IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-003180

First-tier Tribunal Nos: HU/60180/2022
LH/01168/2023

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 13th November 2024

Before

UPPER TRIBUNAL JUDGE OWENS

Between

MISS KHAI ATLAS HYKAJ
(NO ANONYMITY ORDER MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Georget instructed by Malik & Malik Solicitors
For the Respondent: Mr Dywnycz, Senior Presenting Officer

Heard at Cardiff Civil Justice Centre on 18 September 2024

DECISION AND REASONS

1. This is a remaking decision in respect of the appellant's appeal against a decision of the Secretary of State dated 1 December 2022 refusing her human rights claim. On 12 July 2024 I set aside the decision of First-tier Tribunal Judge Trevaskis for the reasons given in my decision appended at Annex A of this decision.

2. I have already set out the history of the appeal in the earlier decision. In summary the appellant is a citizen of Albania born in the United Kingdom on 30 June 2022. Her mother, an Albanian citizen, entered the United Kingdom as a visitor whilst pregnant with the appellant. Her father is an Albanian citizen who has pre-settled status in the United Kingdom on the basis of his marriage to a Romanian national.

3. The appellant asserts that it would be a breach of Article 8 ECHR to require her to be removed from the United Kingdom because it is in her best interests to

remain in the United Kingdom where she can have a relationship with her father who plays a large part in her upbringing. To remove her would constitute a disproportionate breach of Article 8 ECHR.

4. The respondent's position is that the relationship with her father can be maintained by visits and electronic means of communication and that the public interest outweighs the appellant's right to respect for family life.

The Evidence

5. I was provided with a consolidated bundle prepared for the error of law hearing on 13 June 2024. The bundle included the Appellant's and Respondent's bundles before the First tier Tribunal, the Respondent's review and the Appellant's Skeleton Argument prepared for the hearing in the First tier Tribunal. There was also a 26 page supplementary bundle of photographs showing Mr Hykaj with his daughter the appellant in various settings with a rule 15(2A) Notice. I admitted the evidence because it postdated the previous appeal and was uncontentious.

Oral evidence

6. I heard oral evidence from the appellant's mother Ms Ibra with the assistance of an Albanian interpreter. The witness confirmed that she understood the interpreter. I also heard evidence from the appellant's father Mr Hykaj who gave his evidence in English.

7. I provide a brief summary of the oral evidence. Ms Ibra confirmed that Mr Hykaj continued to live with his wife and that the couple have no children. Ms Ibra has met Mr Hykaj's wife, although she does not discuss her daughter's upbringing with her. Mr Hykaj continues to see his daughter, the appellant, every day. He takes her out to the park and sometimes has her for the night at his own home. The appellant has a large family in the UK on her father's side including an uncle and cousins. Mr Hykaj provides everything for his daughter financially because Ms Ibra does not work. He buys food, pampers, clothes and toys. He also provides financial assistance to Ms Ibra for her food and necessities. The appellant does not attend nursery. She understands and speaks Albanian and understands English.

8. Ms Ibra's family in Albania still do not accept the fact that she has had a baby out of wedlock. She does not speak to her parents who are unsupportive. She has communicated with her sister who is currently a student in Tirana but her sister is in a difficult position because she does not want to upset her parents.

9. Ms Ibra trained in physiotherapy and had a job in the tax office. Her concern is that if she returns to Albania she will have no-one to look after her daughter whilst she is at work and that she will face stigma as a single parent.

10. Mr Hykaj adopted his statement. He confirmed that his wife continues to accept the appellant as his daughter and has a strong bond with her. His evidence was that his wife loves the child and plays with her. He also confirmed that he was entirely responsible for his daughter's financial support and pays for food, nappies, toys etc. He was not able to quantify exactly how much he spends each month but it is in the region of £500 to £600. He confirmed that he would be able to continue to provide financial support to Ms Ibra if the child returns to Albania but stated that he needs to have daily contact with his daughter.

11. He confirmed that he is a self-employed tyre fitter in Devizes. His wife works in a warehouse. His parents live in a village called Gruemire near Skoder. They are about two hours from Tirana. They are not employed. His brother is in the UK and has his own family. He has no siblings in Albania.

Preserved Findings

12. The following findings are preserved from the decision before the First-tier Tribunal:

(a) The appellant lives with her mother Ms Ibra.

(b) Her father Mr Hykaj and her mother Ms Ibra are not in a relationship.

(c) Her mother was six months pregnant with the appellant when she entered the United Kingdom as a visitor.

(d) The appellant's mother came to the United Kingdom so that the appellant would be born in the United Kingdom and be close to her father.

(e) The appellant's mother has not applied to regularise her status in the United Kingdom.

(f) The appellant's mother has family in Albania consisting of her parents, sisters, uncles, aunts and cousins.

(g) The sponsor's parents in Albania will support the appellant and her mother.

(h) If the appellant and her mother return to Albania the sponsor also says he will support her.

(i) The sponsor's wife also supports the relationship with the appellant and her mother.

(j) The appellant's mother was living independently before she came to the UK and was working in a tax office. She will be able to work in Albania subject to childcare.

(k) The sponsor can maintain contact with the appellant and her mother by modern means of communication. He is able to travel to Albania to visit them.

Additional findings

13. It was not submitted by Mr Dywnycz that the appellant's parents were untruthful in any aspect of their evidence. Their evidence was both internally consistent and consistent with each other's evidence. Ms Ibra's evidence about her family not approving of her decision to have a child without being married is also consistent with the independent background evidence. I also take into account that Mr Hykaj was candid that he could continue to provide financial support to the child in Albania and that his parents could assist to a limited extent. I therefore find both witnesses to be credible and I accepted both their oral and written evidence in its entirety.

I make the following additional findings:

a) The appellant is now aged two years and three months and has grown up having her father in her life on a daily basis, despite him not being in a relationship with her mother.
b) The appellant's parents are jointly responsible for her and are her joint carers. Although the appellant lives primarily with her mother, she sees her father every day, stays at his home on occasion and has a bond with her stepmother. Her financial needs are entirely met by her father and both parents are responsible for her welfare and emotional needs.
c) The appellant has not yet started school and is healthy. She speaks and understands Albanian and understands English.
d) She also has a relationship with wider family members in the UK including a paternal uncle and cousins who do not live far away.
e) The appellant's mother is estranged from her own parents because for cultural reasons they do not approve of the fact that she has had a child out of wedlock. She would be returning to Albania as a single mother with a young child who did not have a strong network of support from her immediate family in Albania. She could get some assistance from her sister although this would be limited because of split loyalties. She could also get some support from Mr Hyjkaj's parents although they live in a village two hours away from Tirana where Ms Ibra and the appellant would be likely to live if they returned.
f) The appellant's mother, Ms Ibra is likely to face stigma by virtue of being a single mother and the appellant herself may also face stigma
g) If the appellant's father obtains settled status in 2025, the child will have a right to obtain British nationality, subject to her father meeting all of the requirements for settled status.

14. There was no expert report by an independent social worker before me, but I find as a matter of common sense that the appellant would undergo significant disruption if she is removed from her current safe and secure environment where she has a close bond with both of her parents as well as her step-mother and relocated to another country where she would be living with her mother only and be removed from physical daily contact with her father. I have no hesitation in finding that this would be upsetting for her despite any attempts by her parents to mitigate the effect on her by providing reassurance and support and by regular electronic contact with her father and occasional visits. In the long term the appellant is young enough to adapt to the changed circumstances but she would no doubt at her young age find the disruption upsetting and confusing. I am not able to make any findings in the absence of any expert evidence on the long term effect on her emotional and physical welfare.

15. It is common ground that the appellant cannot meet the immigration rule as a child of parents settled in the UK or any other provision of the immigration rules. I therefore consider Article 8 ECHR in the wider balancing exercise context in order to determine whether it would be "unjustifiably harsh" to remove the appellant from the UK. I have had regard to the principles in Agyarko [2017] UKSC 11 in this respect. I remind myself that there is no test of exceptionality. Each case will rest on its own facts.

16. It is not in dispute that family life is engaged between the appellant and both of her parents and that to remove her from the UK would interfere with her family life with her father and that Article 8(1) is therefore engaged, nor that any

removal would be consistent with a legitimate aim and in accordance with the law.

17. I turn to the best interests of the appellant which is an important and primary consideration although not the paramount consideration nor determinative of the Article 8 ECHR balancing exercise. I find that it is overwhelmingly in the best interests of the appellant for her to remain in the UK in an emotionally, physically and financially secure environment where she can have daily physical contact with both parents. She was born in the UK, has lived here throughout her short life and has a relationship not only with her parents but with her stepmother and wider family members. She will also potentially face stigma in Albania as a child who was born out of wedlock who is living with a single mother. Her situation would be more difficult in Albania because her mother would not have the same level of practical support as she has in the UK, although she would be able to obtain some financial support from the appellant's father and seek employment as she did before and could get some support from the appellant's paternal grandparents. I also accept that she will not have a relationship with her maternal grandparents. The appellant herself will be able to access education both in Albania and in the UK.

18. The appellant's father could relocate to Albania to pursue his family life there, but I find that this is very unlikely to happen in the real world scenario. Firstly, he lives with his wife in the UK and she is not an Albanian national. She does not speak Albanian and does not want to relocate to Albania. She is a Romanian national on a route to settlement in the UK and would risk losing her status. The appellant's father has migrated to the UK in order to obtain work and have a better life. He has a business in the UK from which he derives a good living. If he returns to Albania, he will lose his income and his business and his opportunity to apply for settled status and the possibility of his daughter acquiring British citizen. The reality is that he will not relocate to Albania with his Romanian wife.

19. He can of course maintain a relationship with his daughter if she were to return with her mother. He can speak to his daughter daily on the telephone and by video calls and visit her in Albania as his work permits. I do not find that this replaces the intensity of a relationship with involves physical contact particularly for a young child such as the appellant whose relationship will be very much one of cuddles and physical proximity rather than verbal communication. I find that it will be more difficult to have a satisfactory phone and video relationship with a very young child who has not yet learned to speak properly. However, as I have stated above this goes some way to mitigating the disruption that will be experienced by the child.

20. It is manifestly in the public interest to maintain immigration control and I must afford significant weight to the fact that the appellant does not meet the immigration rules because neither of her parents are settled in the UK. I give particular weight to this factor. Her father is here with pre-settled status and her mother is here as an unlawful overstayer who has not as yet sought to regularise her stay.

21. I also take into account that her mother came here as a visitor whilst pregnant in order to give birth to the appellant in UK and because she wanted support during her pregnancy as she was finding the situation difficult in Albania.

22. This is an unusual appeal however because it is not the mother who has made an application, the application has been made by the appellant (with the assistance of her parents). The appellant who was an unborn baby at the time she entered the UK has had no control over her immigration status. There was no intention on her part to breach immigration control and I note the guidance in Zoumbas [2013] UKSC 74 which reiterates that a child must not be blamed for matters for which he or she is not responsible, such as the conduct of the parent. This reduces the weight of the public interest.

23. The family life provisions at 117B (4) do not apply to the appellant. The appellant's family life with her father is particularly strong. He clearly has a close bond with his daughter and I afford this weight.

24. I afford little weight to the appellant's private life which was formed when she was her unlawfully in the sense that although she was born in the UK, her immigration status has not been regularised.

25. The appellant does not as yet speak English although she can understand English and the longer she remains in the UK the more likely it is that she will speak English. She is not a burden on the taxpayer as her father meets her financial expenses and in any event these are both neutral factors.

26. I have found that the best interests of the appellant lie in remaining in the UK where she is able to maintain the status quo and have a secure relationship with both of her parents without any disruption which is an important but not determinative consideration.

27. Mr Georget made much of the appellant's entitlement to register for British citizenship once her father had obtained settled status which he submitted Mr Hykaj would be able to apply for early next year (2025). Firstly, it is far too speculative for me to make a finding that he will obtain settled status because this will be dependent on a variety of factors which the Secretary of State will consider at the relevant time. Although I have found that the appellant's father is likely to remain in the UK because he will wish to acquire settled status this is not the same as stating that he will obtain it. Of course if he does, his daughter will have an entitlement to register as a British citizen pursuant to s1(3) of the British Nationality Act 1981, although my understanding of the relevant sections is that she would have this entitlement even were she to relocate abroad. I therefore disregard this submission and treat this as a neutral factor.

28. Having carefully considered all of the factors weighing on each side of the balance (in what is admittedly) a finely balanced case, I am satisfied that the appellant's right to family life with her father in the UK outweighs the public interest in immigration control and it would be unjustifiably harsh to remove her to Albania.

Notice of decision

29. The re-making of the appeal is allowed pursuant to Article 8 ECHR.

R J Owens

Judge of the Upper Tribunal
Immigration and Asylum Chamber

12 November 2024

Appendix A

IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-003180

First-tier Tribunal Nos: HU/60180/2022
LH/01168/2023

THE IMMIGRATION ACTS

Decision & Reasons Issued:

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Before

UPPER TRIBUNAL JUDGE OWENS

Between

MISS KHAI ATLAS HYKAJ
(NO ANONYMITY ORDER MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Dhanji instructed by Malik & Malik Solicitors
For the Respondent: Ms Rushforth, Senior Presenting Officer

Heard at Cardiff Civil Justice Centre on 13 June 2024

DECISION AND REASONS

1. The appellant appeals with permission against the decision of First-tier Tribunal Judge Trevaskis ("the judge") heard on 27 June 2023 dismissing her appeal against a decision of the Secretary of State dated 1 December 2022 refusing her human rights claim.

2. The appellant is a citizen of Albania born in the United Kingdom on 30 June 2022. Her mother, an Albanian citizen, entered the United Kingdom as a visitor whilst pregnant. Her father is an Albanian citizen who has pre-settled status in the United Kingdom on the basis of his marriage to a Romanian national. The appellant asserts that it would be a breach of Article 8 ECHR to require her to be removed from the United Kingdom because it is in her best interests to remain in

the United Kingdom where she can have a relationship with her father who plays a large part in her upbringing. To remove her would constitute a disproportionate breach of Article 8 ECHR. The respondent's position is that the relationship can be maintained by visits and electronic means of communication and that the public interest outweighs the appellant's right to respect for family life.

The Decision of the First-tier Tribunal

3. The judge heard evidence from the appellant's mother and father. The judge found that the appellant's mother is her primary carer and that the appellant's mother has supportive family in Albania who can assist her to bring up the child. The judge found that it was the best interests of the appellant to remain with her primary carer and that her removal from the United Kingdom would not be a breach of Article 8 ECHR.

The Grounds of Appeal

4. Grounds 1 and 2. The judge failed to take account of materially relevant evidence when concluding that the appellant's mother is her primary carer and the judge failed to give any or adequate reasons for rejecting the evidence before him that the appellant's father is her joint primary carer.

5. Ground 3. The judge made an error of fact amounting to an error of law. The judge found that the appellant's mother's evidence that her family in Albania would not support her on return was not plausible because the appellant's father had not stated this. This is factually incorrect.

Rule 24 Response

6. Ms Rushforth confirmed that there was no Rule 24 response but indicated that the appeal is opposed on the basis that although the First-tier Tribunal made the errors as asserted in the grounds, the error is not material to the outcome of the appeal.

Documentation

7. I checked that both parties had sight of the relevant documentation. This included the grounds of appeal, the grant of permission, the decision of the judge, the original respondent's bundle and appellant's bundle as well as the skeleton argument.

Grounds 1 and 2.

8. Ms Rushforth did not submit that the judge had not erred in the manner alleged in the grounds. I am satisfied that the judge failed to take account of relevant evidence before him when concluding that the appellant's mother is her primary carer and, by implication, that the appellant's father is not. The judge heard evidence from both witnesses which was that the sponsor plays a central role in the appellant's upbringing. That evidence included the following. In his witness statement the sponsor stated:

> "34. Since Khai has been born I have seen her every day. I normally go to Zenepe's house after work and spend a few hours there with my

> daughter. Since my daughter's birth I have provided for, be it baby formula, nappies, clothes, and any other necessities that are needed. I do this not because it's my job as a father but out of happiness for my daughter. I also ensure that Zenepe is also taken care of as this is only right …".

9. This was corroborated by Ms Ibra who stated in her statement:

> "31. Arjan has seen Khai every day since the day she was born. He comes every day after work to spend a couple of hours with Khai. He has always been there for her, he will go to the shops to buy all the necessities, including baby formula, clothes, and nappies. I am extremely grateful that I am not alone in raising Khai and that I have Arjan's support. Evelina has also met Khai, they have spent time together and I know that Khai really likes her. I myself get on very well with Evelina too.
>
> 32. Arjan and I always take Khai out be it to the park or even any hospital appointments, we believe it is only healthy for a child at that age to see their parents together. I have even taken Khai to visit her father whilst he is at work. I know that Arjan does not want to miss out on any moment, he is always happy when he is around Khai, and she is always smiling when she is around her father. I know how important they have both become to each other, their bond is unbreakable".

10. At [8] the judge stated the appellant lives with her mother who is her primary carer. At [12] the judge stated the best interests of the appellant, a female infant, will be served by staying with her mother who is her primary carer. From this it is clear that the judge did not consider the appellant's father to be a joint primary carer. There was no indication in the decision that the judge has taken into consideration at any point the role which the appellant's father plays in his daughter's life and to what extent he is a joint family carer.

11. I agree with Mr Dhanji that it was of course open to the judge to reject the evidence of the appellant's mother and father but that there was nothing in the determination to suggest that the judge did this. If the judge rejected the evidence then he was under a duty to provide reasons why he had decided to reject the evidence and no such reasons were provided. I am therefore satisfied that the judge failed to take into account material evidence and failed to give any or adequate reasons for rejecting the witnesses' evidence if that is what he meant to do. I am satisfied that the judge has made an error of law.

Ground 3. a

12. Ms Rushforth did not seek to submit that the judge had not erred as contended in the grounds. I am also satisfied that the judge made an error of fact amounting to an error of law. At [9] of his decision he said;

> "The Appellant's mother has family in Albania consisting of her parents, sister, uncles, aunts and cousins; although she claims they will not support her if returned, I do not find that to be plausible because the Sponsor has not stated that; furthermore, the Sponsor says that his parents in Albania will support the Appellant and her mother".

13. This was factually inaccurate as can be seen from paragraph 43 of the sponsor's witness statement where he stated:

> "43. It has been stated that Khai can move to and live in Albania. I do not want to raise Khai in Albania for many reasons. I live and work here, but Khai and I cannot be separated, she is my daughter, my first born and my blood, she deserves to be with her father. She can also not return with her mother because in Albania, her mother would return to an awkward and a very hostile environment. Zenepe does not have her parents support and they do not speak to her, let alone Khai. Zenepe tried to speak to her parents, but they labelled her a 'walking mistake and disgrace of the culture'. This is not the environment I would like my daughter to live in and be raised in. If I allowed Zenepe and Khai to return to Albania I would not be a good dad or a good friend, they would both be subject to abuse, and I will not allow this". (Emphasis added)

14. It is clear from the statement that the appellant's father did in fact state that the appellant's mother's family would not support her on return and that the judge made a factual error at paragraph 9. I am satisfied that the judge made an error of fact.

Materiality

15. The real issue in this appeal is whether these errors are material to the outcome. Ms Rushforth did not make any detailed submissions. Mr Dhanji's submission is that both errors are material because they fed into the judge's analysis of why it was in the appellant's best interests to return to Albania with her mother. The judge did not factor in the extent to which the appellant's father plays a role in her life in the United Kingdom and the likely living circumstances and available support network in Albania. I am in agreement that had the judge not made these errors the judge may have formed a different view on the child's best interests which may have led to a different outcome in respect of the proportionality assessment.

16. The test is set out in AJ (Angola) [2014] EWCA Civ 1636. It cannot be said in this case that it is clear on the materials before the Tribunal that any rational Tribunal must have come to the same conclusion. I therefore find that these errors are material to the outcome of the appeal and the decision should be set aside with the findings below preserved.

Preserved Findings

17. Both parties agreed that the judge's error did not infect all of the findings in the decision and the following findings are preserved:

    (a) The appellant lives with her mother.

    (b) Her father and her mother are not in a relationship.

    (c) Her mother was six months pregnant with the appellant when she entered the United Kingdom as a visitor.

(d) The appellant's mother came to the United Kingdom so that the appellant would be born in the United Kingdom and close to her father.

(e) The appellant's mother has not applied to regularise her status in the United Kingdom.

(f) The appellant's mother has family in Albania consisting of her parents, sisters, uncles, aunts and cousins.

(g) The sponsor's parents in Albania will support the appellant and her mother.

(h) If the appellant and her mother return to Albania the sponsor also says he will support her.

(i) The sponsor's wife also supports the relationship with the appellant and her mother.

(j) The appellant's mother was living independently before she came to the UK and was working in a tax office. She will be able to work in Albania subject to childcare.

(k) The sponsor can maintain contact with the appellant and her mother by modern means of communication. He is able to travel to Albania to visit them.

18. I do not preserve the finding that the appellant's mother is her primary carer. I do not preserve the finding that the sponsor can return to live in Albania with or without his wife as it is not clear on what basis this finding was made, and I do not preserve the finding that it is the best interests of the appellant to stay with her mother who is her primary carer.

Disposal

19. Both parties were in agreement that this appeal should be retained at the Upper Tribunal for re-making and I am in agreement with that course of action.

Notice of Decision

1. The making of the decision of the First-tier Tribunal involved the making of an error of law.

2. The decision is set aside with the findings at [17] above preserved.

3. The appeal is adjourned for re-making at the Upper Tribunal on the first available date at a face to face Tribunal in Cardiff before UTJ Owens with a time estimate of two hours.

R J Owens

Judge of the Upper Tribunal
Immigration and Asylum Chamber

8 July 2024