



**IN THE UPPER TRIBUNAL**  
**IMMIGRATION AND ASYLUM CHAMBER**

Case No: UI-2024-001010

First-tier Tribunal Nos: HU/55561/2023  
LH/06750/2023

**THE IMMIGRATION ACTS**

**Decision & Reasons Issued:  
On 26 June 2024**

**Before**

**UPPER TRIBUNAL JUDGE McWILLIAM**

**Between**

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

Appellant

**and**

**SA  
(ANONYMITY ORDER MADE)**

Respondent

**Representation:**

For the Appellant:

Mr E Tufan, Senior Home Office Presenting Officer

For the Respondent:

Mr A Slatter, Counsel instructed by Sterling Law Associates LLP

**Heard at Field House on 21 May 2024**

**Order Regarding Anonymity**

**Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, the Appellant and any member of his family is granted anonymity.**

**No-one shall publish or reveal any information, including the name or address of the Appellant, likely to lead members of the public to identify the Appellant and family member. Failure to comply with this order could amount to a contempt of court.**

**DECISION AND REASONS**

1. I shall refer to the Respondent in these proceedings as the Appellant as he was known before the First-tier Tribunal (FTT). He is a citizen of Albania. His date of birth is 1 March 2008.

2. I make a direction that the Appellant should be anonymised in accordance with the Guidance Note 2022 No 2: Anonymity Orders and Hearings in Private. I conclude that the Appellant's age necessitates a departure from the principle of open justice.
3. The Respondent was granted permission to appeal by Deputy Upper Tribunal Judge Lewis on 11 April 2024 against the decision of the First-tier Tribunal (Judge M P W Harris) to allow the Appellant's appeal against the decision of the ECO on 22 March 2023 to refuse to grant him entry clearance. The salient parts of the grant of permission read as follows:-
  - “4. In respect of the first, the absence of *'any specific policy explanation for why people who have obtained limited leave to remain under the EUSS scheme are not included in the category of parent who can sponsor a child to join them under Appendix FM'* (paragraph 17), the Judge found that this did not diminish the weight to be accorded to the public interest in maintaining effective immigration control, and that the failure of the Appellant to meet the requirements of the Immigration Rules *'weighs against the appellant's case on proportionality'* (paragraph 19).
  5. The second factor, in respect of financial support, was found to be *'of neutral effect'* in respect of proportionality (paragraph 21).
  6. It seemingly follows that in allowing the appeal the Judge concluded that the third factor - *'the best interests of the [minor] appellant [being] for him to reside with both parents in [the UK]'* (paragraph 27) - determinatively outweighed the public interest.
  7. Pursuant to paragraphs 1(a), (b), and (d) of the Grounds, it is arguable that this analysis:
    - (i) Failed to take into account, or consider, the possibility of the Appellant's parents returning to their country of nationality to look after their son;
    - and/or
    - (ii) Inappropriately accorded weight to the EUSS pre-settled status of the parents (*vide* paragraph 24, and paragraph 27 - *'Given the immigration status of the parents...'*), in a manner inconsistent with the earlier observations in respect of the scheme of the Immigration Rules (paragraphs 17-19).
  8. In this latter context it might be thought that it will be a rare case in which the best interests of a child are not to join parents present in the UK. If this in itself is to be accorded determinative weight - (and it is arguable the Judge relied on no more than *'the age of the appellant and his needs as a child'* in concluding that the impact of the Respondent's decision would be unjustifiably harsh and that there were compelling circumstances rendering the decision disproportionate (paragraph 28)) - it arguably negates the substance of Appendix FM insofar as it relates to parents with limited leave.

9. Paragraph 1(c) of the Grounds is of less merit: it is not apparent that it was argued before the First-tier Tribunal that the Appellant's circumstances in Albania were not as described in the evidence".
4. At the hearing the judge heard evidence from the Appellant's mother (MA), his father (KA), his brother (LA) and his brother's wife (KM). The Appellant's parents entered the UK as dependent relatives under the EUSS. They have limited leave (LLTR) to remain in the UK. The judge identified the issues at paragraph 8 and recorded that the Appellant accepts that he could not meet the Immigration Rules (IR) under Appendix FM because his parents have been granted LLTR under Appendix EU and not under Appendix FM with reference to paragraph E-ECC.1.6. of Appendix FM. The Appellant relied on Article 8 outside of the Rules.
5. The SSHD did not dispute that Article 8(1) was engaged. The judge identified that the issue for him was whether the decision of the ECO is a disproportionate interference with the Appellant's right to respect for family life.
6. The judge recorded that the SSHD relied upon the maintenance of effective immigration control being in the public interest and that the decision is not "against the best interests of the appellant".
7. The judge at [17] stated as follows:-
  17. *Turning to the first matter raised by the appellant, I accept that the respondent has not identified in this appeal any specific policy explanation for why people who have obtained limited leave to remain under the EUSS scheme are not included in the category of parent who can sponsor a child to join them under Appendix FM. I take that into account.*
  18. *However, against this there is the clear general consideration contained in s.117B(1) Nationality, Immigration and Asylum Act 2002 that the IR) maintenance of effective immigration controls is in the public interest. The Immigration Rules express those controls. I am not persuaded that the weight I should attach to the consideration under s.117B(1) of the 2002 Act is significantly reduced by the absence of any specific policy statement regarding Appendix FM and parents who have obtained leave under the EUSS scheme.*
  19. *It is accepted that the appellant does not succeed under the Immigration Rules. I have regard and attach weight to the consideration that the maintenance of effective immigration controls is in the public interest. This is a matter that weighs against the appellant's case on proportionality.*
  20. *As regards the matter raised at paragraph 3.2 of the skeleton argument, I remind myself that I am looking at circumstances as of the date of the hearing not at the time of the entry clearance application. At the time of the application, it was not said that the appellant's parents had sufficient income to support the appellant whether to satisfy the requirements of Appendix FM or at all. Things have moved on.*

21. *It was expressly raised in oral and documentary evidence before me by the appellant that his mother was now in regular employment and earning a sufficient income to support him without third party support, particularly by reference to the Appendix FM financial eligibility criteria. The respondent did not dispute this claim in cross-examination or submissions. On the evidence in this appeal I accept there is the claimed financial support for the appellant provided by his mother. However, when it comes to my assessment of proportionality, I consider the circumstance that the appellant would not need maintenance by public funds in this country to be of neutral effect.*
22. *Moving on to the best interests of the appellant, I remind myself that I am required in law to treat this as a primary consideration.*
23. *In submissions the respondent argued that it was because of actions taken by the appellant's parents and his sister, that the appellant has ultimately found himself living in a different country to that where his parents have come to live and that his sister has found she has had to move away from the appellant's address in Albania in order to undertake her university studies. However, I remind myself that I should not take into account the conduct of the appellant's parents or his adult sibling when considering the question of the appellant's best interests: KO Nigeria [2018] UKSC 53.*
24. *Moreover, I have to consider the real world situation. This is that at present both of the appellant's parents have EUSS pre-settled status giving them limited leave to be in the UK.*
25. *The respondent submitted that it would not be against the best interests of the appellant for the current arrangement to continue, which involves the appellant's father from time to time making visits to spend time with the appellant. It was also suggested that the appellant was at an age when he was beginning to be relatively independent compared to a younger child.*
26. *While the appellant is indeed a teenager, I consider that it is still the case that he remains a child in need of care and support. I am satisfied that this will clearly be best provided by his parents compared to his sister or any other relative in Albania. On the evidence in this appeal I find that it is in the appellant's best interests to reside with both his parents rather than depend on modern means of communications and the current arrangement of visits by his father from the UK.*
27. *Given the immigration status of the parents, the real world alternative to the current arrangement is for the appellant to join his parents, and indeed his brother and his family, in this country. It has not been argued before me by the respondent that the claimed accommodation available to the appellant in this country is anything but suitable. In the circumstances, I find that the best interests of the appellant are for him to reside with both his parents in this country.*
28. *Given the age of the appellant and his needs as a child, I find it would be unjustifiably harsh for the appellant to reside in Albania apart from*

*his parents. It is in this context that I find the best interests of the appellant outweigh the factors relied upon by the respondent. Weighing up the matters before me, I find that there are compelling circumstances which make the decision of the respondent disproportionate and in breach of Article 8”.*

### The Grounds of Appeal

8. The grounds of appeal before the FTT and before the UTJ granting permission are under the heading “*Failure to provide reasons or any adequate reasons for findings on material matters*”. There are four paragraphs listed under this heading. Paragraph 1(a),(b) and (d) make the same point that the FTT failed to provide adequate reasons why the Appellant cannot live with his parents in Albania bearing in mind that Article 8 does not allow individuals to choose where they want to live, and the Appellant’s parents have not provided any reasons why they cannot return to Albania and care for the Appellant. The grounds before the UT, whilst relying on the grounds before the FTT, add to the original grounds. They say that it is accepted that the decision letter and the SSHD’s review did not “explicitly” state that the Appellant’s parents could return to Albania, however, this was advanced by the Presenting Officer at the hearing before the FTT. The SSHD relied on the Presenting Officer’s note of the hearing. It is submitted that the point which was alluded to in the SSHD’s review where it was stated that Article 8 does not permit an individual to choose where they wish to continue family life.
9. Paragraph 1(c) of the grounds raise a different issue. It says that the judge failed to assess whether the Appellant’s circumstances in Albania are credible and simply accepted that his older sister has moved away from him despite the lack of evidence to support this. It is submitted that it is not credible that the Appellant, who was at the time of drafting the grounds aged 15, would be left in Albania without adequate care put in place from relatives or that this would be legal.

### The Relevant Immigration Rules (IR) (Published 25 February 2016 and Updated 11 April 2024)

10. The relevant IR are as follows:

#### **GEN: General**

##### **Purpose**

- GEN.1.1. This route is for those seeking to enter or remain in the UK on the basis of their family life with a person who is a British Citizen, is settled in the UK, is in the UK with protection status (and the applicant cannot seek entry clearance or permission as their family member under Appendix Family Reunion (Protection) of these rules), is in the UK with permission as a Stateless person, is in the UK with limited leave under Appendix EU, or is in the UK with limited leave as a worker or business person by virtue of either Appendix ECAA Extension of Stay or under the provisions of the relevant 1973 Immigration Rules (or Decision 1/80) that underpinned the European Community Association Agreement (ECAA) with Turkey prior to 1 January 2021. It sets out the requirements to be met and, in considering applications under this route, it reflects how, under Article

8 of the Human Rights Convention, the balance will be struck between the right to respect for private and family life and the legitimate aims of protecting national security, public safety and the economic well-being of the UK; the prevention of disorder and crime; the protection of health or morals; and the protection of the rights and freedoms of others (and in doing so also reflects the relevant public interest considerations as set out in Part 5A of the Nationality, Immigration and Asylum Act 2002). It also takes into account the need to safeguard and promote the welfare of children in the UK, in line with the Secretary of State's duty under section 55 of the Borders, Citizenship and Immigration Act 2009.

## **Definitions**

GEN.1.2. For the purposes of this Appendix 'partner' includes the applicant's fiancé(e) or proposed civil partner (unless a different meaning of partner applies elsewhere in this Appendix).

GEN.1.3. For the purposes of this Appendix

- (a) 'application for leave to remain' also includes an application for variation of leave to enter or remain by a person in the UK;
- (b) references to a person being present and settled in the UK also include a person who is being admitted for settlement on the same occasion as the applicant;
- (c) references to a British Citizen in the UK also include a British Citizen who is coming to the UK with the applicant as their partner or parent;
- (d) references to a person being 'in the UK with limited leave under Appendix EU' mean an EEA national in the UK who holds valid limited leave to enter or remain granted under paragraph EU3 of Appendix EU to these Rules on the basis of meeting condition 1 in paragraph EU14 of that Appendix; and
- (e) references to a person being 'in the UK with limited leave as a worker or business person under Appendix ECAA Extension of Stay' mean a person granted such leave by virtue of either Appendix ECAA Extension of Stay or under the provisions of the relevant 1973 Immigration Rules (or Decision 1/80) that underpinned the European Community Association Agreement (ECAA) with Turkey prior to 1 January 2021.

## **Exceptional circumstances**

GEN.3.1.

- (1) Where:
  - (a) the financial requirement in paragraph E-ECP.3.1., E-LTRP.3.1., E-LTRP.3.7. (in the context of an application for limited leave to remain as a partner), E-ECC.2.1., E-ECC.2.5., E-LTRC.2.1., or E-LTRC.2.5. applies, and is not met from the specified sources referred to in the relevant paragraph; and

- (b) it is evident from the information provided by the applicant that there are exceptional circumstances which could render refusal of entry clearance or leave to remain a breach of Article 8 of the European Convention on Human Rights, because such refusal could result in unjustifiably harsh consequences for the applicant, their partner or a relevant child; then

the decision-maker must consider whether such financial requirement is met through taking into account the sources of income, financial support or funds set out in paragraph 21A(2) of Appendix FM-SE (subject to the considerations in sub-paragraphs (3) to (8) of that paragraph).

- (2) Where the financial requirement in paragraph E-ECP.3.1., E-LTRP.3.1., E-LTRP.3.7 (in the context of an application for limited leave to remain as a partner), E-ECC.2.1., E-ECC.2.5., E-LTRC.2.1., or E-LTRC.2.5. is met following consideration under sub-paragraph (1) (and provided that the other relevant requirements of the Immigration Rules are also met), the applicant will be granted entry clearance or leave to remain under, as appropriate, paragraph D-ECP.1.2., D-LTRP.1.2., D-ECC.1.1., D-LTRC.1.1., paragraph 315, or 316B of the Immigration Rules.

#### 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.
- (3) Where the exceptional circumstances referred to in sub-paragraph (2) above apply, the applicant will be granted entry clearance or leave to enter or remain under, as appropriate, paragraph D-ECP.1.2., D-LTRP.1.2., D-ECC.1.1., D-LTRC.1.1., D-ECPT.1.2. or D-LTRPT.1.2.

#### GEN.3.3.

- (1) In considering an application for entry clearance or leave to enter or remain where paragraph GEN.3.1. or GEN.3.2. applies, the decision-maker must take into account, as a primary consideration, the best interests of any relevant child.

- (2) In paragraphs GEN.3.1. and GEN.3.2., and this paragraph, 'relevant child' means a person who:
- (a) is under the age of 18 years at the date of the application; and
  - (b) it is evident from the information provided by the applicant would be affected by a decision to refuse the application.

### **Family life as a child of a person with limited leave as a partner or parent**

This route is for a child whose parent is applying under this Appendix for entry clearance or leave, or who has limited leave, as a partner or parent. For further provision on a child seeking to enter or remain in the UK for the purpose of their family life see Part 8 of these Rules.

### **Section EC-C: Entry clearance as a child**

- EC-C.1.1. The requirements to be met for entry clearance as a child are that-
- (a) the applicant must be outside the UK;
  - (b) the applicant must have made a valid application for entry clearance as a child;
  - (c) the applicant must not fall for refusal under any of the grounds in Section S-EC: Suitability for entry clearance; and
  - (d) the applicant must meet all of the requirements of Section E-ECC: Eligibility for entry clearance as a child.

### **Section E-ECC: Eligibility for entry clearance as a child**

- E-ECC.1.1. To meet the eligibility requirements for entry clearance as a child all of the requirements of paragraphs E-ECC.A1.1. to 2.7. must be met.
- E-ECC.A1.1 The applicant must provide a passport or other document which satisfactorily establishes their identity and nationality.

### **Relationship requirements**

- E-ECC.1.2. The applicant must be under the age of 18 at the date of application.
- E-ECC.1.3. The applicant must not be married or in a civil partnership.
- E-ECC.1.4. The applicant must not have formed an independent family unit.
- E-ECC.1.5. The applicant must not be leading an independent life.
- E-ECC.1.6. One of the applicant's parents must be in the UK with limited leave to enter or remain, or be being granted, or have been granted, entry clearance, as a partner or a parent under this Appendix (referred to in this section as the 'applicant's parent'), and
- (a) the applicant's parent's partner under Appendix FM is also a parent of the applicant; or
  - (b) the applicant's parent has had and continues to have sole responsibility for the child's upbringing; or



- (c) there are serious and compelling family or other considerations which make exclusion of the child undesirable and suitable arrangements have been made for the child's care.

### The decision of the ECO

11. The decision of the SSHD was that the Appellant did not meet all the eligibility requirements. He did not meet the eligibility requirement of paragraph E-ECC.1.2. to 1.6. It went on to say that the decision maker was not satisfied that one of the Appellant's parents was in the UK with LLTR under Appendix FM or that there were serious and compelling family or other considerations which would make exclusion undesirable. The decision maker was also not satisfied that the Appellant met the eligibility financial requirements of paragraph E-ECC.2.1. to 2.4. on the basis that to meet the financial requirements the Sponsor would need a gross income of at least £22,400 per annum and that the evidence submitted was a statement that the Sponsor was self-employed and had been since 2019. There was no documentary support in accordance with the evidential requirements of the IR. The decision maker considered exceptional circumstances under GEN.3.1. and GEN.3.2. taking into account GEN.3.3. and the Appellant's best interests "as a primary consideration". In the letter the following was stated:-

"The desire to live in the UK rather than Albania does not represent a relevant factor in this case, as Article 8 does not oblige the UK to accept the choice of a child and their parent as to which country in which they prefer to reside. Your mother and father have made the decision to settle here, thus knowing and accepting that they would have to meet the immigration requirements of the UK in order for you to join them. I am therefore satisfied the decision is justified by the need to maintain an effective immigration and border control".

### The Respondent's Review

12. I was referred to the Respondent's review that was before the FTT, specifically at paragraph 7(f) which states as follows:-

"Article 8 does not provide an individual the choice to exercise their family life in a country of their choosing and as such a State has a margin of appreciation in controlling the entry of migrants into its territory. The fact therefore that the A is unable to satisfy the requirement of the Immigration rules under Appendix FM is a weighty factor in the proportionality assessment".

### The Respondent's submissions

13. Mr Tufan relied on the grounds of appeal. He submitted that there was nothing stopping the Appellant's parents from going back to Albania to continue family life with the Appellant. The best interests of the child cannot be determinative of proportionality.

### The Appellant's submissions

14. I will engage with the submissions made in turn.

15. In relation to the grounds at 1(c), I accept Mr Slatter's submission that there is no error arising. I agree with the comments of DUTJ Lewis. The judge accepted the Appellant's case concerning his circumstances in Albania. The minute that was prepared by the presenting officer does not disclose that a submission was made by the Presenting Officer that the circumstances of the Appellant as advanced by the evidence of the witnesses was not credible. In the absence of such a submission it was open to the judge to proceed on the footing that the Appellant was living on his own in Albania as claimed by witnesses. There is no error of law properly identified.
16. Mr Slatter submitted that there was no error of law in relation to the decision of the judge under Article 8. He submitted that the judge considered the possibility of the Appellant's parents returning to live in Albania. However, there is no support for this. I find that the judge did not consider the possibility of the Appellant's parents returning to Albania. The decision letter said that Article 8 does not oblige the UK to accept the choice of a child and their parent where to reside and the Respondent's review at paragraph 7(f)) sufficiently covers the point. In any event it is accepted by Mr Slatter that it was raised at the hearing.
17. I find that whether family life can continue elsewhere is a fundamental part of the proportionality assessment and the failure to consider this is a material error of law. I take into account the Court of Appeal's summary of the position of applicants for LTE as a family member on the basis of family life with a person already in the UK in *SS (Congo) [2015] EWCA Civ 387 ( paras 39-40)*. At [39v] the following was said:
- If family life can be carried on elsewhere, it is unlikely that 'a direct and immediate link' will exist between the measures requested by an applicant and his family life (Draon, para. [106]; Botta v Italy (1998) 26 EHRR 241, para. [35]), such as to provide the basis for an implied obligation upon the state under Article 8(1) to grant LTE; see also Gül v Switzerland, [42].*
18. The judge did not consider the possibility of family life continuing in Albania. While the Appellant's best interests are unarguably to be reunited with his parents, the judge did not consider whether this could be achieved by his parents returning to Albania. For this reason alone the decision is vitiated by a material error and should be set aside. I will, however, deal with the other issues raised in the grounds.
19. Mr Slatter sought to defend the judge's reasoning that the case needed to be assessed on the basis of "the real world situation ... that both parents have EUSS pre-settled status giving them leave to be in the UK" (see [24]). The nature of the rights actually held by the Appellant's parents was a relevant consideration to be taken into account. Mr Slatter submitted that there is ample authority for the proposition that the best interests of the child be assessed on the basis of the real world situation, for example *EV (Philippines) & Ors v Secretary of State for the Home Department [2014] EWCA Civ 874*.
20. I do not agree with Mr Slatter. It may be that the judge was referring to the comments of Lewison LJ in *EV (Philippines) & Ors v SSHD [2014] EWCA Civ 874* at [55], with reference to the real world situation but in that case the real world situation was that the children and parents were in the UK facing a removal decision. The parents had no right to remain and the interests of other family members were to be considered in the light of this. This Appellant's case is that it is in his best interests to be with his parents. This is accepted. However, there is

no cogent argument that it is in his best interests to be with his parents specifically in the UK. He is not a British citizen and he has never lived in the UK. The SSHD is not seeking to remove him. I do not find that *EV* has any application. While the Appellant is a relevant child for the purposes of GEN.3.3.(2) of Appendix FM and therefore pursuant to GEN.3.3.(1) the decision maker is required to take into account as a primary consideration the best interests of any relevant child, this must be considered in the context of there being no material evidence that family life could not continue in Albania.

21. In support of the decision of the FTT, Mr Slatter relied on the reference in GEN.1.1 to those seeking to enter or remain in the UK on the basis of their family life with a person in the UK with limited leave under Appendix EU. GEN.1.1 gives examples of those who do not satisfy the IR in respect of the status of their parents. It reinforces the need for an assessment under Article 8, with reference to s.55 BCIA. I do not understand that there is any issue in respect of the approach to be taken. I do not understand how GEN.1.1 assists the Appellant over and above that an assessment outside the IR must be made if an applicant cannot meet the requirement of the IR for reasons including that they have family life with a person who has been granted leave under Appendix EU.
22. Mr Slatter submitted that the contention that by allowing the appeal the judge has “negated the substance of Appendix FM” insofar as it relates to parents with LLTR, is misconceived. He said that the “family life as a child of a person with limited leave as a parent” provision within Appendix FM was in substance met by the Appellant. Only E-ECC.1.6. of the relationship requirement was in issue. No suitability requirement was relied on by the SSHD and the judge found in the Appellant’s favour in relation to the eligibility financial requirements. Even within E-ECC.1.6. both biological parents were in the UK and had been granted LTE and had joint responsibility for the Appellant. There were also serious and compelling considerations which made the Appellant’s exclusion undesirable given that he was living on his own with reference E-ECC.1.6 (c). Mr Slatter submitted that (c) was not an issue because it was not relied on by the Respondent.
23. I do not accept Mr Slatter’s submission on the issue. The decision of the ECO raised (a) and (c). The Respondent’s Review was not so clear in respect of (c). At the hearing my attention was not drawn to the decision of the ECO which states that (c) was not accepted. While neither of the parties referred me to the Appellant’s Response to the Respondent’s review, I have considered this. The Appellant relied on para 297 of the IR. While this was not pursued at the hearing, it was submitted that further to the review the Appellant sought to add to the issues in the schedule in the Appellant’s Skeleton Argument whether the Appellant succeeded under para 297(i)(f). This is drafted in identical terms to E-ECC.1.6.(c). In the light of this, it is clear that this was an issue at the hearing and should have been determined.
24. The issue raised by the Appellant in the ASA before the FTT and the Rule 24 response is that although E-ECC.1.6. of Appendix FM was not met, the rationale for this where the Appellant’s partner’s parent is also the Appellant’s parent is not clear. In the ASA before the FTT it was said that the Respondent is “put to proof in relation to the policy objective”. It was submitted that this is relevant to the weight contributed to the public interest consideration in s.117B(1) of the 2002 Act when evaluating proportionality outside of the IR. Mr Slatter relied on the case of *Zhang, R (on the application of) v SSHD [2013] EWHC 891*. It was submitted by Mr Slatter that if the FTT was correct to consider that the weight to

be attributed to the public policy in immigration control was not “significantly reduced” by the absence of an obvious policy rationale for excluding parents with LLTR under Appendix EU; the conclusion that GEN.3.2.(2) of Appendix FM was met notwithstanding a failure to meet the EC-C.1.1. of Appendix FM did not negate the substance of that provision and was rationally open to the judge in light of the findings of fact made in relation to Appellant as a relevant child.

25. In respect of policy considerations the judge accepted that the SSHD had not identified a specific policy explanation why people who have obtained LLTR under the EUSS scheme are not included in the category of parent who can sponsor a child under Appendix FM, he then went on to say at [18] that he was not persuaded that the weight to be attached to s.117B(1) “*is significantly reduced by the absence of a policy statement regarding Appendix FM and parents who have leave under EUSS scheme*”. While I do not find contradiction in the findings of the judge. In so far as the findings suggest that some, albeit not significant, weight was attached to the failure to identify a policy explanation, I find that the judge’s approach was erroneous. Mr Slatter’s reliance on *Zhang* is misconceived. This case concerned the compatibility of the IR with Article 8 where there was no discretion to allow a case under Article 8 within the IR. The SSHD’s policy allowed for discretion to be exercised. The court concluded at [60] that the “out of rules” discretion should not be deployed as universal panacea to sustain the viability of any rule which is drafted in bright line terms. While the court also concluded that the policy’s aim in that case was to deter persons from entering the UK unlawfully and then enjoying the luxury of making an in country application and on the facts of that case it was found that the “policy considerations lie in quite the opposite direction,” this was a finding on the particular facts of the case. It does not form part of the ratio. The relevant IR for this Appellant are not drafted in “bright line terms” as is clear from GEN.3.1. I find that by attaching some weight to the presenting officer having failed to identify a rationale for the policy, this negated the substance of the IR. The FTT has no jurisdiction to consider whether the IR are reasonable or rational. In any event, for the purpose of this appeal, there is no challenge to the specific findings of the judge on this issue and they were not material to the decision of the judge.
26. Mr Slatter submitted that taking into account the human rights context of the appeal, even if there were a rational basis for excluding the Appellant because his parents were granted LLTR under Appendix EU and not FM, it is submitted that the public interest in his non-admission does not outweigh the family life value at the heart of this appeal. He relied on *Patel and others (Appellants) v Secretary of State for the Home Department (Respondent)* [2013] UKSC 72 at [45]-[57]. Mr Slatter did not explain how *Patel* assists this Appellant. This Court of Appeal were discussing the “near miss” argument. The Appellant’s case cannot reasonably be described as falling into the category of a “near miss”. In any event, I take note of what was said at [57] that while the context of the IR may be relevant to the consideration of proportionality, this cannot be equated with a “near miss” or “sliding scale” principle. A near-miss under the IR cannot provide substance to a human rights case which is otherwise lacking in merit.
27. I set aside the decision of the judge because of the material error of law identified.

*Re-making*

28. I raised the issue of remaking before the parties. Mr Slatter made an application to adjourn to give the Appellant the opportunity to expand upon the argument raised by the judge granting permission relating to the absence of a specific policy aim. However, the issue was not raised by the SSHD in the grounds. Mr Slatter had argued it before the FTT and the judge reached a conclusion on this. I heard submission from Mr Slatter on the issue and he addressed it in his Rule 24 response. Moreover the Appellant's representatives had not made an application for the consideration of evidence that was not before the FTT. I take account of the terms of the standard directions issued to the Appellant's solicitors on 7 May 2024 (see 4.1 iii and iv). I decided that it was fair and just to proceed to remake the decision on the evidence before the FTT with regard to the overriding objective. I gave Mr Slatter the opportunity to make submissions. He agreed that no further evidence had been relied on by the Appellant. Mr Slatter did not submit that the position of the Appellant had changed since the date of the hearing in a way material to the proportionality assessment.

#### *Re-making*

29. I take into account *SS Congo* in so far as it is relevant to the assessment of proportionality in entry clearance cases and the significance of whether family life can continue outside the UK including [40] where the following was said:

*In the light of these authorities, we consider that the state has a wider margin of appreciation in determining the conditions to be satisfied before LTE is granted, by contrast with the position in relation to decisions regarding LTR for persons with a (non-precarious) family life already established in the United Kingdom. The Secretary of State has already, in effect, made some use of this wider margin of appreciation by excluding section EX.1 as a basis for grant of LTE, although it is available as a basis for grant of LTR. The LTE Rules therefore maintain, in general terms, a reasonable relationship with the requirements of Article 8 in the ordinary run of cases. However, it remains possible to imagine cases where the individual interests at stake are of a particularly pressing nature so that a good claim for LTE can be established outside the Rules. In our view, the appropriate general formulation for this category is that such cases will arise where an applicant for LTE can show that compelling circumstances exist (which are not sufficiently recognised under the new Rules) to require the grant of such leave.*

30. There is evidence from the Appellant's parents and their eldest son and wife. I understand that the family want to live together in the UK and that this would be economically to their advantage. However, the Appellant's parents have themselves been here for a relatively short period of time. At the date of the hearing the Appellant was aged 15 and living alone. His best interests are to be reunited with his parents as soon as possible. However, the Respondent's decision does not prevent the Appellant and his parents being reunited. His situation, living alone, is untenable and perhaps unlawful in Albania. There was no evidence explaining why it would be disproportionate for the parents to return to Albania to continue to care for the Appellant. There is no evidence that family life cannot continue in Albania.
31. While the Appellant concedes that the financial requirements of the IR were not met at the date of the decision, the FTT's view was that his mother was in employment and earning a sufficient income to support him with reference to Appendix FM. I understand that to be a finding that the financial requirements of Appendix FM were met at the date of the hearing which is a finding in favour of the Appellant when assessing proportionality. However, I take into account

s.117B(1) of the 2002 Act that the maintenance of immigration control is in the public interest. There are no exceptional circumstances in the context of GEN.3.2.(2) properly identified. The Appellant has not established that there are serious and compelling considerations that make the his exclusion undesirable ( E-ECC.1.6 (c )) because his parents are free to return to Albania. Family life can continue in Albania as it did before the Appellant's parents came to the UK.

32. The decision to refuse entry clearance is proportionate.
33. The appeal is dismissed under Article 8 ECHR.

**Joanna McWilliam**

Judge of the Upper Tribunal  
Immigration and Asylum Chamber

**18 June 2024**