Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/21061/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 6 September 2022	**On 10 December 2022**

Before

UPPER TRIBUNAL JUDGE ALLEN

Between

REIVILO VERMAAK
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr M Aslam, directly instructed
For the Respondent: Ms A Everett, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a national of South Africa. He appealed to the First-tier Tribunal against the decision of the respondent of 20 September 2018, refusing leaving to remain in the United Kingdom. The judge dismissed his appeal. The appellant sought and was granted permission to appeal that decision and, following a hearing on 25 January 2022, a panel consisting of myself and Deputy Upper Tribunal Judge Monson allowed the appeal in respect of the evaluation of Article 8 outside the Immigration Rules. The judge's decision dismissing the appeal in respect of Appendix FM was upheld.

2. In summary the appellant's claim is that he came to the United Kingdom with his wife in 2017. He came on a visit visa but his wife is a British citizen and they have been joined in the United Kingdom by his son and his wife's three children, all from earlier marriages. He and his wife had lived with his wife's second son Dax in South Africa from 2005 until 2017. They continued to reside together for a while after that but subsequently the appellant and his wife moved to their own home. As a consequence it is the case that the appellant and his wife and all their children and grandchildren have moved to the United Kingdom and the only one who has not been able to do so within the Immigration Rules is the appellant.

3. The appellant's wife gave evidence via video link. She adopted her statement from 2019. She said that currently neither she nor her husband owned a property in South Africa and had not done so for many years. Since 2005 they had lived in South Africa with her son Dax and his family. They had lost money on the house when they sold it in 2005. Neither she nor her husband had family living in South Africa. They had no other assets in South Africa and were currently living in rented accommodation in the United Kingdom. She was in receipt of income pension credit and housing benefit and they had no other income. They had four children between them in the United Kingdom, who were in a position to help them financially but they had never needed financial support from them in the United Kingdom. Hopefully they would not require any such support in the future. They were managing on the sources of income that they had.

4. She was referred to the letter from the GP Dr Modi dated 17 August 2022 and was asked whether the further investigations had yet taken place and said that they had not yet. As to whether her husband was receiving treatment she said she just took medication and he had blood pressure and blood thinners and cholesterol. On a day to day basis he managed his own care on his own. He did not need help with anything. He remembered to take his medication. If he had to return to South Africa she would go with him. She was asked how they would manage if that were the case and she said they would not manage at all. They did not have anywhere to go to as all their family and all their support system were in the United Kingdom and it was not just financial but emotional support that they needed. Their children were all settled in the United Kingdom. Her husband's son was, though he was settled, he was an engineer in ships and so worked two months on and two months off.

5. When cross-examined by Ms Everett the witness was asked whether, before they came to the United Kingdom they had enquired about applying for an appropriate visa for her husband, for example a settlement visa. Mr Vermaak said that unfortunately they had been misled and were told they could apply when they were here and they had begun this process five years ago. They had not been back to South Africa in the last few years. They were settled here in the United Kingdom.

6. She was asked whether, if they had to go back, she thought that the children would financially support them for example with rent there. She

said it would be difficult. They were all establishing themselves in the United Kingdom so they had limited finances to a degree.

7. Her husband had not received medical treatment in South Africa. He just had aspirin as a blood thinner. She was asked whether the children visited South Africa ever and had friends that they visited and said no, most of the close friends were here, having moved to the United Kingdom or Ireland. If she and her husband were living in South Africa, she did not think the children would visit. They had a very unhappy relationship with South Africa and that was the main reason to come to the United Kingdom.

8. There was no re-examination.

9. In her submissions Ms Everett said that there was further evidence since the decision in 2018 and the scope of the appeal was Article 8. She could see how it could be a persuasive case if the account about being misled was accepted and clearly the evidence suggested they were to have financial support in South Africa and could find somewhere to live. It was not said that the medication which the appellant was on was not available there. It was a question of the proportionality of removal for the appellant at his age and with his wife to return to the place in which they were familiar. They had understandable reasons for leaving but it was not disproportionate for them to be returned. The fact of their financial independence in the United Kingdom was a positive but they did not meet the requirements of the Rules and the amount required had been found to be proportionate. In essence the judge's findings on the evidence were undisturbed and the issue in the error of law finding in respect of his conclusion was as to the points and approach he had adopted.

10. In his submissions, Mr Aslam argued that it was very difficult to see what the public interest was in removal. It was true that given the couple's ages it was highly unlikely that the Secretary of State would wish to take steps to remove them.

11. Evidence had been provided as to how they came to the United Kingdom and it was consistent. If it was the case that they had been misled then there was no reason to disbelieve their evidence that they had been told that they could regularise the appellant's position when in the United Kingdom. In addition also the application in the United Kingdom had been made in good time and they had always had section 3C leave and this was to the appellant's credit.

12. As regards the financial circumstances, yes they had four children and three certainly were establishing themselves and buying properties and were willing and able, whenever required, to assist their parents financially but so far, because of the appellant's wife's entitlements the couple had managed on their own. The financial assistance was there but the children had commitments and the appellant's wife could not be sure as to its availability.

13. Though EX.1 was not freestanding, there were still very significant obstacles. They existed for all the reasons set out in the judge's findings.

The reasons for coming to the United Kingdom were the level of crime in South Africa and the fact they had been living with the appellant's wife's son Dax since 2005 and had always lived with family in the United Kingdom since then until more recently.

14. There was another doctor's letter pointing out the appellant's health issues and there were quite a number of issues outlined there. Further investigations were to take place. This added to the already existing very significant obstacles for both in managing in South Africa. They had a very tightknit family unit albeit that they were no longer living together but they were increasingly dependent on their children and they had family life with the children and grandchildren. It would be disproportionate for them to be required to return to South Africa. It was the case that they did not meet the £18,600 requirement, but they were living within their means and the rent was paid and they ran a car. There would be no further burden on the public purse. The fact that they spoke English was a further positive in respect of section 117B. There existed very significant obstacles and removal would be disproportionate.

15. I reserved my decision.

16. It is right, as was effectively common ground between the representatives, that the relevant factors were identified by the judge in assessing proportionality and the reason why he was found to have erred in law was because he ascribed points to the various elements for and against the public interest in immigration control which was found by the panel to be an error of law, a view which has been subsequently confirmed by the Upper Tribunal in KB [2022] UKUT 161 (IAC). Of relevance to the assessment of proportionality are the terms of section 117B of the Nationality, Immigration and Asylum Act of 2002. Some of the matters referred to by the judge have in essence fallen away. For example, the judge found, at paragraph 45 of his decision, that it had not been shown that there was any dishonesty involved in the appellant entering the United Kingdom as a visitor without an intention to leave, and the judge made no adverse findings in that regard. There is no reason to disagree with that view, and indeed I find credible the appellant's wife's evidence that they had been misled as to procedure and had thought that they would be able to regularise her husband's position when they came to the United Kingdom.

17. As regard the point at paragraph 46, the appellant stating in cross-examination that if he had lost the appeal, he would not leave the United Kingdom voluntarily, although that matter was not broached expressly before me, the situation if the couple were returned to South Africa was raised before the appellant's wife and that point was not reiterated. In any event, it was not found to be a negative factor by the judge and I agree in that regard.

18. As regards the point at paragraph 47 that the appellant would be able to obtain entry clearance if he applied from South Africa, in light of the judge's findings in this regard, which have not being challenged, that a

decision maker would not find that the financial requirements would be met from the sources made available, the position remains the same. As the judge observed at paragraph 59 of his decision, the public interest in immigration control continues to have significant weight. The fact that the appellant speaks English, as noted above, is a relevant factor but it is neutral rather than negative, as is the point concerning financial independence in light of what was said in Rhuppiah [2018] UKSC 58. As the judge observed, sub-section (4) and (5) and (6) are matters of no or very little impact in this case.

19. On the positive side, the judge considered first the interference with the appellant's relationship with his wife. It is clear however from her evidence that she would return to South Africa with him, and accordingly there would be no interference. Weight however must be attached to the effect of the separation from the children and grandchildren. As noted above, the appellant and his wife lived with her son Dax for some twelve years while in South Africa and lived either with him or other family members for some time after they first arrived in the United Kingdom, though they now live on their own. Clearly, the appellant and his wife play a role in their grandchildren's lives, in particular having spent the number of years they did in the household of Dax, and it can be assumed they formed a close bond with the children. Of course there is again, it is relevant to note, the fact that they have been living apart from that family for some time now. Weight clearly must be attached to the interests of the children, in particular their best interests which are a primary concern. Though, as the judge noted, there is no evidence that the appellant's presence is needed for their care. What he provides to them and what he receives from them is love, a point emphasised by the judge at his paragraph 68.

20. As regard the situation the appellant would face in South Africa, it is of course important to bear in mind the reasons why they came to the United Kingdom which was essentially because the crime situation had become such, as summarised at paragraph 31 of the judge's decision, that they found it intolerable to continue to live there. The judge found at paragraph 33 that crime and governance in South Africa are a serious problem. The appellant and his family have been victims of crime in South Africa and farm invasions can be particularly prevalent for white farmers though there is no evidence tht the appellant would return to South Africa as a farmer. They would have been able to return as has been accepted, together, and with support from the family although it is proper to accept, I think, that from the appellant's wife's evidence, as the children are making their way in the United Kingdom, such support may be limited. Equally though promises were made as to support that can be provided in the United Kingdom and no reason is provided why at least a good level of that support could not be made to the appellant and his wife in South Africa. They would therefore return to their home country in which they lived for many years and with sufficient support to be able to maintain, as I find on the evidence, a reasonable lifestyle there.

21. As regards the appellant's health condition, he had a heart attack some twenty years ago and has continued to take medication to control his blood pressure and cholesterol. At the time Dr Modi saw him he had no cardiac or respiratory symptoms of concern. He was experiencing pain in his right knee intermittently but was still managing to walk independently with the help of a knee support. He had signs of established osteoarthritis but had no problems with his gait and so Dr Modi did not feel further intervention was needed other than for him to continue exercising and walking. He had had some routine blood tests in February 2020, which were essentially normal.

22. In August 2020 he had developed some symptoms including tiredness, dizziness, inability to walk as far as previously and breathlessness on minimal exertion. Blood tests proved to be normal. After a further telephone consultation in March 2021 a knee x-ray was arranged and there was also a reference to the appellant experiencing some short-term memory loss. The knee x-ray confirmed severe right knee osteoarthritis and he was being referred to the musculoskeletal clinic for consideration of a knee replacement.

23. He also reported increased shortness of breath. It was thought that he might have had a further heart attack or a pulmonary embolism but investigations revealed that neither was the cause of his breathlessness, chest tightness, dizzy spells and palpitations but the CT scan of his chest revealed features of bronchiectasis. He is awaiting the outcome of an investigation to see whether he is suffering from interstitial lung disease. The cardiology clinic arranged an echocardiogram which found no significant abnormalities to account for his breathlessness.

24. At the most recent appointment on 5 August 2022 the appellant reported feeling tired all of the time even first thing in the morning with breathlessness at rest with minimal exertion. He reported being forgetful and had lost some weight, which he thought was due to a reduced appetite. Dr Modi had organised a further set of blood tests to investigate his memory loss as well as the increasing breathlessness and he has been re-referred to the respiratory clinic so they can review him as soon as possible. Dr Modi concludes that he does not believe that the appellant is capable of looking after himself and that is not in his best interests to be deported to South Africa.

25. The only particular comment I would make on that is to refer back to the appellant's wife's evidence where she said that he can manage his own care on his own on a day-to-day basis and does not need help with anything. Otherwise I factor all this medical evidence into account in the evaluation of proportionality. In conclusion I consider that the public interest in the maintenance of a firm and fair system of immigration control outweighs the other factors in this case. The appellant is in the United Kingdom without any immigration status. He can return to South Africa with his wife and can be supported financially by his family in the United Kingdom. I accept that this must present something of a bleak prospect for the appellant and his wife to be separated from the family for

whom they have been close for a significant number of years. However, the matter has to be assessed in accordance with the existing law, and on the basis of a proper application of the relevant legal principles I consider that it has been shown that his removal from the United Kingdom would not be disproportionate. Accordingly the appeal is dismissed.

No anonymity direction is made.

Signed Date 9th December 2022

Upper Tribunal Judge Allen