed, I find it not only spurious but also indicative of a lack of candour on the part of the appellant and her family.

45. As I have already observed, this issue does not appear to have featured, at least to any material extent, in the submissions made to the respondent, which resulted in

the refusal of the human rights claim that is under appeal. It certainly did not feature in the grounds of appeal against that decision.

46. At the hearing before me, Mr Dixon said that one of the criminal incidents had been perpetrated by the appellant's carers. He was, however, unable to point me to anything in the evidence to confirm this. I note that it does not feature in the witness statement of the appellant.

47. More importantly, the First-tier Tribunal Judge was not told about the previous appeal hearings, involving the appellant. The immigration history set out earlier records that an appeal was heard in August 2009. Following a High Court review, granted to the appellant, the Article 8 aspect of that appeal was reconsidered.

48. As a result of my asking the parties about these proceedings, Mr Duffy, for the respondent, produced a copy of the decision of Immigration Judge Doran, promulgated on 8 January 2010. This decision is highly revealing. It sets out paragraphs 4 to 11 of the determination of Immigration Judge Lingard, promulgated in August 2009. Despite the reconsideration of Judge Lingard's decision, her findings in paragraphs 4 to 11 had "not been disputed", according to Immigration Judge Doran. He also reproduced Judge Lingard's findings and conclusions, recorded at paragraphs 31 to 41, which he said "have also not been challenged".

49. At paragraph 41 of Judge Lingard's unchallenged findings, we find the following:-

> "41. I note that in the grounds of appeal it was asserted the appellant had unfortunately experienced two incidents of burglary whilst in Kenya during November 2008, although this is not referred to in her detailed appeal statement. It would not be unsurprising to think the appellant would be, to say the least, upset by such experiences but I regard them as sporadic acts of criminal activity it is reasonable to presume could occur in any city environment."

50. The submissions made by Mr Davison, Counsel for the appellant before Judge Doran, are recorded at paragraphs 43 to 46 of Judge Doran's determination. There is no reference in those submissions to the burglaries that occurred in 2008. It is plain that they were not being relied upon, on the basis that their significance for the appellant's Article 8 case had been addressed by Judge Lingard in 2009.

51. In these circumstances, I find that the emphasis now sought to be placed on the burglaries, in the various sets of applications that followed the First-tier Tribunal Judge's decision, is entirely inappropriate.

(b) The appellant's grandchildren

52. The First-tier Tribunal Judge is criticised for failing to make a finding about what is said to have been the evidence regarding significant religious and cultural inputs made by the appellant to the lives of her two grandchildren.

53. Granddaughter R was 16 at the date of the hearing before Judge Eldridge. Her brother, S, was 12. R's handwritten statement concentrated upon what it would be like for the appellant if the latter were to have to leave the United Kingdom. So far as R herself was concerned, her statement said that the appellant "does so much for me and my family she is always looking after me and my brother, although we may be a handful, she always finds a way to control us and educate us on what family means".

54. S's statement said that the appellant was "the best nani in the world. She cooks the best food, gives the best hugs and kisses, what more could you want". If she were to leave the United Kingdom, S was concerned over "who else was going to cook the best food and who else would give the best hugs and kisses in the world". Sometimes, when S's parents "go to the films, … we have no worries as nani's always there comforting us and taking care of us".

55. Some drawings and photographs were exhibited with the statements of the grandchildren.

56. In her statement, the appellant said:-

> "I spend a big part of my life together with my grandchildren, such as taking part in family events, having treats, imparting family history, playing games, going on holidays, shopping, watching TV or videos, babysitting, giving personal advice, joining in religious activity."

57. The appellant's daughter (the mother of R and S) said:-

> "My children have forged a close bond with my mother over the years while she spends time with them she forgets her problems, if only for a short time. My mother's continued presence has also helped my children in learning from her wisdom, loving nature and improving their Gujarati (mother tongue). My daughter has now started to learn traditional Indian cooking from my mother who is an expert. My son has a happy nature and this reminds my mother of my dad who was of a similar disposition."

58. The attempt to characterise this evidence as significant, in Article 8 terms, is doomed to failure. At paragraph 28 of his decision, Judge Eldridge was, I find, entirely justified in categorising the relationship between the appellant and her grandchildren in the way he did. The judge noted that the appellant stayed with the mother and the children only in alternate weeks. Nevertheless, he accepted that the grandchildren were very attached to the appellant who plays an important part in their lives and that her removal would be a source of great regret to them.

59. Many children, of all backgrounds, learn valuable things from their grandparents. As a general matter, the relationship between grandparent and grandchild, beneficial though it may be, is unlikely to carry material weight in terms of Article 8, unless the grandparent has stepped into the shoes of a parent. In the present case, there was no evidence before the First-tier Tribunal Judge to begin to show that the grandchildren would be deprived of access to relevant religious instruction or that they would

suffer any material degradation in their sense of cultural identity, were the appellant to return to Kenya.

60. This brings me to the critique of the First-tier Tribunal Judge's approach to the best interests of children in section 55 of the 2009 Act. The various grounds of challenge contend that the judge was wrong to look at best interests in terms of the welfare of the grandchildren.

61. The concept of welfare, however, lies at the heart of the obligation. That this is so emerges clearly from the judgment of Lady Hale in ZH (Tanzania):-

> "24. Miss Carss-Frisk acknowledges that this duty [to make the best interests of children a primary consideration] applies, not only to how children are looked after in this country while decisions about immigration, asylum, deportation or removal are being made, but also to the decisions themselves. This means that any decision which is taken without having regard to the need to safeguard and promote the welfare of any children involved will not be "in accordance with the law" for the purpose of article 8(2). Both the Secretary of State and the tribunal will therefore have to address this in their decisions.
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> 25. Further, it is clear from the recent jurisprudence that the Strasbourg Court will expect national authorities to apply article 3(1) of UNCRC and treat the best interests of a child as "a primary consideration". Of course, despite the looseness with which these terms are sometimes used, "a primary consideration" is not the same as "the primary consideration", still less as "the paramount consideration". Miss Joanna Dodson QC, to whom we are grateful for representing the separate interests of the children in this case, boldly argued that immigration and removal decisions might be covered by section 1(1) of the Children Act 1989:
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> > "When a court determines any question with respect to –
> >
> > (a) The upbringing of a child; or
> >
> > (b) The administration of a child's property or the application of any income arising from it, the child's welfare shall be the court's paramount consideration."
>
> However, questions with respect to the upbringing of a child must be distinguished from other decisions which may affect them. The UNHCR, in its Guidelines on Determining the Best Interests of the Child (May 2008), explains the matter neatly,
>
> > "The terms 'best interests' broadly describes the well-being of a child. … The CRC neither offers a precise definition, nor explicitly outlines common factors of the best interests of the child, but stipulates that:
> >
> > • the best interests must be **the determining factor for specific actions**, notably adoption (Article 21) and separation of a child from parents against their will (Article 9);

- the best interests must be **a primary** (but not the sole) **consideration for all other actions** affecting children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies (Article 3)." (emphasis in original)

> This seems to me accurately to distinguish between decisions which directly affect the child's upbringing, such as the parent or other person with whom she is to live, and decisions which may affect her more indirectly, such as decisions about where one or both of her parents are to live. Article 9 of UNCRC, for example, draws a distinction between the compulsory separation of a child from her parents, which must be necessary in her best interests, and the separation of a parent from his child, for example, by detention, imprisonment, exile, deportation or even death."

62. The First-tier Tribunal Judge rightly noted that the grandchildren live with their parents. The appellant stays in the house only on alternate weeks. If the appellant were removed to Kenya, the children will continue to live with their parents.

63. Once the relationship between the appellant and the grandchildren is stripped of the hyperbole which those acting for the appellant put on it, these findings of the First-tier Tribunal Judge were determinative of the "best interests" issue.

(c) Obstacles to integration

64. Turning to the position of the appellant herself, Judge Eldridge was entitled to find that there would not be very significant obstacles to the appellant's integration in Kenya. The judge gave adequate reasons for that finding. He did not overlook any material evidence in this regard. Properly read, paragraph 24 of his decision does not show that he was imposing a test of whether it would be "unduly harsh" for the appellant to return. As I have already noted, his reference to that test arose because he was examining the issue of "very significant obstacles" by reference to the case law of Kamara and MK.

(d) Precariousness

65. I have already noted that the grounds of application to the High Court for judicial review of the Upper Tribunal's refusal of permission to appeal advanced a ground concerning the judgment of the Court of Appeal in Kamara that had not been put to the Upper Tribunal. In Kamara, Sales LJ expressed doubt as to whether a person's immigration status was necessarily "precarious" in terms of section 117B(5), where that person does not have indefinite leave to remain in the United Kingdom.

66. This ground should not have featured in the application for judicial review. Leaving aside the issue of "Robinson" obvious points (with which we are not concerned),

Upper Tribunal Judge Smith cannot be criticised for not dealing with a ground of challenge that was not put to her.

67. In any event, there are two reasons why this ground is without merit. First, Sales LJ's doubts were confined to a person who has limited leave to enter or remain. There is nothing in his judgment that suggests he was thinking a person's immigration status might not be "precarious", notwithstanding that the person is in the United Kingdom unlawfully. On the current state of the law, the only situation in which weight could be given to a private life developed by an overstayer or illegal entrant would be in the circumstances described by the House of Lords in EB (Kosovo) [2008] UKHL 41; namely, where there has been a delay by the respondent in relevant decision making. No issue of delay is taken in the present case.

68. Secondly, whatever section 117B(5) might say about the issue is, frankly, irrelevant. Section 117B(4)(a) states in terms that little weight should be given to a private life established by a person at a time when that person is in the United Kingdom unlawfully. It is therefore in my view impossible for the appellant to pray section 117B(5) in aid.

(e) The appellant's health

69. The issue of very significant obstacles to integration in Kenya is closely entwined with that of the appellant's physical and mental health. So far as her physical health was concerned, the First-tier Tribunal Judge rejected the claims being made on the appellant's behalf by her and the other witnesses. So far as I am aware, there is no criticism made of his conclusions on this issue which were, in any event, open to him on the evidence.

70. The evidence put forward regarding the appellant's alleged mental health difficulties was entirely historic in nature. As long ago as 4 October 2013, Dr Kansagra had recorded (bundle, P161) that the appellant was "recovering well from her depression". That fits with the evidence regarding the appellant's private health insurance, dated from January 2018, which records her as stating that, in the past five years, she had not had or received treatment for "mental illness, including depression, that has required referral to a specialist". She also answered "no" to the question whether in that period she had received treatment for a heart condition or a heart problem.

(f) Recourse to the NHS

71. The final area of criticism regarding the First-tier Tribunal Judge's decision relates to the financial position of the appellant and that of her family. The appellant criticises the judge's finding, at paragraph 33 of the decision, that "even although I was

satisfied that at the moment the appellant's health needs are met privately, in the reasonably settled order of these things, that may well not be the case in the future".

72. The appellant contends that this point was never put to her by the judge and that, in the circumstances, his finding is irrational.

73. I do not agree. Given the credibility issues that the judge had identified, and in the light of the concerns I have expressed regarding the lack of candour regarding the significance of the burglaries in Kenya, it was not at all speculative for the judge to conclude that, if the appellant were to be granted leave to remain in the United Kingdom on Article 8 grounds and became entitled to receive NHS treatment, she might well decide to do so.

74. In any event, I do not consider that this criticism of the judge, even if made out, can be said in any way to be material. It is quite evident from his decision that the outcome would have been the same, even on the basis that the appellant would continue to seek private medical attention, should this be necessary.

(g) The significance of the family's financial means

75. The second challenge to the First-tier Tribunal's Judge's decision regarding the financial means of the appellant and, more particularly, her son is articulated above; most markedly in the grounds that accompanied the application for judicial review.

76. In summary, the argument is as follows. In striking the proportionality balance under Article 8(2), the First-tier Tribunal Judge should have had regard to the fact that the appellant's son is running a substantial business, employing 40 people, with a turnover of £950,000 a year, and is, as such, an overwhelming net contributor to the UK economy. As Mr Dixon puts it in his written submissions for the hearing on 2 July:-

> "49. It is submitted that the fact that the appellant's family are clear and overwhelming net contributors to the UK economy is a relevant factor to be taken into account in Article 8 terms. It is trite law that Article 8 encompasses the rights of family members. There is no reason in principle why the contribution made by the family to society and to the economy should not be factored into the balancing exercise in terms of proportionality: the degree to which other family members contribute is as relevant as the degree to which their rights are impacted … It constitutes a very distinct value to the community. The FtT Judge has erred in leaving out of account the net contribution of the appellant's family."

77. On behalf of the appellant, Mr Dixon sought to rely on the judgments of the Court of Appeal in UE (Nigeria) and Others v Secretary of State for the Home Department [2010] EWCA Civ 975. That case, however, makes reference to a number of earlier decisions. Two of these require some analysis, in order to understand the judgments in UE.

78. In R v Immigration Appeal Tribunal ex parte Bakhtaur Singh [1986] Imm AR 352, the House of Lords considered a challenge to the refusal by the Immigration Appeal Tribunal to grant permission to appeal against the decision of an adjudicator. The adjudicator had dismissed the appeal of the applicant against the Secretary of State's decision to deport him as an overstayer, pursuant to section 3(5)(a) of the Immigration Act 1971.

79. The applicant had been part of an Indian folk music group. The adjudicator held that, in deciding whether to exercise differently the Secretary of State's discretion under paragraph 154 of the Immigration Rules (as then in force), he could not have regard to the effect of the applicant's deportation upon the Sikh community, who benefited from his playing "at festivals and the like", where the applicant was "a major attraction … capable of attracting audiences of several thousands".

80. The House of Lords held that, on a proper construction of paragraphs 154, 156 and 158 of the Immigration Rules, such a consideration as just described was within the range of matters to be considered by the Secretary of State and, by extension, the adjudicator.

81. The House of Lords rejected the proposition, advanced on behalf of the Secretary of State, that the effect of deportation on third parties was a matter which the Secretary of State alone, rather than the Immigration Appellate Authorities, could consider. This was because of the combined effect of paragraphs 154 and 156 to 158 of the Immigration Rules. In giving the only reasoned opinion, Lord Bridge said this:-

> "The question of what weight is to be attributed to third party interests of the kind I have been discussing which would be adversely affected by a decision to deport is entirely a matter for the Secretary of State or the Appellate Authorities exercising discretion under the statute and must depend upon all the other relevant circumstances in the context of which the decision falls to be made. It may well be difficult to attach any considerable weight to the third party interest affected if the person liable to deportation has established his reputation and proved the value of his services from which the third party interest arises during a period when his presence in this country was in contravention of the immigration laws. However, that is not for your Lordships to decide."

82. We now move forward by over two decades to 2008 and the case of RU (Sri Lanka) v Secretary of State for the Home Department [2008] EWCA Civ 753. This was primarily concerned with the significance or otherwise of the Secretary of State's delay in making an immigration decision regarding the appellant. During his time in the United Kingdom, the appellant had established a business here.

83. The lead judgment was given by Scott Baker LJ. For our purposes, the relevant passage is as follows:-

> "40. It not infrequently happens in Article 8 cases, and this is an example, that arguments are advanced that the claimant has in some way contributed to the community during the time he has been in the United Kingdom. In the present case the appellant has set up a business that employs a number of people. In my

judgment contribution to the community is not a freestanding factor falling to be taken into account when weighing the proportionality test in Article 8. It may, however, have some relevance if it forms part, for example, of the private life forged by the appellant whilst here."

84. Richards LJ agreed with the judgment of Scott Baker LJ. So too did Pill LJ, who also said this:-

> "I agree with the finding that there was interference, subject to Article 8(2) with the right to respect for the appellant's private life (Article 8(1)). I wish to express agreement, however, with Scott Baker LJ's finding, at paragraph 40, that the appellant's contribution to the community is not a freestanding factor when a breach of Article 8 is alleged. It may throw light on the private life of an applicant, and be relevant in other ways, but the respect due under Article 8 is not to be judged by reference to the success, or lack of success, of the applicant in the United Kingdom."

85. I now turn to UE. This case involved six appellants: a husband and wife and their four children. In determining their Article 8 rights, Immigration Judge Dean "took account of the effect of removal on each of the appellants in terms of their individual activities: in one case as a writer, a poet and performer; in other cases on their educational progress and their work and cultural activities" (paragraph 6).

86. Judge Dean was not, however, prepared to put into the balancing exercise mandated by Article 8(2) the value of the appellant's various activities to the community in the United Kingdom. In reliance upon MA (Afghanistan) v Secretary of State for the Home Department [2006] EWCA Civ 1440, the judge held that those activities were only relevant when considering the impact of removal on the appellants themselves.

87. At paragraph 8 of his judgment, Sir David Keene put the question to be decided as follows:-

> "When the decision-maker is carrying out the balancing exercise required to determine whether removal is proportionate in an Article 8 case, is it relevant on any basis that the person in question is of value to the community in the United Kingdom, a value of which that community will be deprived if he were removed?"

88. For the appellants, Mr Knafler relied upon the decision of the House of Lords in Bakhtaur Singh "where it was held that in deportation cases the effect on third parties of the deportation, including any loss of value to parts of the community in this country, was a relevant consideration to the exercise of discretion under the Immigration Rules" (paragraph 10).

89. By contrast, Mr Auburn, for the Secretary of State, submitted that the "rights conferred on individuals under the European Convention … are not a reward for good behaviour or for their contribution to society but are intrinsic" (paragraph 11).

90. At paragraph 18, Sir David Keene said that, although value to the community could only be taken into account, so far as relevant to the exercise of immigration control, the retention in the United Kingdom of someone who is of considerable value to the

community could properly be seen as relevant to such control (paragraph 18). It was a matter going "to the weight to be attached to that side of the scales in the proportionality exercise". Moreover:-

> "18. … the weight to be attached to the public interest in removal of the person in question is not some fixed immutable amount. It may vary from case to case, and where someone is of great value to the community in this country, there exists a factor which reduces the importance of maintaining firm immigration control in his individual case. The weight to be given to that aim is correspondingly less.
>
> 19. None of this means that the individual is being rewarded for good behaviour. It goes instead to the strength of the public interest in his removal and how much weight should be attached to the need to maintain effective immigration control in his particular case."

91. On Bakhtaur Singh, Sir David Keene had this to say:-

> "22. That of course was not an Article 8 case, but it would be surprising, to my mind, if the balancing exercise required under Article 8 to determine the issue of proportionality were to be seen as narrower in scope than that involved in the exercise of the statutory discretion and, in particular, if the concept of the "public interest" of relevance to immigration control were to be more tightly defined in the former than the latter."

92. Sir David then turned to the issue of whether a finding to that effect was open to the Court of Appeal, in the light of the judgments in RU (Sri Lanka). In summary, he did not consider that the statement of Scott Baker LJ at paragraph 40 of the latter's judgment constituted part of the *ratio* in RU and so it was, accordingly, open to the court "to find that the loss of such public benefit is capable of being a relevant consideration when assessing the public interest side of proportionality under Article 8 and as a matter of principle I do so find" (paragraph 35).

93. Having done so, Sir David immediately sounded the following note of caution:-

> "36. I would, however, before concluding, emphasise that, while this factor of public value can be relevant in the way which I have described, I would expect it to make a difference to the outcome of immigration cases only in a relatively few instances where the positive contribution to this country is very significant, perhaps of the kind referred to by Lord Bridge in Bakhtaur Singh. The main element in the public interest will normally consist of the need to maintain a firm policy of immigration control, and little will go to undermine that. It will be unusual for the loss of benefit to the community to tip the scales in an applicant's favour, but of course all will depend upon the detailed facts which exist in the individual case and in particular on the extent of the interference with his private and/or family life.
>
> 37. In the present case I would be surprised if a consideration of these matters excluded by the second immigration judge were ultimately to make a difference to the judgment on proportionality, but it might. I cannot be confident that it

would not, and that being so, I would allow this appeal and remit the case to the Upper Tribunal."

94. In referring to Lord Bridge's examples, it seems that Sir David Keene had in mind the following passage from the opinion in Bakhtaur Singh:-

> "In the argument before your Lordships it was not disputed that the effect of deporting a particular individual or a third party other than his family and persons intimately connected with him may well be a factor which is relevant to the discretionary decision whether he should be deported or not. A number of examples will make this clear. (1) A person liable to deportation has been carrying on business in partnership. His deportation will ruin the partnership business. (2) A person liable to deportation is an essential and irreplaceable worker for a company engaged in a successful export business. His deportation will seriously impair the business. (3) A person liable to deportation is a social worker upon whom a particular local community has come to depend. His deportation will deprive the local community of his services which will be difficult to replace. (4) A person liable to deportation is an indispensable member of a team engaged in scientific research of public importance. His deportation will put at risk the benefit which the public will enjoy if the research were successful."

95. Richards LJ agreed that the appeal in UE should be allowed. He did not consider that the Court of Appeal was precluded from so finding by the judgments in RU (Sri Lanka).

96. However, Richards LJ did not take the same view of the relationship between Bakhtaur Singh and Article 8 as Sir David Keene had done:-

> 39. The Article 8 balance exercise is not necessarily co-extensive with the exercise of the discretion to remove under the immigration statutes and Immigration Rules. In practice they will often involve the same considerations, but they need not do so. One cannot say that, because a factor is relevant to the extremely broad discretion under the statute or rules as vouchsafed by the decision in ex parte Bakhtaur Singh … it must also form part of the Article 8 exercise. The issue under Article 8 is the specific issue of whether interference with private life is proportionate to the legitimate aim pursued. I refer to "private life" because that is what we are concerned with in this case. A broad balancing exercise is required, but one needs to identify with some care what is being balanced against what. On one side of the balance is the legitimate aim in pursuit of which removal is to be effected. … In the present case, as the Secretary of State's decision letters make clear, the aim relied on is the maintenance of effective immigration control. That is what goes into the balance as weighing in favour of removal. On the other side of the balance, weighing against removal, is the individual's right to respect for private life.
>
> 40. Factors are relevant to the assessment of proportionality under Article 8 in such a case only in so far as they impact either on the weight to be given to the maintenance of effective immigration control or on the weight to be given to the individual's private life. It is not a question of dropping into the scales all aspects of the public interest for or against removal or anything that might be relevant to the exercise of a discretion under the statute or Immigration Rules. It is a more specific and targeted exercise.

> 41. For those reasons I consider that contribution to the community is not a freestanding or stand-alone factor to be put into the Article 8 balance as an independent consideration in its own right. It can affect the balance only in so far as it is relevant to the legitimate aim or the private life claim."

97. Like Sir David Keene, Richards LJ was doubtful whether, if it had been properly taken into account, the contribution of the appellant to the community would have made any difference to the judge's ultimate conclusion; but he could not say that the judge would clearly have reached the same conclusion in any event.

98. Ward LJ, the third member of the court, was alive to the difference in views of Sir David Keene and Richards LJ regarding Bakhtaur Singh:-

> "Insofar as a difference of emphasis can be detected in the judgments of my Lords, their *dicta* seem to me with respect to be *obiter* and I prefer therefore to say no more about it."

99. Mr Dixon also relied upon the judgment of HHJ Worster, sitting as a Deputy High Court Judge, in R (Zermani) v Secretary of State for the Home Department [2015] EWHC 1226 (Admin). It seems from the Deputy Judge's judgment that he was concerned with a decision made pursuant to paragraph 353 of the Immigration Rules, in which the Secretary of State refused to treat submissions that followed the refusal of a human rights claim, as a "fresh claim" giving rise to a right of appeal to the First-tier Tribunal.

100. The applicant was said to be of value to the local community in Wrexham, in connection with his work for the Wrexham Refugees and Asylum Seekers Support Group, and other organisations, as well as organising a community football tournament for young people. The applicant helped the Welsh Refugee Council and was said by the chairman of the local mosque to be a highly valued member of "our community". The local police diversity officer also referred to the applicant's "assistance and guidance whilst helping the Muslim community".

101. The Deputy Judge's attention was drawn to the passage in Sir David Keene's judgment in UE, in which he gave his views as to the scope of the analysis required, on the one hand, under the Immigration Rules and, on the other, in connection with the proportionality balancing exercise inherent in Article 8(2) of the ECHR. It does not appear that the Deputy Judge's attention was drawn to the somewhat different analysis contained in the judgment of Richards LJ.

102. Having noted a number of Scottish cases, which followed the approach in UE, the Deputy Judge held that, on the facts of the case before him, the Secretary of State had not had proper regard to the letters of support, attesting to the applicant's value to the community.

103. According to the Deputy Judge:-

> "… the letters of support speak not only of his value to the community, but some of them also refer to how difficult it would be to replace him. … The letters of support

> come from people whose views (potentially at least) must count for something. These are people with responsibilities in the community who, on the face of it, might be expected to write these sort of letters only when they are moved to do so by their genuine concerns. These are not friends or relations or even employers, these are people who have seen this man do something quite out of the ordinary. It may well be that a decision-maker will have reached the same conclusion had this case been considered outside the Rules, from the facts of this case I cannot say that it would be inevitable."

104. The Deputy Judge's reference to taking a decision outside the Rules leaves it unclear whether this was, in fact, a fresh claim case. In any event, the Deputy Judge made it plain that his decision to grant judicial review was not to be taken as indicating what the Secretary of State might conclude, following an analysis of the letters of support.

105. It is now necessary to take stock of the position.

106. It is, of course, the case that the balancing exercise to be undertaken in Article 8(2) situations is a wide-ranging one. So much is plain not just from UE but, more particularly, from the House of Lords' opinions in Razgar v Secretary of State for the Home Department [2007] UKHL 27 and Huang v Secretary of State for the Home Department [2007] UKHL 11.

107. That does not, however, mean there is no difference between, on the one hand, the factors which the respondent may consider in deciding how to exercise discretion under the Immigration Rules or other statements of immigration policy and, on the other hand, the factors to be decided in determining the weight to be given to the public interest in maintaining immigration control. On this issue, I respectfully consider that Richards LJ was right to say what he did in paragraphs 39 and 40 of UE.

108. In 1986, the appellate regime was such that an adjudicator, determining a deportation appeal of the kind described in Bakhtaur Singh, was required to decide whether the Secretary of State's discretion under the Immigration Rules should be exercised differently. In a real sense, therefore, the adjudicator was an extension of the decision-making process and so had to take his or her own view of matters of immigration policy, albeit giving appropriate weight to the view of the Secretary of State.

109. The present appellate regime is radically different. Appeals no longer lie against decisions taken under the Immigration Rules. Leaving aside revocation of protection status and deprivation of citizenship, immigration appeals now lie only against refusals of protection and human rights claims. First-tier Tribunal judges are no longer empowered by Parliament to decide how a discretionary policy expressed in the Immigration Rules should be exercised in a particular case.

110. Even before the radical changes effected to the appeal regime by the Immigration Act 2014, there had been, over the years, a marked decline in the instances of discretionary decision-making under the Rules. In particular, the adoption of the

"points-based" system removed much of the discretion for which the Rules had previously provided.

111. The fact that the respondent has to operate his immigration policy compatibly with Article 8 does not mean that each and every decision he makes, pursuant to the Immigration Rules and his other policies, as to who should and should not be allowed to enter and remain in the United Kingdom, must be based on considerations which are necessarily the same as those relevant to a proportionality balancing exercise under Article 8.

112. Accordingly, the warnings contained in the judgments of Sir David Keene and Richards LJ are important. Before coming to the conclusion that submissions regarding the positive contribution made to the United Kingdom by an individual fall to be taken into account, as diminishing the importance to be given to immigration controls, a judge must not only be satisfied that the contribution in question directly relates to those controls. He or she must also be satisfied that the contribution is "very significant". In practice, this is likely to arise only where the matter is one over which there can be no real disagreement.

113. I am not sure that the list of examples given by Lord Bridge in Bakhtaur Singh are all of this kind. It must be remembered that those examples were given against the background of the former appellate regime which, as I have said, gave adjudicators a foothold in the policy realm that is not shared by their successors.

114. Without in any way intending to be prescriptive, it is likely that one touchstone for distinguishing between instances that lie, respectively, exclusively in the policy realm and in the area of Article 8, is whether the removal of the person concerned will lead to an irreplaceable loss to the community of the United Kingdom or to a significant element of it.

115. If judicial restraint is not properly maintained in this area, there is a danger that the public's perception of human rights law will be adversely affected.

116. The following example is, perhaps, useful. Let us assume a judge is faced with two human rights appeals in respect of individuals whose situations are entirely the same, save for the fact that one is a bus driver and the other a brain surgeon. The judge might have his or her own view as to which occupation is of more value to the United Kingdom. But that view, alone, should not lead the judge to treat them differently under Article 8. Were the judge to do so, he or she would be seriously trespassing upon the respondent's policy realm.

117. It must be emphasised that UE is binding authority that, in an appropriate case, the weight to be given to the importance of maintaining immigration control can be diminished by reason of the effect that the removal of the appellant from the United Kingdom would have upon the community. I have tried to identify what are the correct criteria for determining if the case is, in fact, an appropriate one.

118. In Lama (video recorded evidence – weight – Article 8 ECHR) [2017] UKUT 00016 (IAC), the Upper Tribunal (McCloskey J) extended the principle in UE to a case where the appellant's removal from the United Kingdom would prevent a third party, who would remain in the United Kingdom, from continuing to make a contribution to United Kingdom society. In Lama, the person in question was "Mr R, who made a significant contribution through his acting to the community in general and to the cohort of disabled people in society" (paragraph 43). Although McCloskey J held that someone else could, in theory, be substituted for the appellant in Mr R's life, nevertheless "in qualitative and emotional terms, [the appellant] is irreplaceable".

119. Given what I have just said, Lama has in my view to be seen as in effect deciding that Mr R's contribution to the community would be materially impaired if he had to be cared for by anyone other than the appellant. Otherwise, it seems to me that Lama comes close to saying that immigration controls counted for less, because of Mr R's status.

120. How does the appellant's submission on this issue fit within the case law? The blunt answer is that it does not. There is no prospect of the appellant's son abandoning his business, and the employees who work in it, if the appellant were to be removed to Kenya. What the Tribunal is being asked to do can be distilled into the proposition that someone whose family makes a substantial contribution to this country's economy ought thereby to be subject to a less stringent set of immigration controls than a person whose family does not make such a contribution.

121. Not only is this, in its own terms, an extremely unattractive proposition. It is one which, if allowed to succeed, would inflict grave damage on human rights law. It would introduce an entirely unjustified distinction between the rich, and everyone else. It would also lead to calls for other forms of contribution to be so recognised. As can be seen from Lama, that danger is real.

122. It is, of course, the case that wealth is a factor that can directly impact on a person's ability to secure leave to enter or remain under the Immigration Rules. Obvious examples are to be found in the rules relating to entrepreneurs, investors and retired persons of independent means.

123. In MM (Lebanon) and others v Secretary of State for the Home Department [2017] UKSC 10, the Supreme Court rejected a challenge to the lawfulness of the rules that impose a minimum income requirement (MIR) on non-EEA family members seeking entry to join their settled partners in the United Kingdom. A person who cannot meet the MIR can demand to be given entry clearance if he or she has a case of such a nature as, exceptionally, to succeed under Article 8 of the ECHR.

124. The appellant can find no support for her proposition from the existence of rules of this kind. The fact that the respondent's immigration policies in some respects favour those who will not be a burden on public funds, if admitted to or allowed to remain in the United Kingdom, or might encourage the wealthy to come to this country,

does not mean a person's wealth thereby becomes a factor which, in the context of Article 8, generally diminishes the importance to be given to be given to the system of rules that the respondent has chosen to frame, pursuant to his functions under the Immigration Acts.

125. I wish to emphasise that nothing I have just said is intended to be a criticism of the appellant's son. On the contrary, his energy and success are to be commended. Human rights, however, are not, without more, to be dispensed by reference to such matters.

126. With all of this in mind, it is relevant to turn to the rules on adult dependent relatives. In the introduction to the Immigration Directorate Instruction Family Migration: Appendix FM Section 6.0 (August 2017) we find the following:-

> "The purpose of this route is to allow a non-European Economic Area (non-EEA) national adult dependent relative (ADR) of:
>
> - a British citizen in the UK;
>
> - a person settled in the UK; or
>
> - a person in the UK with refugee leave or humanitarian protection;
>
> to settle here, if they can demonstrate that, as a result of age, illness or disability, they require a level of long-term personal care that can only be provided in the UK by their relative here and without recourse to public funds.
>
> The policy intention behind the ADR Rules is, firstly, to reduce the burden on the taxpayer for the provision of NHS and local authority social care services to ADRs whose needs can reasonably and adequately be met in their home country; and secondly to ensure that those ADRs whose needs can only be reasonably and adequately met in the UK are granted immediate settled status (whether their sponsor has this or is a British citizen) and full access to the NHS and local authority social care services.
>
> **This is intended to avoid creating a disparity between ADRs depending on their wealth and that of their sponsor, and to give those ADRs who qualify certainty about their long-term status in the UK."** (My emphasis)

127. The important point is that the respondent's policy specifically requires everyone, rich and poor alike, to show that the requisite care can only be provided in the United Kingdom by a relative here. It is not enough that there will be no recourse to public funds.

128. In the present case, the First-tier Tribunal Judge's findings were that the appellant, if returned to Kenya, could be financially supported by her United Kingdom family. It is clear that the family would have the requisite financial means to buy care services for the appellant in Kenya.

(h) Conclusions

129. It is time to stand back and see where we have reached. None of the criticisms advanced by the appellant of Judge Eldridge's decision disclose an error of law on his part. The judge was entitled to find that the appellant did not meet the requirements of the Immigration Rules. In terms of paragraph 276ADE, he was entitled to find that there were not "very significant obstacles" to the appellant's integration into Kenya, where she had lived much of her life.

130. So far as Article 8 was concerned, the judge made valid and entirely sustainable findings regarding the position of the appellant's grandchildren, properly applying section 55 of the 2009 Act.

131. The judge correctly concluded that little weight could be given to the appellant's private life, established whilst the appellant had been in the United Kingdom unlawfully. The appellant had abused immigration controls by overstaying the period of entry clearance given to her. After becoming appeal rights exhausted in respect of the Asylum and Immigration Tribunal's decision of January 2010, the appellant ought to have embarked. Instead, she and her family have done their best to defy immigration controls.

132. In all the circumstances, the First-tier Tribunal Judge was entitled to conclude that removal of the appellant from the United Kingdom would not violate the United Kingdom's responsibilities under Article 8 of the ECHR, whether to the appellant or anybody else.

Notice of Decision

The appeal is dismissed.

No anonymity direction is made.

Signed Date

The Hon. Mr Justice Lane
President of the Upper Tribunal
Immigration and Asylum Chamber