



**Upper Tribunal  
(Immigration and Asylum Chamber)**

Appeal Number: HU/04908/2016

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 07 March 2018**

**Decision & Reasons  
Promulgated  
On 05 April 2018**

**Before**

**UPPER TRIBUNAL JUDGE SMITH**

**Between**

**MR ILIR [E]  
(ANONYMITY DIRECTION NOT MADE)**

Appellant

**and**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellant: Mr S Knight, Counsel instructed by Sterling Chance Solicitors

For the Respondent: Mr C Avery, Senior Home Office Presenting Officer

**Anonymity**

An anonymity direction was not made by the First-tier Tribunal. No application was made to me for anonymity of the Appellant. There is no reason to make such a direction. I have however anonymised the names of the children affected by these proceedings.

**DECISION AND REASONS**

**BACKGROUND**

1. By a decision promulgated on 17 January 2018, I found an error of law in the decision of First-tier Tribunal Judge Asjad itself promulgated on 23 March 2017. I therefore set that decision aside and gave directions for a resumed hearing to take place before me to re-make the decision. My error of law decision is appended to this decision for ease of reference.
2. The essential background facts are as follows. The Appellant is a national of Albania. He is an illegal entrant. He entered the UK clandestinely in May 2014. His asylum claim was refused on 17 April 2015. On 6 August 2015, he made an application to remain in the UK based on his family life. He is in a relationship with a British national, now known as [CE] (formerly [CU] nee [CB]). Their relationship began in around June 2014. The couple have one child of that relationship, A, who is also a British citizen. She was born on [ ] 2016. The Appellant is also the stepfather of another child, L. He is also a British citizen. He was born in [ ] 2015.
3. The Respondent's decision under appeal is dated 16 June 2016. Although L was born prior to the Respondent's decision under appeal, the Respondent sought DNA evidence to show the Appellant's paternity of that child which was not forthcoming. As it now transpires, L is not the Appellant's child. As a result, and because A was not born at the time of either the application made by the Appellant or the Respondent's decision under appeal, the Appellant's family life as a parent was not considered by the Secretary of State.
4. This is an appeal which proceeds under the Nationality, Immigration and Asylum Act 2002 as amended by the Immigration Act 2014. The new provisions require the express consent of the Respondent to the raising of any "new matter". The Respondent has consented to the raising of the Appellant's relationship with A and L in this appeal and to my determination of the issue whether the Appellant ought to be permitted to remain based on that relationship.
5. The appeal is for the above reasons firmly focussed now on whether the Appellant should be permitted to remain as the partner of [CE] and the parent of A and L. That issue is to be considered both under and outside the relevant Immigration Rules ("the Rules").
6. I heard evidence from the Appellant and [CE]. I also heard evidence from [GG] who is the adult son of [CE] from a previous relationship. I do not record all the evidence which I heard. The parties will be aware of that evidence as they were present at the hearing and the evidence is contained in the note of proceedings. I have therefore referred in what follows only to that evidence which is relevant to the issues which I need to determine.

## **DISCUSSION AND CONCLUSIONS**

### **The Position under the Immigration Rules**

#### **Relationship as a partner**

7. In order to satisfy the Rules in this regard, the Appellant has to show that he meets R-LTRP.1.1 of Appendix FM to the Rules. That requires him to

satisfy either all of the requirements in E-LTRP.1.2. to 4.2. or to meet paragraphs E-LTRP.1.2-1.12. and E-LTRP.2.1. if paragraph EX.1. applies. Although the Appellant's partner, [CE], is a British citizen and therefore meets E-LTRP.1.2., she is unable to meet the definition of "partner" under Gen.1.2. of Appendix FM because the couple had not been cohabiting in a relationship akin to marriage for a period of two years at the date of application. By August 2015, they had been together for only about one year, having met first in June 2014 and moved in together at some point between then and August 2015. As such, the Appellant cannot meet the Rules for that reason.

8. Even leaving aside the failure to satisfy the primary definition of partner, the Appellant's immigration status is such that he could not meet all the relevant criteria under the Rules for limited leave to enter as a partner. As such, he can only meet E-LTRP.2. if paragraph EX.1. also applies. There is also a question mark whether the couple could meet the minimum income threshold. Paragraph E-LTRP.3. is also not satisfied on the evidence. However, again, the Appellant would not be required to meet that criterion if paragraph EX.1. applies.
9. Before turning to consider whether paragraph EX.1. is met, I deal first with the prior issue whether the relationship between the Appellant and [CE] is a genuine and subsisting one and whether they intend to live together permanently in the future. Those are requirements under E-LRPT.1.7. and E-LRPT.1.10. and must be met, as a matter of common sense, for the application to succeed at all on this basis.
10. I begin by saying that I found [CE] to be a truthful witness. I accept that she views her relationship with the Appellant as genuine and is committed to its success. She has had relationships in the past which have failed including one with a Kosovan national who left her as soon as he had obtained his indefinite leave to remain based on their relationship. She said in evidence that she thought that she had been used by him. I would therefore expect her to be somewhat cautious about accepting as a partner someone who has a benefit to gain from the relationship in immigration terms as does the Appellant. I accept her evidence that she genuinely believes that the Appellant is different to her former Kosovan husband, that she believes the relationship with the Appellant to be a genuine one and that she believes that the Appellant is as committed to her as she appears to be to him.
11. [CE]'s evidence was supported by her son, [GG]. Although he has since moved out of the household with the Appellant and his mother, he continues to visit them regularly and believes the Appellant to be genuine in his intentions. He considered that his mother's relationship with her Kosovan husband was also "real" but "not very healthy" and he "did not like the guy". He said though that he was not concerned that his mother was about to commit to another similar relationship because he thought the Appellant to be genuine. He could talk to the Appellant and had bonded with him more than he had done with his previous stepfather.

12. I do though have some doubts about whether the relationship is genuine and subsisting notwithstanding [CE]'s assertions. First, the Appellant had a family in Albania. He left his wife and children in 2012 although he was not divorced from his ex-wife until 2014. He has children in Albania now aged ten and six years. This is probably more relevant to the Appellant's relationship with his children than with [CE] but does show that the Appellant has no compunction about walking away from a relationship even if there are children involved.
13. Second, I have concerns due to the timing and way in which the relationship was formed and developed. The Appellant had arrived in the country illegally just over one year before he met [CE]. He claimed asylum at some point thereafter and his claim was refused in April 2015. Since the Appellant himself gave evidence that he came to the UK "for a better life", the asylum claim appears not to have been genuine. It was not in any event accepted by the Respondent and it does not appear that the Appellant appealed that decision.
14. About two months after the Appellant was refused leave and when he no longer had any basis to stay in the UK, the Appellant met [CE] by chance when he went to do some work for her at the direction of his friend. The evidence I was given is that the couple got on and exchanged telephone numbers. The Appellant then, within a few days, contacted [CE] to ask her out for a drink and the relationship then developed very quickly to the extent that [CE] thought that her son, L, born in April 2015, was the son of the Appellant and was on her admission, slightly shocked that he was not. The relationship had therefore developed very quickly indeed.
15. Of course, it is not the case that just because a relationship is formed quickly that it is not genuine or that it should not continue successfully. The fact that a couple can form a mutual attraction within a few weeks and make a lasting commitment to each other in such a short space of time is not of itself implausible. As I have already indicated, I accept [CE]'s evidence that she genuinely committed to the relationship very quickly. She did so she said because she found the Appellant to be "friendly, happy and positive". She said that they wanted to spend all their time together.
16. Conversely, when the Appellant was asked the same question about what it was that attracted him to [CE], he said that he did not know, that they got on "well and very quickly", that they had "liked each other very quickly" and that when he had been detained, he had that day been with her. In re-examination when asked how much he liked [CE], he said that "the first week, it was me and her together, the second week I accept as wife and she accept me as husband. It was love. She came to see me for three months in detention. Why would she do that if she didn't love me." The Appellant appeared not to understand that the issue is not whether [CE] is genuinely committed to him but whether he is really committed to her. The Appellant's answers gave no insight into any emotional relationship between him and [CE]. I recognise however that not everyone is able to express emotions in the same way and that cultural differences may also explain the Appellant's reluctance to discuss his feelings for [CE].

The Appellant also gave evidence in English which is not his native language and he may have found it difficult to find the right words to express his feelings.

17. The third and final reason for my doubts about the relationship is the limited supporting evidence from friends and family. Notwithstanding the Appellant's evidence that [CE]'s family have accepted him as part of the family and that he has been invited to family functions as her partner, there was no evidence, whether in writing or orally from any of those family members apart from [GG] to whose evidence I have already referred. The Appellant and [CE] were asked about what they had done together at Xmas. There were some discrepancies in their evidence to which I will refer later but one thing worthy of note is that they spent Xmas together as a family with a visit from [GG] but there was no reference to seeing any wider family or attending Xmas lunches or parties with, for example, [CE]'s parents or siblings. There are a few brief letters in the bundle from a few friends and a neighbour who say that the couple appear to be happily living together but little detail is given. None of the friends provided a statement or came to give evidence about the relationship.
18. I note that [CE] has changed her name to include the Appellant's surname. As I have already indicated, though, I do not doubt her commitment to the Appellant. It is his to her about which I have some doubts.
19. Against those doubts, however, it is undoubtedly the case that the couple are living together and have a child together which suggests an ongoing relationship as partners. I will come on to look at the Appellant's relationship with his children below.
20. The relationship can only be a genuine and subsisting one with a genuine intention to live together permanently if both partners have that genuine commitment to one another. For the reasons I have given, I have some doubts about the credibility of the Appellant's motivation and commitment to the relationship.
21. However, even if the relationship is a genuine and subsisting one and both partners intend to live together permanently, the Appellant would still need to satisfy paragraph EX.1. of Appendix FM. So far as concerns the relationship as a partner, that reads as follows:-

"EX.1. This paragraph applies if

...

(b) the applicant has a genuine and subsisting relationship with a partner who is in the UK and is a British Citizen, settled in the UK or in the UK with refugee leave or humanitarian protection, and there are insurmountable obstacles to family life with that partner continuing outside the UK.

EX.2. For the purposes of paragraph EX.1.(b) "insurmountable obstacles" means the very significant difficulties which would be faced by the applicant or their partner in continuing their family life together outside the UK and which could not be overcome or would entail very serious hardship for the applicant or their partner."

22. When [CE] was asked what she would do if the Appellant was removed to Albania, she said that she had not really thought about it but would probably go and visit him and then come back to the UK or they could meet up, for example in France. She said she had never been to Albania so she would have to see what it was like. She would probably go for a couple of months. However, she could not imagine giving up her house. Whilst understandably reticent about a move to a foreign country that she does not know, [CE]'s evidence did not disclose that there are any obstacles to her relocating if she chose to do so. Certainly, nothing she said shows that there are any "insurmountable obstacles".
23. For those reasons, even if the relationship is genuine and subsisting and otherwise meets the requirements of the relevant Rules (which it does not due to the length of the relationship at date of application), the Appellant's application based on his relationship with [CE] fails based on his illegal immigration status coupled with the lack of any insurmountable obstacles to continuation of their family life in Albania.

#### Relationship as a parent

24. I can deal with this aspect of the appeal more shortly. The Appellant is undoubtedly the father of A, who is a British citizen and therefore meets the Rules to that extent (E-LTRPT.2.2). The question whether that is a genuine and subsisting relationship is disputed by the Respondent. I do not though need to consider that at this juncture because, due to his immigration status, the Appellant can only meet the Rules to qualify for leave as a parent if he can show that he meets E-LTRPT.2.3 and E-LTRPT.2.4 as well as EX.1.(a). E-LTRPT.2.3 and E-LTRPT.2.4 provide as follows:-

"E-LTRPT.2.3.

Either-

- (a) the applicant must have sole parental responsibility for the child or the child normally lives with the applicant and not their other parent (who is a British Citizen or settled in the UK), and the applicant must not be eligible to apply for leave to remain as a partner under this Appendix; or
- (b) the parent or carer with whom the child normally lives must be-
  - (i) a British Citizen in the UK or settled in the UK;
  - (ii) not the partner of the applicant (which here includes a person who has been in a relationship with the applicant for less than two years prior to the date of application); and
  - (iii) the applicant must not be eligible to apply for leave to remain as a partner under this Appendix.

E-LTRPT.2.4.

- (a) The applicant must provide evidence that they have either-
  - (i) sole parental responsibility for the child, or that the child normally lives with them; or

(ii) direct access (in person) to the child, as agreed with the parent or carer with whom the child normally lives or as ordered by a court in the UK; and

(b) The applicant must provide evidence that they are taking, and intend to continue to take, an active role in the child's upbringing."

25. It is clear to me that those provisions are directed at the position where a parent relies only on that relationship to obtain leave, in other words where there is no other parent with continuing contact or where the relationship between parents has broken down and one parent seeks contact. It is not intended for the position where, as here, the Appellant relies on a continuing relationship with the other parent and where it is said that both parents and the child or children continue to live as a family unit.
26. The Respondent's policy guidance on family and private life is now set out in a document entitled "Family Migration: Appendix FM Section 1.0b: Family Life (as a Partner or Parent) and Private Life: 10 – Year Routes" and was revised as at 22 February 2018 ("the Guidance"). At page 19 of the Guidance, the position as a parent under the Rules in the circumstances here is summarised as follows:-

"The parent route is not for couples with a child together who are in a genuine and subsisting partner relationship together. Applicants in this position must apply under the partner route where or once they are eligible to do so, or under the private life route. An applicant cannot apply under the parent route if they are or will be eligible to apply under the partner route, including where the applicant is in a partner relationship but the couple have not yet been living together for two years."

27. Of course, the Guidance is the Respondent's interpretation of the Rules and is not determinative of the way in which the provisions should be interpreted by the Courts. However, the summary in the Guidance accords with my interpretation of the relevant Rules. Accordingly, the Appellant cannot succeed under the Rules as a parent. I do not therefore need to consider paragraph EX.1.(a) on which provision the Appellant relies.

#### Private life

28. The Appellant has lived in the UK now for only about five years. As such, he cannot meet the residence requirements under paragraph 276ADE unless he can show, applying paragraph 276ADE(1)(vi), that there are very significant obstacles to his integration in Albania. There is no evidential basis for such a claim. The Appellant was born and has lived most of his life in that country. He speaks the language and will understand the customs of that country. He still has relatives there, including the children of his previous marriage. Although he says that he came to the UK for a "better life" suggesting that such things as employment may not have been that easy for him in Albania, there is no evidence of any difficulties which would meet the very high threshold implicit in the wording "very significant obstacles".

#### The Position Outside the Rules

### Partner relationship

29. In light of the findings made at [9] to [23] above, I can deal with this aspect of the appeal very shortly. Even if the relationship is a genuine and subsisting one to which both parties are committed, the evidence is that there are no insurmountable obstacles to family life continuing in Albania (subject of course to the position of the children which is separately considered below). Based on what is said by the Supreme Court in Agyarko and Ikuga v Secretary of State for the Home Department [2017] UKSC 11 ("Agyarko"), in circumstances where there are no insurmountable obstacles to the British citizen partner going to live abroad, a decision to refuse leave will not be disproportionate unless there are other exceptional circumstances which render the decision unjustifiably harsh. There are no such circumstances here.
30. Having regard to the fact that the Appellant and [CE] entered into a relationship when they knew that he was here unlawfully, to the need for maintenance of effective immigration control, and that family life could be continued between the Appellant and [CE] in Albania, if they so choose, the decision to refuse the Appellant leave as the partner of [CE] is not disproportionate.

### Parent relationship

31. The position arising from the relationship between the Appellant and A (and to a lesser extent L) is though very different outside the Rules. I begin by considering the disputed issue whether there is a genuine and subsisting parental relationship between the Appellant and those children before moving on to consider what their best interests require.
32. It is not disputed that A is the Appellant's daughter. L is not his son. However, it is also not disputed that the Appellant lives in the same house as [CE] and the two children.
33. There was some discrepancy between the evidence of the Appellant and that of [CE] about the relationship between L and his biological father. The Appellant says that L sees nothing of his father who does not have any interest in him. [CE] said, on the other hand, that L's father does see him from time to time albeit infrequently. She takes L to the park every couple of months so that L's father can spend time with him. It is of course possible that the Appellant is unaware of this arrangement if it takes place outside the home. In any event, [CE]'s evidence was at one with the Appellant's about L's father's interest in L. She says that there is no court order in place in relation to L's father's access to his child and that she did not think it would bother the father if he did not see L.
34. The Respondent sought to show by cross-examination that, although the Appellant is A's biological father and L's stepfather and lives with them, he does not enjoy a genuine and subsisting relationship with them.
35. I have already mentioned that the Appellant has children of a previous relationship living still in Albania. He has apparently had some contact with them since leaving Albania, although that appears to be undermined to some extent by the divorce document from Albania dated 2015 in which



the Appellant's ex-wife says that the Appellant had not maintained contact with the children since coming to the UK two years earlier. I recognise however that the Appellant's relationship with his ex-wife had by that stage clearly broken down and she may wish to give the impression to the Court that the Appellant is not a good father in order to retain custody of the children. The Appellant was not represented in those proceedings.

36. [CE] spoke of the Appellant having contact with his children in Albania via Skype at some point after their relationship started. However, she and the Appellant both said that he does not have contact with them at present because of a breakdown in communication between the Appellant and his ex-partner. The Appellant did not appear particularly distressed in his evidence about this breakdown of contact. He said he had no plans to contact those children because he was "stuck" (although he did go on to say that he intended to see them again). However, he also pointed out that just because he had left one family did not mean that he would leave another one.
37. There was a further discrepancy between the evidence of the Appellant and [CE] regarding what the family did at Xmas. The Appellant said that the children waited until after breakfast on Xmas day before opening their presents whereas [CE] was firm in her evidence that the children opened their presents on Xmas Eve because they were unable to hide the presents and the children therefore wanted to open them because they could see them. I believed her evidence over that of the Appellant. However, I do not consider this to be a major discrepancy and appears to me to be symptomatic of the general tenor of the Appellant's evidence about his relationship with the children which Mr Avery described as showing a "lack of interest".
38. It is fair to say that the Appellant's evidence was quite vague as to the part he plays in the lives of A and L or the interest he has in their development. For example, when the Appellant was asked about his hopes for the future for his children in the UK, he said he had "some" but it was "not going to change anything". He "hoped to get a visa and go on holiday in summer." He hoped to stay in the UK. That answer did not demonstrate an interest or involvement in the development of his children. It may be though that he did not understand the question.
39. The Appellant and [CE] gave evidence about what they do as a family. The Appellant's evidence was, as I have noted, quite general in nature. He feeds the children, plays with them, gives them medicines and occasionally picks them up and takes them to school. However, [CE] developed on that evidence. She said that the Appellant occasionally takes the children out to give her a break and plays and reads books with them. She also spoke about family outings together. There is a good deal of photographic evidence of the Appellant with the children and some of him with [CE] and the children.
40. A is of course still quite young and L is only just over a year older so it is perhaps unsurprising that the children's mother will have a greater involvement, particularly since, as Mr Knight put it, the Appellant admitted

that he is not a “hands on” father when it comes to some of the more mundane chores such as nappy changing.

41. Similarly, I do not consider that the Appellant’s admission that he does not attend parents’ evenings at L’s school has any particular importance or relevance. As the Appellant pointed out, English is not his first language and he leaves such things to [CE].
42. The Appellant is not of course the biological father of L. However, [CE]’s evidence is that L considers the Appellant to be his father. As I have already noted, her evidence is that L’s own father shows little interest in him. As [CE] attested, therefore, L does not know any other father. She said that the Appellant treats L and A the same.
43. Overall, when the evidence is considered in the round and in the context of the Appellant living in the same house and as part of the family unit with [CE] and the children, I accept that he has a genuine and subsisting relationship with the children. That is so not just in relation to A, who is his biological daughter, but also in relation to L. I accept [CE]’s evidence that L sees the Appellant as his father because he does not really know his biological father.
44. I turn then to the children’s best interests, which are a primary although not the only or the paramount consideration when it comes to weighing the proportionality of removal of the Appellant.
45. I have very little evidence about the children. That is perhaps unsurprising given their very young age. A is only about eighteen months old. As such, she only goes to nursery one day per week. L is aged nearly three years. He attends nursery. However, at their very young ages, education and friendships outside their family unit are unlikely to hold any particular significance for them. At their age, their most important relationship is with their parents. I accept it is in the best interests of children to have a relationship with both parents. Although that includes in L’s case also his own father, the evidence I was given is that his own father shows no real interest in him. For that reason, I consider it is in the best interests of both A and L to continue to live with both [CE] and the Appellant.
46. Although there is no or very limited evidence that the children’s best interests are served by remaining in the UK, I take into account that they are both British citizens. [CE] said that if the Appellant were to leave and she chose to relocate to Albania with him, she would of course take the children with her. Were she to do so, the children would of course be deprived of the benefit of their rights as British citizens to an education here. They would also be deprived of contact with their wider family on their mother’s side. The importance of British citizenship was underlined in the speech of Lady Hale (as she then was) in ZH (Tanzania) v Secretary of State for the Home Department [2011] UKSC 4 (“ZH (Tanzania)”) in the following terms:-

“30. Although nationality is not a “trump card” it is of particular importance in assessing the best interests of any child ...

31. ... all of these considerations apply to the children in this case. They are British children; they are British, not just through the "accident" of being born here, but by descent from a British parent; they have an unqualified right of abode here; they have lived here all their lives; they are being educated here; they have other social links with the community here; they have a good relationship with their father here. It is not enough to say that a young child may readily adapt to life in another country. That may well be so, particularly if she moves with both her parents to a country which they know well and where they can easily re-integrate in their own community ... But it is very different in the case of children who have lived here all their lives and are being expected to move to a country which they do not know and will be separated from a parent whom they also know well.
32. Nor should the intrinsic importance of citizenship be played down. As citizens these children have rights which they will not be able to exercise if they move to another country. They will lose the advantages of growing up and being educated in their own country, their own culture and their own language. They will have lost all this when they come back as adults. ..."
47. In ZH (Tanzania) the facts included also the separation of the British child from one of her parents. That is not the position here if the children were to leave with both their mother and father. As I have already noted, the evidence is that L sees the Appellant as his father and that L's father shows no great interest in his son. However, having regard to what is said in that case about the importance to the child of being brought up in the country of its nationality, I accept that, as British citizens, the best interests of both A and L are to remain in the UK.
48. On the basis of those findings, I turn to whether the relationship between the Appellant and A and L should entitle him to remain outside the Rules.
49. As the Respondent points out, the Rules now provide at GEN.3.2. how applications which cannot succeed under the Rules should be approached. That reads as follows:-  
  
"GEN.3.2.(1) Subject to sub-paragraph (4), where an application for entry clearance or leave to enter or remain made under this Appendix, or an application for leave to remain which has otherwise been considered under this Appendix, does not otherwise meet the requirements of this Appendix or Part 9 of the Rules, the decision-maker must consider whether the circumstances in sub-paragraph (2) apply.  
  
(2) Where sub-paragraph (1) above applies, the decision-maker must consider, on the basis of the information provided by the applicant, whether there are exceptional circumstances which would render refusal of entry clearance, or leave to enter or remain, a breach of Article 8 of the European Convention on Human Rights, because such refusal would result in unjustifiably harsh consequences for the applicant, their partner, a relevant child or another family member whose Article 8 rights it is evident from that information would be affected by a decision to refuse the application."
50. The Rules are of course primarily directed at the Respondent's own decision-makers. In any event, GEN.3.2(2) goes no further than the

accepted legal position. If an application does not meet the Rules, it is still necessary to consider whether a refusal would result in unjustifiably harsh consequences for an affected party. If that would be the case, then leave should be granted (see [45] of the judgment in Agyarko).

51. I am bound to take into account when looking at the position outside the Rules also section 117B Nationality, Immigration and Asylum Act 2002 ("Section 117B") which provides as follows:-

**"Article 8: public interest considerations applicable in all cases**

- (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.
- (6) In the case of a person who is not liable to deportation, the public interest does not require the person's removal where—
  - (a) the person has a genuine and subsisting parental relationship with a qualifying child, and
  - (b) it would not be reasonable to expect the child to leave the United Kingdom."

52. I begin by considering the application of Section 117B(6). As I have already found, the Appellant has a genuine and subsisting parental relationship with A and L who, as British citizens, are both qualifying children. As such, I have to determine whether it would be reasonable to expect those children to leave the UK. I have already found that it is in their best interests to remain in the UK as British citizens entitled to the benefit of that citizenship and that their best interests favour remaining with both their mother and the Appellant.

53. I have referred at [26] above to the Guidance issued by the Respondent to her caseworkers dealing with applications made on the basis of family and private life. I was directed by the Respondent's skeleton argument to the Respondent's revised policy on the issue of reasonableness in this context and in particular to the section headed "EX.1.(a) – Reasonable to expect" (page 35 of the Guidance) which it is said applies equally to the position under Section 117B(6). I do not need to refer to EX.1.(a) because as I have concluded at [25] to [27] above, the Appellant cannot succeed under the Rules based on his relationship as parent where he claims to be in a genuine and subsisting partner relationship with the children's mother.
54. The section of the Guidance to which I was referred re-directs decision makers to the section of the Guidance which is headed "Reasonable to expect a child to leave the UK?" which appears at page 74 onwards of the Guidance. That begins with the following statement:-
- "If the effect of the refusal of the application would be, or is likely to be, that the child would have to leave the UK, the decision maker must go on to consider whether it would be reasonable to expect the child to leave the UK."
55. Immediately prior to that section, is a section dealing with whether it is reasonable to expect a child to leave when considering the position under the Rules. That makes the point that prior consideration is required of the consequence of refusal of an application. If the child will not in fact leave the UK because the child will remain with the other parent in the UK, it is suggested that a decision maker does not reach the position of needing to consider whether it is reasonable to expect the child to leave as the child will not in fact leave. However, as is also said in the section at page 73 "... where there is a genuine and subsisting parental relationship between the applicant and the child, the removal of the applicant may still disrupt their relationship with that child. For that reason, the decision maker will still need to consider whether, in the round, removal of the applicant is appropriate in light of all the circumstances of the case, taking into account the best interests of the child as a primary consideration and the impact on the child of the applicant's departure from the UK. If it is considered that refusal would lead to unjustifiably harsh consequences for the applicant, the child or their family, leave will fall to be granted on the basis of exceptional circumstances."
56. Insofar as one reaches the stage of considering whether it is reasonable to expect the child to leave the UK, the Guidance goes on to say this (at page 76):-

**"Where the child is a British citizen"**

Where the child is a British citizen, it will not be reasonable to expect them to leave the UK with the applicant parent or primary carer facing removal. Accordingly, where this means that the child would have to leave to the UK because, in practice, the child will not, or is not likely to continue to live in the UK with another parent or primary carer, EX.1(a) is likely to apply.

In particular circumstances, it may be appropriate to refuse to grant leave to a parent or primary carer where their conduct gives rise to public interest

considerations of such weight as to justify their removal, where the British citizen child could remain in the UK with another parent or alternative primary carer, who is a British citizen or settled in the UK or who has or is being granted leave to remain. The circumstances envisaged include those in which to grant leave could undermine our immigration controls, for example the applicant has committed significant or persistent criminal offences falling below the thresholds for deportation set out in paragraph 398 of the Immigration Rules or has a very poor immigration history, having repeatedly and deliberately breached the Immigration Rules.”

57. The Guidance appears to reflect in large part the Court of Appeal’s guidance in MA (Pakistan) and others v Secretary of State for the Home Department [2016] EWCA Civ 705 (“MA (Pakistan)”). Those cases were concerned with qualifying children who were foreign nationals who had been in the UK for more than seven years rather than British citizen children. However, what is said at [46] of the judgment that “strong reasons” are needed to refuse leave once the qualifying requirements of the Rules (or here the legislation) are met applies equally.
58. It may be suggested by the Respondent that this appeal is to be distinguished from the position in MA (Pakistan) because, in accordance with what is said in the Guidance, I am required first to consider whether A and L will or are likely to be required to leave the UK with the Appellant and their mother or whether it is more likely that they will remain here with their mother. If that is the submission, I disagree that this is what is required by Section 117B (6). Section 117B (6) on its face requires only that there be a genuine and subsisting parental relationship with a qualifying child (which I have accepted applies here) and an assessment whether it is reasonable to expect the child to leave the UK.
59. By contrast, the consideration under section 117C (5) is whether “the effect of [the parent’s] deportation” is unduly harsh which, read together with the relevant paragraph of the Rules means that a Judge should consider whether it would be unduly harsh for a child to leave with a foreign criminal parent or for the child to remain in the UK without that parent. The consideration under Section 117B(6) is only whether it is reasonable to expect the child to leave the UK and not whether it is reasonable to expect the child to remain in the UK without one parent. If the latter were the wording of the legislation, then I can see the relevance of whether the child would in fact leave before one can determine the effect on that child. However, that is not what the legislation says. As such, in my judgement, the Guidance in this regard imports words into the sub-section which do not there appear and/or puts an impermissible gloss on the statutory language (if indeed that section of the Guidance is intended to apply to Section 117B (6) at all).
60. The wording of Section 117B (6) is also a reason why the question whether the Appellant could be expected to return to Albania to obtain entry clearance as either a partner and/or as a parent does not arise. Mr Knight urged me not to dismiss the appeal on that basis in any event. He pointed out that, since [CE] would be unable to meet the minimum income threshold and the Appellant has an adverse immigration history, the

Appellant would still need to fall back on Article 8 ECHR to succeed. As he put it, the outcome would be either that the Appellant would be refused entry clearance and the family could then only be together if [CE] and the children joined the Appellant in Albania (in which case either the children would have to leave the UK or would be separated from their father/stepfather) or the Appellant would be granted entry clearance in which case his removal would have been a pointless exercise.

61. I do not accept that final submission. There is a public interest in the maintenance of effective immigration control which would support the need for an applicant to comply with the Rules if he is able to do so. However, in the end I have decided that it is not appropriate to consider whether the Appellant could return to Albania for a short period to obtain entry clearance because, in circumstances where the Appellant is in a genuine and subsisting relationship with two British citizen children, the only question is whether it is reasonable to expect them to leave the UK. It is not whether it is reasonable to expect them to do so in the short term while the Appellant seeks entry clearance or to remain with their mother while the Appellant returns to Albania for this purpose.
62. Having assessed that the children's best interests require them to remain with their mother and the Appellant and to remain in the UK, I turn therefore to consider whether there are "strong reasons" for removal of the Appellant in the context of whether it is reasonable to expect A and L to leave the UK.
63. Although not a conclusion which the Court of Appeal reached with any great enthusiasm in MA (Pakistan), as the Court held at [45] of the judgment in that case, Section 117B (6) is not a free-standing provision when assessing what the public interest requires. When considering whether it is reasonable to expect A and L to relocate to Albania with their mother and the Appellant, I should take into account other public interest factors.
64. Here, the Appellant is an illegal entrant. Although he claimed asylum on arrival, he gave evidence that he came to the UK to seek a better life. As such, it appears that his asylum claim was not genuine. Clearly the Respondent found it not to be well-founded as she did not recognise him as a refugee. I have no information to suggest that the Appellant appealed against that decision which suggests that he was prepared to accept this as the right outcome.
65. The Appellant said that when he went to carry out some work at the home of [CE], he did so for no payment. I do not accept his evidence about this. [CE] confirmed that she paid him for the work. As such, I also find that the Appellant was working when he had no permission to do so.
66. All of those factors weigh against the Appellant and in favour of the public interest in removal based on the need to maintain effective immigration control.
67. In addition, in this case, [CE] is not working and is in receipt of benefits. Although she gave evidence that she worked before having her children

and “would not mind” returning to employment now that the children are beginning education, it is far from clear that the family will not continue to have recourse to public funds if the Appellant is permitted to remain. [CE] was working in what appears to have been a low-paid job. Although the Appellant has worked, it appears as a general handyman/decorator and gives his profession in some of the documents as a builder, again, that is unlikely to pay particularly well. As such, the Appellant may be a burden on the taxpayer if the family continue to rely on benefits to support themselves.

68. When considering whether it is reasonable to expect A and L to relocate to Albania, I have regard to what is said in the Guidance. As cited in the extract to which I refer at [56] above, the circumstances in which it is envisaged that it might be reasonable to expect a qualifying British citizen child to leave the UK are those in which the foreign national parent has “committed significant or persistent criminal offences ... or has a very poor immigration history, having repeatedly and deliberately breached the Immigration Rules.”
69. The Appellant has not committed any offences (apart from the obvious one of entering the UK illegally). Although the Appellant’s immigration history is very far from good and his breaches of the Rules can fairly be described as “deliberate”, he has not committed repeated breaches over a lengthy period. The breaches of immigration control and other public interest factors weighing against the Appellant are not, in my estimation, sufficiently egregious to outweigh the best interests of A and L. Put another way, I do not consider that the Appellant’s adverse immigration history is a sufficiently strong reason to refuse leave when viewed in the context of whether it is reasonable to expect two British citizen children to relocate to Albania.
70. For the above reasons, I conclude that the Respondent’s decision to refuse leave to remain to the Appellant and to remove him is unlawful under section 6 Human Rights Act 1998 (as a breach of Article 8 ECHR) and I allow his appeal on that basis.

### **Notice of Decision**

**The Appellant’s appeal is allowed on the basis that the Respondent’s decision is unlawful under section 6 HRA 1998 (as a breach of Article 8 ECHR)**

Signed 

Dated: 28 March 2018

Upper Tribunal Judge Smith



## **APPENDIX: ERROR OF LAW DECISION**



IAC-AH-DN-V1

**Upper Tribunal  
(Immigration and Asylum Chamber)**

Appeal Number: HU/04908/2016

### **THE IMMIGRATION ACTS**

**Heard at Field House**

**On Friday 15 December 2017**

**Decision & Reasons  
Promulgated**

.....

**Before**

**UPPER TRIBUNAL JUDGE SMITH**

**Between**

**MR ILIR [E]  
(ANONYMITY DIRECTION NOT MADE)**

Appellant

**and**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

#### **Representation:**

For the Appellant: Mr S Knight, Counsel instructed by Hunter Stone Law

For the Respondent: Mr T Wilding, Senior Home Office Presenting Officer

#### **Anonymity**

An anonymity direction was not made by the First-tier Tribunal. No application was made to me for anonymity of the Appellant. There is no reason to make such a direction. I have however anonymised the names of the children involved in these proceedings.

## **ERROR OF LAW DECISION AND REASONS**

### **Background**

1. The Appellant appeals against the decision of First-tier Tribunal Judge Asjad promulgated on 23 March 2017 ("the Decision") dismissing the Appellant's appeal against the Secretary of State's decision dated 16<sup>th</sup> February 2016 refusing his human rights claim based on his relationship with his British citizen partner [CU] and his child A and stepchild L.
2. The Appellant is a national of Albania. He entered the UK clandestinely in May 2014 and claimed asylum which was refused on 17 April 2015. He applied for leave to remain based on his human rights on 6 August 2015 leading to the decision under appeal.
3. The Judge did not accept that the Appellant is in a genuine and subsisting relationship with his partner or that they could meet the Immigration Rules on this basis as there was insufficient evidence of cohabitation for a period of two years. She also did not accept that the Appellant is in a genuine and subsisting parental relationship with his child or stepchild due to the lack of evidence as to the part he plays in their lives.
4. The Appellant sought permission to appeal on the basis that the Judge had failed to take account of material evidence as to cohabitation and that the couple were unable to marry only because the Respondent was holding the Appellant's passport. The Appellant also says that he does have a genuine and subsisting parental relationship with the children even if his statement does not deal with this in any detail. He is named as the father of both children on their birth certificates and has proved by DNA evidence that he is the father of the younger.
5. It is contended that the Judge has failed to assess the human rights of the Appellant, his partner and his children. Permission to appeal was granted by First-tier Tribunal Judge Norton-Taylor on 7 September 2017 in the following terms (so far as relevant) :-
  - "3. It is arguable that the Judge has indeed failed to take relevant evidence into account and has failed to adequately address the totality of the Article 8 claim. It appears as though there was evidence in the 288-page appellant's bundle potentially indicating cohabitation in early 2015. More importantly even if cohabitation had not occurred until 2015 (and therefore short of the two-year period required by GEN.1.2 of Appendix FM) the Judge herself notes the fairly extensive evidence relating to 2015/2016 at [9]. When concluding that there is no change in the subsisting relationship at all [10] the Judge appears not to have considered whether this evidence was supportive of the couple's claim. In addition, it is arguable that there are no reasons stated as to why the couple's own evidence was implicitly rejected. It is arguable that the Judge failed to take account of the fact that the appellant was not permitted to work and therefore could not contribute to the household finances. In respect of the couple's British citizen daughter, whilst the witness statements are indeed thin on detail, if the Judge's assessment of the couple's relationship is flawed it

is arguable that this might have infected the consideration of the parental relationship.

4. In light of Section 117B(6) of the 2002 Act an error in relation to the child may well be material.”
6. This matter comes before me to decide whether the Decision contains a material of error and if so to remake the Decision or remit the appeal for rehearing to the First-tier Tribunal.

### **Discussion and Conclusions**

7. The Appellant’s case readily sub-divides into two aspects of a family life claim. The first relates to his partner relationship with [CU] and the second to his parental relationship with his biological child A and his stepchild L. There is one further point in relation to the Appellant’s private life which I will come to if necessary once I have dealt with the family life aspect.
8. Dealing first then with the submissions made by the Appellant in relation to family life with his partner, Mr Knight submitted that the couple began to live together in 2015. He took me to various documents which show that a relationship was in being as claimed from 2014 and that the couple were living together at least from June 2015 as there is evidence of tax credits being sent to the same address. He accepted that the evidence does not show that the couple had been cohabiting for two years as at the date of the Respondent’s decision.
9. As Mr Wilding pointed out, there could not be evidence of cohabitation for two years as at the date of application because the Appellant’s own case is that the relationship did not start until 2014 and the application was made in August 2015. As Mr Wilding pointed out, therefore, there is no question that this relationship could fall within an eligible relationship for the purposes of the Immigration Rules. This aspect of the case therefore fell to be considered outside the Rules.
10. In essence, the Appellant’s case is that the Judge has failed to consider material evidence when looking at the genuineness of the relationship. I turn therefore to what the Judge said about this :-

“9. I have considered the evidence before [me] carefully in order to show me whether or not the Appellant and [CU] have lived together in a relationship akin to a marriage or civil partnership for at least two years prior to the date of application so that they meet the definition of ‘partners’ under the Immigration Rules. The evidence of both [CU] and the Appellant was that they began living together soon after she discovered she was pregnant and that this was in August 2014. There are documents within the Appellant’s bundle that show them both living at the same address. Many of these are addressed separately i.e. to the Appellant - such as from Tesco, Argos and Sky. [CU] is in receipt of Housing Benefit and there is a letter from the Housing Association dated February 2015 (145) to say that she can have a partner living with her. There are no documents related to 2014 at all. There is only one shared bill for Virgin Media - the earliest of which is dated July 2015. There are joint Tax Credit awards

relating to 2015 and 2016. Whilst this can show that [CU] has declared to the HMRC that she has a Partner and there is a joint award, her bank statements show that she has been receiving Income Support since at least October 2016 and no working tax credits. It would appear that since the HMRC decision on the tax award was made – [CU]’s circumstances have changed. I also note that despite claiming to live together since 2014 there are no joint financial commitments – such as joint bank accounts or shared bills prior to 2016 (apart from Virgin Media). There is nothing to say that the Appellant contributes to any of the household bills other than for Virgin Media. Many of the letters that the Appellant relies upon are for 2016. I take all of the above into account and find that the Appellant cannot demonstrate on the balance of probabilities that he is the Partner of [CU] and he cannot meet the immigration rules on this basis.

10. I accept that there are letters from friends to say that the Appellant and [CU] are in a relationship together and it appears genuine – but none of their evidence was tested and they did not attend the Tribunal in support of this appeal. There are some undated photographs and cards addressed to the couple. But given the absence of any documentary evidence to support the Appellant and [CU] living together I do not find that the Appellant could have demonstrated that the relationship is genuine and subsisting. Any Article 8 family life on the basis of his relationship with [CU] fails on that basis.”
11. I am unpersuaded by the submission that the Judge has failed to look at the documents. The point made by the Judge is that the documents do not show shared responsibility. There may well be reasons why that is so such as that the Appellant cannot work and cannot open a bank account due to his immigration status. It is not the case however that the Judge has failed to note the documents which are addressed to the Appellant at the same address as [CU]. Those are referred to. Similarly, there is reference to the joint tax credit awards in 2015 to which I was taken and there is also reference to the Virgin Media bill to which I was also taken.
12. I am unpersuaded that there was any error in failing to take into account the car insurance documents. The fact that a person is permitted to drive another person’s vehicle does not show a genuine and subsisting relationship as a partner.
13. There are however two matters which are not factored into the Judge’s assessment. The first is that both the Appellant and his partner gave oral evidence. As Mr Knight rightly pointed out, there is no adverse finding of credibility let alone any reasons given for finding both the Appellant and his partner not to be credible in their evidence as to the relationship. The second point is that the Appellant and his partner have a child together. I will come to that later in terms of the effect on the Article 8 claim. However, it is also a relevant factor when looking at the genuineness of the relationship between the Appellant and his partner and it is not mentioned in that context.

14. Mr Knight's other submission in this regard is that the couple were not on notice that there was any issue taken as to the genuineness and subsistence of the relationship. As Mr Wilding pointed out, the Secretary of State did not reach a view whether the relationship is genuine as she concluded that the application could not meet the Immigration Rules. When considering the application of paragraph EX.1, however, she did state that it was not accepted that the relationship was genuine and subsisting because the couple were not married and had not been cohabiting for two years prior to the date of application. That said, there was no cross-examination on the part of the Respondent of the Appellant and his partner. Mr Knight also represented the Appellant before the First-tier Tribunal and has provided (in his skeleton argument for this hearing) a note of the Home Office submissions. Those are summarised as being that the couple did not meet the Immigration Rules but that it would be open to them to make a new application when they can meet the Rules. It is implicit in that submission that no point was taken as to the genuineness of the relationship.
15. For the above reasons, I am satisfied that the Judge erred in law when dealing with the family life claimed based on the partner relationship. Whilst it may have been open to her to find that the relationship was not a genuine one, she needed to give reasons as to the oral evidence she heard particularly in the absence of cross-examination of the Appellant and his partner. The Judge needed to explain why having heard that evidence, she found it not to be credible.
16. I turn then to deal with the Appellant's family life as the parent of a British citizen child. The Judge deals with this point at [11] of the Decision as follows:-
  - "11. Insofar as his relationship with his daughter is concerned she is a British Citizen. Apart from some generic email from Mothercare, there is very little before me to show that the Appellant has a genuine parental relationship with his daughter (or his stepson). Even the statements of both the Appellant and [CU] are silent on what if any role the Appellant plays in the life of his daughter and stepson. He is named on their birth certificates but that is all. On balance, I find that the Appellant does not have a genuine parental relationship with his daughter such that paragraph EX.1 needs to be considered further. Article 8 on the basis of his family life with his daughter (and for the same reason his stepson) fails for the same reasons."
17. I deal first with a point which emerged during the hearing concerning the extent to which the Appellant's relationship with his biological child is a "new matter" for the purposes of Section 85 Nationality, Immigration and Asylum Act 2002. By coincidence, on the day prior to the hearing before me, the Tribunal promulgated its decision in the case of Mahmud (S.85 NIAA 2002 - 'new matters') [2017] UKUT 00488 (IAC) ("Mahmud"). The headnote to that decision reads as follows:-

- “1. Whether something is or is not a ‘new matter’ goes to the jurisdiction of the First-tier Tribunal in the appeal and the First-tier Tribunal must therefore determine for itself the issue.
2. A ‘new matter’ is a matter which constitutes a ground of appeal of a kind listed in section 84 as required by section 85(6)(a) of the 2002 Act. Constituting a ground of appeal means that it must contain a matter which could raise or establish the listed ground of appeal. A matter is the factual substance of a claim. A ground of appeal is the legal basis on which the facts in any given matter could form the basis of a challenge to the decision under appeal.
3. In practice, a new matter is a factual matrix which has not previously been considered by the Secretary of State in the context of the decision in section 82(1) or a statement made by the appellant under Section 120. This requires the matter to be factually distinct from that previously raised by an appellant as opposed to further or better evidence of an existing matter. The assessment will always be fact sensitive.”

The final paragraph of the headnote is lifted from paragraph 31 of the decision which continues consideration of what constitutes a “new matter” as follows :-

“By way of example, evidence that a couple had married since the decision is likely to be new evidence but not a new matter where the relationship has previously been relied upon and considered by the Secretary of State. Conversely, evidence that a couple had had a child since the decision is likely to be a new matter as it adds an additional distinct new family relationship (with consequential requirements to consider the best interests of the child under Section 55 of the Borders, Citizenship and Immigration Act 2009) which itself could separately raise or establish a ground of appeal under Article 8 that removal would be contrary to Section 6 of the Human Rights Act.”

18. In this particular case, the Appellant’s stepson L was born prior to the date of the Respondent’s decision. The Secretary of State requested DNA evidence in relation to that child which the Appellant failed to produce by the date of that decision. As it subsequently transpired, the Appellant is not the father of that child in any event but as DNA evidence had not been produced the Secretary of State declared herself unable to make any decision on the Appellant’s relationship with that child.
19. The Appellant’s biological child A was not born until after the Respondent’s decision in September 2016. Accordingly, her birth and the Appellant’s relationship with her and entitlement to stay on that basis was not a matter which the Secretary of State could consider. There has been no Statement of Additional Grounds made prior to the hearing before me. Based on what is said in the Mahmud, the Appellant’s relationship with A and his basis for remaining in the UK as a parent is very clearly a “new matter”. That is though not the end of consideration of this issue. The Secretary of State is able to give consent for a “new matter” to be considered. As was pointed out by the Tribunal at [36] of the decision in Mahmud, Section 85(5) of the 2002 Act requires actual consent by the Respondent which cannot be deemed or implied.

20. Mr Knight did not seek to suggest that there has been consent in this case. Instead, he submitted at the hearing before the First-tier Tribunal that GEN.1.9 of Appendix FM to the Immigration Rules applies. That reads as follows so far as relevant:-

“(a) the requirement to make a valid application will not apply when the Article 8 claim is raised:

(iii) in an appeal (subject to the consent of the Secretary of State where applicable); and ...”

Mr Knight refers in this regard to [27] of his skeleton argument dated 14 February 2017 which reads “Pursuant to GEN.1.9(a)(iii) the Article 8 claim may be raised in the course of the appeal i.e. as of today’s date, and thereby be considered as within the Rules.” There is however no reference there to the matter of consent and that does not appear to have been expressly raised with the Judge. Certainly, if it was, the Judge has made no reference to it and there is no record that the Secretary of State has given her consent to the “new matter” being raised. That constitutes an error of law.

21. There is however a question whether that error of law is material. Had it not been for my conclusions in relation to the partner aspect of the appeal I may have been persuaded by Mr Wilding’s submission that on the evidence before her and in light of the fact that the birth of the Appellant’s biological child raises a “new matter”, the finding of the Judge at [11] of the decision is not so unreasoned as to be perverse. However, since I have already determined that there is a material error of law in relation to the findings on the partner relationship, whether this error is material matters not. The Decision still falls to be set aside in relation to the other error.
22. For those reasons, I am satisfied that there is a material error of law in the Decision of Judge Asjad promulgated on 23 March 2017 and I set that aside.
23. There then followed some discussion as to how the “new matter” relating to A should be determined. Mr Wilding noted that there was no Statement of Additional Grounds in relation to this child. That was overcome by the handing in to me of a further statement from [CU] which confirms the birth of A and that the Appellant cares for this child as her parent.
24. In light of the indication by the Tribunal in Mahmud that express consent is required by the Secretary of State and Mr Wilding having confirmed that he was not in a position to give that instantly, I gave an oral direction at the hearing that by 4pm on Friday 22 December 2017 the Respondent should indicate in writing to the Tribunal (copied to the Appellant) whether she consents to the Tribunal determining the “new matter” of the birth of A and the Appellant’s relationship as the biological father of that child at the resumed hearing. That direction is also recorded below. I have received a letter dated 21 December 2017 confirming that the Respondent consents to the new matter being raised (although wrongly stated as referring to the Appellant’s biological child as L rather than A), in the event that I find an error of law (as I have now done).

25. Mr Knight indicated that if I found an error of law he was content that the matter should remain within the Upper Tribunal but that further evidence would need to be called, particularly in light of the passage of time since the last hearing. I have therefore given directions to deal with that matter. I also note that since the last hearing, under cover of a letter dated 21 December 2017, I have now been provided with further witness statements from the Appellant and [CU] which I assume are those which Mr Knight indicated that they would wish to provide. I have however allowed a further very short period for any further evidence to be provided should the Appellant wish to do so.

**Notice of Decision**

**I am satisfied that the Decision contains material errors of law. The Decision of First-tier Tribunal Judge Asjad promulgated on 23 March 2017 is set aside.**

**The appeal will be relisted for a resumed hearing subject to the following directions :-**

- 1. By 4pm on Friday 22 December 2017 the Respondent is to indicate in writing to the Tribunal (copied to the Appellant) whether she consents to the Tribunal determining the “new matter” of the birth of A and the Appellant’s relationship as the biological father of that child at the resumed hearing (now completed: see above).**
- 2. By 4pm on Friday 26 January 2018, the Appellant is to file with the Tribunal and serve on the Respondent further witness statements from him and his partner together with any further documentary evidence on which the Appellant wishes to rely (now completed in part: see above).**
- 3. By 4pm on Friday 9 February 2018 both parties are to file with the Tribunal and serve on the opposing party skeleton arguments setting out their position in relation to any legal issues.**
- 4. The resumed hearing of the appeal will be listed on the first available date after Monday 19 February 2018 - time estimate half day.**

Signed 

Dated: 16 January 2018

Upper Tribunal Judge Smith