IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-003752
UI-2023-003754
First-tier Tribunal No: HU/56063/2022
HU/56063/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 28 May 2024

Before

DEPUTY UPPER TRIBUNAL JUDGE WILDING

Between

(1) JANIE OLIVIA AH KUN
(2) EDWARD AH KUN
(ANONYMITY ORDER NOT MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms A Radford, Counsel
For the Respondent: Mr M Parvar, Senior Home Office Presenting Officer

Heard at Field House on 27 February 2024

DECISION AND REASONS

1. The appellants appeal against the decision of the respondent refusing their application for leave to remain on human rights grounds. Their original appeal was dismissed by First-tier Tribunal Judge Hoffman in a decision dated 9 July 2023. The matter first came before me on 1 November 2023 where the respondent conceded that there was a material error of law in the Judge's decision. I have appended my error of law decision to this decision.

Appellants' case

2. The appellants are nationals of South Africa, and are ethnically Chinese. They lived in Johannesburg with their daughter, Angeline, until 2014 when she moved to London to take up a job opportunity with KPMG. She remains living in the UK and is the appellants' sponsor.

3. Living and working in apartheid era South Africa was challenging for the appellants, they have been impacted by incidents of racism throughout their lives in South Africa. They have been impacted by crime, including "smash and grab" attacks and burglary in South Africa. They have always felt like outsiders in South Africa and never felt comfortable there. Notwithstanding this they established themselves there, but do not identify with South Africa due to their experiences.

4. The appellants last arrived in the United Kingdom on 18 February 2020 to visit their daughter, they had valid visitors' visas until 2024 and had regularly visited her since she moved here in 2014. They were prevented from returning due to the impact of the pandemic. So that they did not overstay their stays they sought and obtained Exceptional Assurances from the Secretary of State permitting them to remain in the UK as South Africa was on the red list. They made the application that led to this appeal on 16 November 2021 while still subject to an Exceptional Assurance.

5. They submit that there are very significant obstacles to integration on return to South Africa, and, in the alternative, that the respondent's decision is disproportionate.

6. They are ageing, aged 81 and 76 as of the date of this decision, and have nothing to return to in South Africa. Whilst they still own property, it is a situation where they live in a gated community, which is at risk from being targeted by thieves. Their house has been burgled since they have come to the UK notwithstanding the security in place. Neither of them can drive, and are reliant on others. The increasing crime rate in South Africa will impact their ability to integrate on return, they will be socially isolated and fear of feeling like prisoners in their own home, reducing their ability to engage in and enjoy normal day to day activities on return. They do not have any family nearby with whom they could turn to for support and their social isolation will enhance their inability to integrate.

7. Outside of the rules they have lived in the UK for the last 4 years and have re-established a family life with their daughter. They have a private life here in their own right, and their removal will impact not only their Article 8 rights but also those of their daughter.

Respondent's case

8. The respondent does not consider that there are very significant obstacles to integration on return to South Africa. They were fully integrated in South Africa before they came to the UK on the final occasion and remain integrated there. That they would prefer to live in the UK does not detract from their social, and financial, integration in South Africa. The reliance on the social situation in South Africa is generalised and unspecific. If it applies to these appellants then it would apply to anyone in that situation, which plainly cannot be the requirement of the immigration rules.

9. The reality of the situation is that the appellant have built their lives in South Africa and have had success in doing so, they own their own home, have investments and their daughter has

made a success of herself. All of which is indicative of a family integrated there, and who would be able to integrate on return.

10. In relation to their relationship with their daughter is a very normal situation where an adult child emigrates, she is on a good salary and they can continue visiting each other as they have been doing since 2014. The love and affection they have with each other does not go beyond the normal emotional ties, and there is not a family life with each other.

11. They can continue with what they were doing before 2020, that is seeing each other regularly through visits, the length of which is a matter for them. If they want, in the future, to move to the UK permanently they can explore that option. The appellants are more than capable of living in South Africa.

The hearing

12. I heard evidence from the appellants. I then heard submissions from both representatives.

13. I had been provided with a supplementary bundle of evidence, which was in addition to the evidence that had been filed before the First-tier Tribunal.

Decision and reasons

14. I have carefully considered the oral evidence of the two appellants, as well as the documentary evidence provided. I only refer to documents I consider necessary in my decision below, but I have taken into account all of the documents and submissions provided by both parties.

15. I consider that the appellants removal would be disproportionate for the purposes of Article 8. I consider that there are very significant obstacles to their integration on return to South Africa, or in the alternative that their removal would be a disproportionate interference with their and their daughters Article 8 rights.

The immigration rules

16. The test found within the immigration rules is whether there are very significant obstacles to an applicant's integration. What that means has been considered in several cases. In Secretary of State for the Home Department v Kamara [2016] EWCA Civ 813, the Court of Appeal said:

14. In my view, the concept of a foreign criminal's "integration" into the country to which it is proposed that he be deported, as set out in section 117C(4)(c) and paragraph 399A, is a broad one. It is not confined to the mere ability to find a job or to sustain life while living in the other country. It is not appropriate to treat the statutory language as subject to some gloss and it will usually be sufficient for a court or tribunal simply to direct itself in the terms that Parliament has chosen to use. The idea of "integration" calls for a broad evaluative judgment to be made as to whether the individual will be enough of an insider in terms of understanding how life in the society in that other country is carried on and a capacity to participate in it, so as to have a reasonable opportunity to be accepted there, to be able to operate on a day-to-day basis in that society and to build up within a reasonable time a variety of human relationships to give substance to the individual's private or family life.

17. In Parveen v The Secretary of State for the Home Department [2018] EWCA Civ 932 the Court emphasised that:

9. That passage focuses more on the concept of integration than on what is meant by "very significant obstacles". The latter point was recently addressed by the Upper Tribunal (McCloskey J and UTJ Francis) in Treebhawon v Secretary of State for the Home Department [2017] UKUT 13 (IAC). At para. 37 of its judgment the UT said:

> *"The other limb of the test, 'very significant obstacles', erects a self-evidently elevated threshold, such that mere hardship, mere difficulty, mere hurdles and mere upheaval or inconvenience, even where multiplied, will generally be insufficient in this context."*

I have to say that I do not find that a very useful gloss on the words of the rule. It is fair enough to observe that the words "very significant" connote an "elevated" threshold, and I have no difficulty with the observation that the test will not be met by "mere inconvenience or upheaval". But I am not sure that saying that "mere" hardship or difficulty or hurdles, even if multiplied, will not "generally" suffice adds anything of substance. The task of the Secretary of State, or the Tribunal, in any given case is simply to assess the obstacles to integration relied on, whether characterised as hardship or difficulty or anything else, and to decide whether they regard them as "very significant".

18. My attention was also taken to the respondent's guidance 'Private Life', the version relied on in the original skeleton argument was version 1.0, I note that the most recent one is version 2.0. In the section 'Faith, political or sexual orientation or gender identity', I agree with the appellant's proposition that there is no reason why this is not extended to include race:

You must consider the relevant country information when considering whether an applicant would face very significant obstacles integrating or re-integrating into the country of return as a result of their faith, political or sexual orientation or gender identity. You must consider the degree of difficulty that would be faced as a result of the applicant's faith, political or sexual orientation or gender identity based on the situation in practice in the country of return and not necessarily solely what is provided for in law. The applicant's previous experience of life in that country and any difficulties the applicant claims to have experienced as a result of their faith, political or sexual orientation or gender identity must also be considered.

19. There was no challenge to either of the appellant's evidence, I accept as credible their oral and written evidence. They gave clear and coherent answers to the questions put to them ably and skilfully by Mr Parvar. The Secretary of State's contention in essence is that in relation to the socio-economic issues going on in South Africa currently that it is the same for everyone in the country, and that the historic allegations the appellants make of never feeling accepted or welcome there were successfully overcome through their time living there, and that anything faced on return would not amount to a very significant obstacle to integration.

20. I find that the appellant's came to the UK with the intentions of visiting their daughter in the UK. That was significantly interfered with due to the pandemic, and that the appellants were in essence prevented from returning to South Africa due to i) the consequences of the pandemic generally and ii) the placing of South Africa on the red list preventing travel there. I take judicial notice that South Africa was on the red list until 15 December 2021. Therefore the appellant's were in the UK for some 22 months effectively in limbo. The Home Office recognised as such and issued Exceptional Assurances on no less than 6 occasions from August 2020 to September 2021. On the final occasion the Assurance was given valid t0 29 November 2021.

21. The appellant's applied whilst that Assurance was in existence. I was not asked to determine whether that amounted to lawful leave for the purposes of the 1971 Act, and by extension I was not asked to determine whether the application made in November 2021 extended their

leave by victim of s3C of the 1971 Act. Equally I was not invited by Mr Parvar to find that the appellant's were unlawfully in the UK at any time since their arrival.

22. The appellants provided a wealth of background information pointing to the increasing crime rate in South Africa. In particular the:

a. The FCO travel advice outlines that South Africa has a high rate of crime, including carjacking, house robbery, rape, and murder. There is an increasing threat of kidnap throughout South Africa. Kidnaps are generally for financial gain or motivated by criminality. There have been incidents involving people being followed from OR Tambo International Airport in Johannesburg to their destinations and then robbed, often at gunpoint. There have also been incidents of crime in and around the airport itself. Incidents of vehicle hijacking and robbery are common, particularly after dark. (…) Vulnerable areas include, but are not limited to: traffic lights, junctions, petrol stations and when approaching or pulling out from driveways

b. The Global Initiative against Transnational Organized Crime, Strategic Organized Crime Risk Assessment: South Africa [Overview: Assessing South Africa's Existential threat], 21 September 2022 outlines that South Africa faces a complex, hybrid criminal threat. Having originated in highly constricted conditions under apartheid, in three decades organized crime has spread across the country and forged links around the world. It has been quick to seize opportunities, robust in the face of (often weak) law enforcement pressure and assertive in protecting its spheres of influence. In particular the report highlights that [the] "*criminal aspect of mass public transport, for instance, may not appear a prima facie existential threat to the state, but analyzing the deeper mechanics of the market highlights its significant influence. It is not only a violent industry that sees high levels of extortion, violence and volatility – affecting many of the millions of South African commuters who rely on taxis – but has served as a money laundering avenue for corrupt officials, drug gangs and cash-in-transit (CIT) heisters, as well as becoming a crucible of professional hitmen who are contracted by other criminal networks and upperworld actors*."

c. A report of 25 November 2022 from the Organized crime and corruption reporting project (OCCRP) which reported that more "*than 7,000 people were killed in South Africa from June to September, representing a 14 percent increase compared to the same period last year, according to the latest crime statistics released by the South African Police Service. Marked increases were recorded in all categories of violent crime ranging from robbery and physical assault to carjacking and kidnapping. Robbery, for example, was up by 22 percent, while kidnappings doubled from 2,000 reported cases last year to 4,000*."

d. In relation to the crime statistics evidence was submitted that outlined "There are no surprises in the quarterly July to September crime statistics released recently They show longstanding, abnormally high violent crime rates, including crimes committed during the orchestrated destabilisation after former president Jacob Zuma's arrest. Underlying these statistics is a state of virtual anarchy, with very low conviction rates for violent crime." The same report went on, "*[t]axi mafias predate 1994, but they have been given free rein since then by a government loath to regulate and monitor them properly, doubtless because of vested interests. This industry is home to most of the well armed hired hit men who kill with impunity. If this government were serious about crime, it would start with regulating and policing the taxi industry, including its*

murderous hit men and their guns. Murder rates are unlikely to drop until the criminal justice system deals with these mafias."

23. In addition to the above, the Appellant's produced background material on South Africa's Chinese population:

    a. A 2019 report documenting that "*negative stereotypes and misconceptions about our race and culture are still being propagated so that we continue to have to endure mockery in all areas of our lives, whether at school, at work or just trying to get our shopping done…Growing up, many of us have struggled to find others with similar backgrounds to allow us to form real connections and feel accepted. Some of us found ourselves feeling disconnected to our culture and our people, while simultaneously struggling to be seen as South African. (…) [M]any of the Chinese population are still seen as foreigners, and some people are even surprised that we can speak English."*

    b. In relation to the historic position of ethnically Chinese South Africans, a report from 2017 BEE-ING Chinese in South Africa, a legal historic perspective, Karen L Harris, Fundamina, Vol 23, Number 2, 2017 was provided which outlined:

    However, by the end of the 1990s, it became increasingly apparent to members of the South African Chinese community that they were being discriminated against in terms of employment equity, as well as matters relating to preferential shares and other economic empowerment deals in both the public and private sectors.

    "The application emphasised that as such, discrimination against the South African Chinese was 'widespread and systematic' during the apartheid years."

    "That discrimination against the Chinese was rife is indeed evident in the historical record and dates back to the first arrivals at the Cape."

    "It thus becomes clear that the exclusion of the Chinese from the benefits of the two Acts (Employment Equity and Broad-Based Black Economic Empowerment) was not something new to them – before and during the apartheid period they had endured similar discriminatory
    treatment".

    "On 18 June 2008 in the High Court in Pretoria at 10.00, Judge Cynthia Pretorius ruled that in case number 59251/07 the South African Chinese 'fall within the definition of black people in the Constitution', allowing them to 'now enjoy the full benefits of black economic empowerment'".

    c. A 2019 Guardian report from 2019 set out that:

    "Incidents of racial discrimination against South Africans of Chinese descent were rife in the 1970s and the so-called colour bar served to ensure the strict separation of races."

    "Throughout the 20th century, race discrimination remained part and parcel of life for the Chinese in South Africa. The racist legislation of apartheid affected almost every aspect of life for all those against whom it was directed. For the Chinese, this included where one could live and work, which schools children could attend and what public facilities were open to Chinese."

"In 1994, the Chinese, along with black South Africans who were discriminated against on the basis of race, were finally granted the right to vote. Since then, great strides have been made towards building an inclusive society. Yet discrimination against Chinese people is still evident, in particular in frequent anti-Chinese hate speech.

It is for this reason that the Chinese Association's hate speech challenge in the equality court, which will be heard on March 25, is to be supported. The case, pursued on behalf of numerous individuals and organisations from across the Chinese community nationally, centres on comments made by 11 individuals in early 2017 on the Facebook pages of Carte Blanche and the Karoo Donkey Sanctuary.

The harshness of the language used, and the hatred it expressed, was a shocking verbal assault on the Chinese. The case will focus on the harmful, hurtful and discriminatory effects of hate speech that denies the dignity and equality of Chinese people. It should be welcomed by all South Africans who wish to celebrate – rather than denigrate – our country's rich cultural,
racial and ethic diversity."

d. A Migration Information Source, Living in between: The Chinese in South Africa, by Yoon Park, 4 January 2012 report in particular highlighted:

"In June 2008, the Pretoria High Court issued an order that Chinese South Africans actually fall within the definition of "black people" – the phrasing used in the legislation to indicate previous disadvantage – as pertains to the EEA and the BBBEE Act. While their court battle ended successfully, the media fallout was replete with scathing headlines: "What color are Chinese South Africans?", "So, now the Chinese want to be black?", and "Only in South Africa: Chinese are classified as black."

The court order only applied to Chinese South Africans and other Taiwanese or Chinese immigrants who had become citizens prior to 1994 – likely fewer than 20,000 in all. However, the lack of clarity about "which Chinese" and "how many Chinese" was a major contributing factor to the subsequent media frenzy and public reaction. Few South Africans distinguish between Chinese South African and Taiwanese South African citizens or new Chinese migrants. In fact, most Africans across the continent tend to refer to anyone from East Asia (and, at times, elsewhere in Asia) as Chinese.

The strong negative public response dampened any sense of victory on the part of the Chinese South African community. It also provided further evidence of their marginal and tenuous position in South Africa, despite their efforts to integrate."

"This is not to say that the Chinese are welcomed with open arms into general South African society, if such can even be said to exist. Even 17 years after the end of apartheid, South Africa continues to be extremely divided along lines of race, ethnicity, and class. The negative reaction to the initial announcement of CASA's victory in their affirmative action case against the South African government is one indication that most South Africans remain highly confused and conflicted about how the Chinese fit into South African society.

While outbursts of xenophobic violence in South Africa tend to target migrants from other African countries, our research indicates that Chinese and South Asian migrants seem to be inordinately targeted by criminals and corrupt officials. While robberies, car hijackings, and extortion may result from their overrepresentation in the retail trade, the practice of racial profiling is also a possible contributing factor. Our research has also found tensions between groups of Chinese, although these have shifted over time."

e. As to the current situation there were reports submitted highlighting that:

"Meanwhile, Chinese in South Africa are becoming victim to rising xenophobia, with some people - wary of Chinese loans and investments through Beijing's Belt and Road Initiative - accusing them of being the 'new colonialists.'"

"In the context of South Africa's continued high levels of unemployment, frustration about the lack of service delivery promised by the ANC, and continued signs of fracture within the leadership of the ruling party, the political opposition in South Africa and even disgruntled government partners have periodically targeted China as a convenient scapegoat."

"The Chinese are clearly seen as "other" and "foreign" – a reality that is hurtful to the thousands of Chinese South Africans whose parents and grandparents were born in South Africa and suffered through apartheid – but they are also not constructed by the state or other political groups as a "despicable other." Memories of Kung Fu masters (à la Bruce Lee), fahfee men, and kind and generous shopkeepers appear to play a mediating role in shaping perceptions about Chinese in South Africa in ways that do not exist in Lesotho. The role of memory and social history in mitigating contemporary contexts of potential conflict are undeniable."

"Length of time in the country is also not an exact indicator of greater integration. Older South Africans who were either born in South Africa or moved to the country as young men still feel like outsiders because of their experiences under apartheid. When interviewed about their sense of belonging, they said they wanted to retire and/or be buried in China once they die. On the other hand, a relatively recent Chinese migrant from Fujian Province claimed to be a dues-paying member of the African National Congress and has started his own local community-policing forum. While he is uncertain about whether or not he will remain in South Africa permanently, he is committed to being an engaged, active citizen in the broadest sense of the word."

24. The above material was not contradicted by any evidence submitted by the respondent, in fact the respondent did not seek to elicit any of his own background material to combat the material relied on by the appellant and nor did I hear any submissions in relation to the background material.

25. I reject Mr Parvar's submission that the evidence is nothing more than generalisations as to the issues of discrimination and violence in South Africa as meaning that limited weight can be placed on it. The respondent did not produce any of his own material to contradict the background material, and I reject the suggestion that if the appellants had been truly affected they would have claimed earlier. The appellants arrived as visitors, and it is plain that the longer they remained in the UK, the more it became clear to them that returning to South Africa would cause them significant difficulties. In any event I accept Ms Radford's submission that before they came to the UK there was more of a community that they had in South Africa, more family members were still alive.

26. Considering the appellants oral evidence and the background material I consider that on balance they have shown that historically ethnically Chinese people in South Africa have suffered societal discrimination through the apartheid era, and that post-apartheid they continue to suffer discrimination and societal 'othering' as outlined above. The first appellant explained in particular how that everyday racism manifested itself through the Covid-19

pandemic where she experienced people treating her differently because of her Chinese ethnicity and remarks were made.

27. I find the appellants' evidence to be credible as to how they felt throughout the apartheid era, and find it credible and consistent with the background material, that notwithstanding their own successes in establishing themselves in South Africa, that nevertheless they were subject to societal discrimination and racism throughout the apartheid era.

28. I also accept as credible, and consistent with the background material that post-apartheid that sense of not belonging and 'othering' has continued for them. I do not consider that the fact that Mr Ah Kun worked until he retired, or that Mrs Ah Kun has managed to do some volunteering post-retirement shows that they managed to cope and thrive notwithstanding the discrimination.

29. I find that the evidence generally points towards a continuation of that historic discrimination in South Africa today. In particular the background material that highlights the media reporting of a significant High Court victory for ethnically Chinese South Africans demonstrates the negative connotations of that victory. This is on top of the background material highlighting that ethnically Chinese people are "*inordinately*" targeted by criminals.

30. I find further that the appellants narrative as to their feelings on whether they feel fully integrated as ethnically Chinese South Africans to be entirely consistent with the background material provided in that their lived experience of life under apartheid. I find that the appellants evidence is credible, understandable and established that they never felt fully a part of life in South Africa under apartheid and that that has continued post-apartheid. I find the narrative of Mrs Ah Kun as to what she experienced in and around the church to be particularly powerful as to the 'day to day' discrimination and 'othering' that she, and her husband, have faced in South Africa.

31. Contrary to Mr Pavar's submission I find that it is notwithstanding the societal discrimination that they established themselves in South Africa and got by, not because it did not exist or what did exist did not affect them. I further find that the historical discrimination they both suffered and were witness to impacts their ability to integrate on return. Whilst they have both lived a considerable period of time in South Africa, both being born there, they nevertheless have not been fully accepted members of society there, either before or after apartheid.

32. I find credible that they have fears and anxieties of returning to South African given the worsening situation there in relation to crime and access to services. The appellants have been victims to crime in South Africa, the first appellant discusses how a smash and grab robbery from her car has made her increasingly uneasy whenever she is in a car at traffic lights. That the background material also highlights the continuing negative connotations that ethnically Chinese South Africans have to endure is linked to the targeting of that community by criminals enhances that fear. I find their fear is not only subjectively credible, but that it is based on a worsening socio-economical environment. In other words the subjective fear is rationally based on the objective material. That they have been victims of burglary since being in the UK is evidence of the background material and the appellants' own experiences conjoining.

33. The appellants have also explained how over time their support network in South Africa has diminished, in particular that their remaining family members in South Africa live a

significant way from where they live in Johannesburg and that they have more family in the UK than they have in South Africa. Their nearest relatives live in the Cape, and they have no one close to them in Johannesburg. This will enhance, on return, their feeling of isolation both perceived, but also actual. They explained in their evidence, which was not disputed, that they live in a gated compound and one which has private security so as to ensure the residents are safe. Mrs Ah Kun explained that on entering and departure they have to make sure that they are not followed in. Notwithstanding these measures their property was burgled since they arrived in the UK which is consistent with the increasing crime rates in South Africa.

34. I further consider it significant, and made out by the clear evidence of the appellants, that the appellants' social and actual isolation will be exacerbated by their advancing years and their ability, or otherwise, to get around. Neither have a valid driving licence. Mr Ah Kun explains he will need to apply for one now he is over 75, and I have not been provided with any material as to the process to obtain one. Public transport, as outlined in the background material I have highlighted above, is problematic and likely to expose the appellants to the possibility of crime. Their advancing years and ethnicity may well enhance their vulnerabilities, as well as their feelings of social isolation. They will need to attend medical appointments, as well as be able to travel around such as to play a part in society on return.

35. Their ages are an important consideration as to their ability to integrate. They are not working age people, who are fit and able going about society. Both have a reducing family in South Africa, their social circle has shrunk, their ability to travel within the country has reduced such that the discrimination they experienced growing up, and throughout their adult lives is felt more acutely.

36. I find as credible their fears, supported by the background material, that on return they will necessarily live a more isolated life because they will not feel safe. As they age, and become more vulnerable, which they are now in 2024 since they were even when they arrived in 2020, their subjective fears and anxieties will contribute to their inability to integrate on return. These fears are supported by the background material which identifies that older people are more vulnerable to robberies and burglaries.

37. In addition to this, I find it relevant, albeit not the most weighty consideration, that there is an increasing issue in relation to 'loadshedding'/power outages, which leads to houses having no electricity or water. This reduces their ability to being connected and their ability to care for themselves. Whilst this is the same for all South Africans affected by such outages, I am considering the impact on these appellants, and consider it a relevant consideration given their respective ages and reliance on others to make sure their everyday needs are met.

38. Taking all of the above into account I consider that whilst the appellants know how society carries in in South Africa there are very significant obstacles to their ability and capacity to participate in society there such that they would have a reasonable opportunity to be accepted there. Their lived experience, in addition to the current situation in relation to crime and social issues means that they will have very significant obstacles to integrating on return.

Outside the rules

39. If I am wrong on the above I go on to consider the Article 8 claim outside of the immigration rules.

40. I adopt the findings in relation to the background material I have already made, as I do the findings as to the appellants' social standing on return. I consider that even if there are not very significant obstacles in integration there nevertheless would be significant obstacles. In my judgment the alternative consideration I give is on the basis that the

41. The appellants have developed a private life in the UK with their daughter, and in my judgment Article 8(1) is clearly engaged on that limb. For the avoidance of doubt I go on to consider whether there is an Article 8(1) family life. The leading authority as to engagement is that of Kugathas v Secretary of State for the Home Department [2003] EWCA Civ 31 where Sedley LJ said:

25. Because there is no presumption of family life, in my judgment a family life is not established between an adult child and his surviving parent or other siblings unless something more exists than normal emotional ties: see S v United Kingdom (1984) 40 DR 196 and Abdulaziz, Cabales and Balkandali v United Kingdom [1985] 7 EHRR 471. Such ties might exist if the appellant were dependent on his family or vice versa. It is not, however, essential that the members of the family should be in the same country. The Secretary of State accepts that that possibility may exist, although in my judgment it will probably be exceptional. Accordingly there is no absolute rule that there must be family life in the United Kingdom, as the Immigration Appeal Tribunal held.

42. The appellants are particularly close with their daughter, there are clearly significant emotional ties, the question is whether the ties they have something beyond the normal emotional ones. In my judgment in this case, on the particular evidence I have heard, they do. They have lived together now for some 4 years or so, they are financially dependent on her in the UK, and the bond they all have together, given she is their only child is significant. This is a family relationship which clearly goes beyond the normal emotional ties of an adult child and their parents. I find that there is a family life between them.

43. The appellants' daughter is well established in the UK, she has a very good job here and here presence is essential for that work. The letter from her employer sets out that she cannot work for long periods outside the UL, that her primary place of work is in London, and that her employment is subject to her having the right to live and work in the UK.

44. The appellants' daughter has developed her own private life in the UK, having been here since 2014. That private life is worthy of protection, and of course I have to take into account the impact on her own Article 8 rights were her parents to be removed.

45. The appellants have a close bond with their daughter, to separate them now, at their respective ages in life, would have a significant impact on them, and also on their daughter.

46. I balance the above with the public interest of effective immigration control as set out in s117B of the Nationality, Immigration and Asylum Act 2002 as amended:

(1)The maintenance of effective immigration controls is in the public interest.

(2)It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are able to speak English, because persons who can speak English –

(a)are less of a burden on taxpayers, and
(b)are better able to integrate into society.

(3)It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are financially independent, because such persons –

(a)are not a burden on taxpayers, and
(b)are better able to integrate into society.

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

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

47. The starting point is that little weight should be given to the appellants' private life in the UK because it was established whilst their status was precarious. I note in particular however that this is a starting point, and is not mandated that little weight must be given. In addition s117B says nothing as to the family life of someone established during that time. As such I consider my starting point to be neutral, albeit informed by s117B(1) that the maintenance of immigration controls is in the public interest.

48. The appellants speak English and are financially independent, which I consider to be neutral factors.

49. The appellant's arrived as visitors and intended on returning to South Africa at the end of their stay, they only did not do so because of the pandemic. They successfully applied for exceptional assurances which were granted all the way until November 2021 when they made their application for leave to remain.

50. I find that on the particular facts of this case, and in particular the particularly close bond the appellants have with their daughter, and that their residence in the UK was at all times with the permission of the Secretary of State elongated by the impact of the pandemic, that the private life of the appellants in the UK should be afforded more weight than the statutory starting point.

51. I also consider that the family life of both appellants and their daughter should be afforded significant weight, as should their daughter's private life, for it is not just the appellants who will be impacted by their removal from the UK.

52. The appellants have little to return to in South Africa in terms of the life they left behind, their advancing years means that they will struggle to adapt on return. As this consideration is undertaken in the alternative to my primary finding that the appellants meet the provisions of the immigration rules, I proceed on the basis that there are not very significant obstacles to their integration. However I consider that there would be significant challenges and difficulties with their integration on return which are weighty consideration in my proportionality assessment.

53. In addition to this is the life they have developed in the UK with their daughter and their own private lives. I place some weight on the lives they have independently developed, but place a greater emphasis on the family life they enjoy with their daughter. The UK is the only country where that family life can realistically be enjoyed. She is in the UK on a visa, and I

take judicial note that she qualifies for indefinite leave to remain later this year. I do not consider, having spent the last 10 years in the UK establishing herself in work here that it would be reasonable or proportionate to expect her to leave the UK and set herself up again in South Africa.

54. The first appellant's health conditions are such that she will not be able to regularly visit as frequently as she has done in the past, as explained in her statement which was not challenged by the respondent, she suffers from osteoporosis, spondylolisthesis and osteoarthritis which contributes to her being unable to sit for a long period of time, such as an 11-12 hour flight. She has to travel in a neck brace, and requires wheelchair assistance whenever she travels.

55. Balancing the public interest with the Article 8 rights of the appellants and their daughter I find that the public interest is outweighed. Their removal would in my judgment be disproportionate.

Notice of Decision

The appeal is allowed on Article 8 grounds.

Judge T.S. Wilding

Deputy Judge of the Upper Tribunal
Immigration and Asylum Chamber

Date: 17th May 2024

IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-003752
UI-2023-003754
First-tier Tribunal No: HU/56063/2022
HU/56063/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:

……

Before

DEPUTY UPPER TRIBUNAL JUDGE WILDING

Between
(1) JANIE OLIVIA AH KUN
(2) EDWARD AH KUN
(ANONYMITY ORDER NOT MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms A Radford, Counsel
For the Respondent: Ms S Lecointe, Senior Home Office Presenting Officer

Heard at Field House on 1 November 2023

DECISION AND REASONS

1. The appellants appeal with permission against the decision of First-tier Tribunal Judge Hoffman ('the Judge') who in a decision dated 9 July 2023 dismissed their appeal on human rights grounds.

Decision and Reasons

2. It is not necessary to set out fuller reasons for the basis of setting this decision aside. Ms Lecointe on behalf of the Secretary of State accepted that there were material errors of law in the decision of the Judge such that his decision had to be set aside. The basis of that concession is:

a. The Judge did not adequately assess the evidence in relation to the impact on the appellants taking into account their respective ages. There was a mistake in relation to the appellants' ages in that the first iteration of the judgment said that they were 65 and 70, before a corrected version being promulgated showing their correct ages of 75 and 80. However even taking into account the mistake being a typographical error, the Judge did not set out in his decision the impact of them given their age and their ability to integrate on return.

b. The Judge failed to set out and lawfully apply the test outlined in Secretary of State for the Home Department v Kamara [2016] EWCA Civ 813. There is no engagement with the evidence of the appellants, or the background evidence relied on as to how they lived and adjusted to the societal discrimination that they faced living in South Africa and how that presented itself as an issue for integration on return. Similarly, the consideration is incomplete and inadequate by failing to factor properly the past difficulties they had, through the prism of the likelihood of future difficulties.

c. In terms of the Article 8 assessment outside of the immigration rules the Judge unlawfully factored the use of the NHS against the appellants even though they have paid the NHS surcharge as necessary. Further the Judge failed to consider that the appellants only lost links to South Africa through the residence in the UK enforced on them by the impact of Covid and the travel restrictions on both the UK and South Africa. The consideration as to what their daughter may or may chose to do fails to consider what she will likely do, and what is likely to happen. The assessment is incomplete and fails to properly consider the proportionality of the appellants' removal from the UK.

3. Given the concession made by Ms Lecointe I treat this appeal as allowed by consent under rule 40(3)(a), and the decision of the Judge is set aside.

4. I do not consider this case is one which requires remittal and I retain the matter in the Upper Tribunal. Directions as set out below.

Notice of Decision

The Decision of the First-tier Tribunal is vitiated with material error of law and is set aside.

No findings of fact are preserved.

Directions

1. The appeal is to be listed in the Upper Tribunal

2. The appellant to file and serve any additional evidence, if so advised, no later than 21 days before the resumed hearing.

3. The appellant to file and serve an updated skeleton argument, if so advised, no later than 14 days before the resumed hearing.

4. The respondent to file and serve a skeleton argument, if so advised, no later than 7 days before the resumed hearing.

5. Time estimate 3 hours.

6. Reserved to Deputy Upper Tribunal Judge Wilding

Judge T.S. Wilding

Deputy Judge of the Upper Tribunal
Immigration and Asylum Chamber

Date: 20th November 2023