IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2024-001177
First-tier Tribunal No:
HU/58724/2023
LH/00286/2024

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 18th November 2024

Before
UPPER TRIBUNAL JUDGE NORTON-TAYLOR

Between
RAMAZAN MORINA
(NO ANONYMITY ORDER MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the appellant: Ms N Bustani, Counsel, instructed by Oaks Solicitors
For the respondent: Mr M Parvar, Senior Presenting Officer

Heard at Field House on 11 November 2024

DECISION AND REASONS

Introduction

1. This is the re-making of the decision in the appellant's appeal against the respondent's refusal of his human rights claim.

2. The appellant is a national of Albania, born in 1997. He entered the United Kingdom illegally in November 2013 at the age of 16 and claimed asylum shortly thereafter. That claim was refused in 2014. Further submissions were put forward in 2019 and these were rejected without a right of appeal. In November 2020, the appellant met Ms Soraia Dias ("Ms Dias"), a Portuguese national, and they began relationship which subsists to this day. The couple were married in November 2021. Ms Dias was previously married to a Romanian national, with whom she had two children, born in 2017 and 2018. That marriage broke down as result of domestic abuse. The children are Romanian nationals and both reside with their mother.

3. The appellant's human rights claim was based on family and private life under Article 8, it being said that the couple could not go and live in Albania, that separation would be disproportionate, and that there would also be very significant obstacles to reintegration into Albanian society.

4. In refusing the human rights claim, the respondent concluded that: the appellant could not satisfy Appendix FM to the Immigration Rules ("the Rules") due to his immigration status; there were no insurmountable obstacles to the couple going to live in Albania, with reference to EX.1 of Appendix FM ("EX.1"); there were no very significant obstacles to the appellant reintegrating into Albanian society; and there were no exceptional circumstances in the case.

5. The First-tier Tribunal (Judge Chapman – "the judge") dismissed the appellant's appeal by a decision promulgated on 22 January 2024. In summary, the judge found that:

    (a) Ms Dias' evidence was entirely credible;

    (b) The appellant had resided in the United Kingdom unlawfully since his arrival in 2013;

    (c) The appellant faced no risk of harm on return to Albania;

    (d) The appellant has no family members residing in the United Kingdom;

    (e) Ms Dias has resided continuously in the United Kingdom since 2013, save for relatively brief periods in Romania during which her two children were born;

(f) The appellant's relationship with Ms Dias is genuine and subsisting and the former has played an "*active*" and "*important*" role in the lives of the two children;

(g) In January 2023, the children's biological father started having contact with them on the basis of an informal arrangement between Ms Dias and a paternal aunt. Thereafter, the children have seen their biological father and other members of his family on a fortnightly basis and other important occasions. He now plays an "*active role*" in their lives. Ms Dias does not have direct contact with the biological father. He has indicated through the aunt that he does not consent to the children going to live in Albania;

(h) The appellant does have close family members residing in Albania from whom he could obtain support;

(i) Because the biological father is now playing an "*active role*" in the children's lives, the appellant does not have parental responsibility for them;

(j) The best interests of the children lie in remaining in the United Kingdom, where they have resided for more than half of their lives and have familial ties. In addition, the best interests are served by the children remaining in their current circumstances, which included contact with their biological father and the presence of the appellant in their lives;

(k) EX.1(a) was not engaged because the two children were neither British citizens, nor had they resided continuously in the United Kingdom for seven years (in this regard, section117B(6) of the Nationality, Immigration and Asylum Act 2002 was not engaged);

(l) With reference to EX.1(b), there were no insurmountable obstacles to the appellant, Ms Dias and her children, going to live in Albania together;

(m) There were no very significant obstacles in the way of the appellant reintegrating into Albanian society;

(n) On Article 8 more widely, a separation of the appellant from Ms Dias and children would not be disproportionate and there were no other exceptional circumstances.

The error of law decision

6. The error of law decision is annexed to this re-making decision and two should be read together. In short terms, it was concluded that the judge had materially erred when considering the question of insurmountable obstacles under EX.1(b) by effectively leaving out of account the children's circumstances, with particular reference to their contact with their biological father and, in turn, the effect of this on Ms Dias' ability to

follow the appellant to Albania. Further, the error relating to EX.1(b) undermined the judge's proportionality assessment.

7. Importantly, a number of primary findings and evaluative conclusions made by the judge were preserved: the findings of fact set out at paragraph 5(a)-(i), above; the conclusion on the children's best interests at paragraph 5(j); and the conclusion on very significant obstacles at paragraph 5(m).

8. It was, and remains, common ground that EX.1(a) and section 117B(6) of the 2002 Act are not engaged because neither of the children are British citizens, nor have they continuously resided in the United Kingdom for at least seven years because they were in Romania for certain periods of time which broke the continuity of residence.

9. There are no protection issues in this case.

The issues at this stage

10. There are two core issues for determination. First, can the appellant demonstrate that there are insurmountable obstacles to family life with Ms Dias continuing outside of the United Kingdom (i.e. in Albania)? Second, if there are no such obstacles, would the appellant's removal from United Kingdom be disproportionate in any event, having regard to whether there are exceptional circumstances (put another way, would have unjustifiably harsh consequences for the family unit)?

11. There is no dispute by the respondent that if EX.1(b) is satisfied, the appellant should succeed in his appeal as no suitability or eligibility concerns have ever been raised. That must be correct in light of TZ (Pakistan) v SSHD [2018] EWCA Civ 1109.

The relevant Rules

12. EX.1(b) and EX.2 provide as follows:

> "EX.1. This paragraph applies if
>
> (a)…
>
> (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 protection status, in the UK with limited leave under Appendix EU in accordance with paragraph GEN.1.3.(d), or in the UK with limited leave as a worker or business person under Appendix ECAA Extension of Stay in accordance with paragraph GEN.1.3.(e), or in the UK with permission as a

> Stateless person, 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."

The approach to EX.1 and EX.2

13. It is undoubtedly the case that EX.1 and EX.2 in combination present a stringent test. Whilst subjective elements may be relevant, the test is ultimately objective in nature. The logical approach is first to decide whether the claimed obstacles to continuing family life amount to very significant difficulties. If they do, the second question is whether those difficulties are either impossible to overcome or there would be very the individual for the individual and/or their partner, taking into account steps which could reasonably be taken to avoid or mitigate the difficulties: Lal v SSHD [2019] EWCA Civ 1925 and NC v SSHD [2023] EWCA Civ 1379.

14. In my judgment, the assessment of EX.1 and EX.2 must be undertaken on the facts as they are found to be at the date of hearing. As with, for example, paragraph 276ADE(1)(iv) and now paragraph 5.1 of Appendix Private Life, and section 117B(6) of the 2002 Act, the test must be predicated on a real-world scenario, as opposed to a hypothetical or speculative basis.

The evidence

15. The appellant provided a consolidated bundle, indexed and paginated 1-245. I express my appreciation of the solicitor's efforts in creating clear and usable bookmarks for this bundle. This makes everyone's task a lot easier.

16. The most significant items of evidence in the bundle are: updated witness statements from the appellant and Ms Dias; a psychiatric report by Dr N Galappathie, dated 3 June 2024; and a report by Independent Social Worker Laurence Chester, dated 15 July 2024.

17. The appellant and Ms Dias attended the hearing and both gave evidence (the appellant with the assistance of an Albanian interpreter,

although his English is relatively good). They adopted their respective witness statements and were asked numerous questions by Mr Parvar about, amongst other matters, the possibility of returning together to Albania, family members in the United Kingdom, the possibility of finding employment in Albania, and Ms Dias' personal circumstances over the course of time.

18. I will address relevant aspects of the evidence when setting out my findings and conclusions, below.

The parties' submissions

19. Mr Parvar relied on the respondent's refusal decision and her review. His basic submission was that there were no insurmountable obstacles to the family unit moving to Albania. He submitted that Ms Dias had been untruthful in certain aspects of her evidence, including the assertion that she had been sexually abused in the past and that her ex-partner (the children's biological father) and had a sexual relationship with a minor in Romania. Ms Dias had, it was submitted, expanded her evidence "*quite considerably*" and that it "*defied any sense of belief*" that she would have allowed the children to have contact with their father. Dr Galappathie's report was undermined because Ms Dias had lied to him, that he had not seen a full set of GP records, and that the report had been commissioned "*out of the blue*". The report was "*overly generous*" and had failed to take account of the possibility of family support in the United Kingdom.

20. The Social Worker's report did not have "*much basis*" to conclude that there would be long-lasting effects on the two children. If the appellant was removed, the children would still have their biological father in this country. Mr Parvar submitted that "*they will cope*". It was submitted that the "*very likely scenario*" was that Ms Dias and the children would accompany the appellant to Albania. She was only saying that she would not go to that country in order to help the appellant's case.

21. As regards the biological father, Mr Parvar submitted that he "*may change his mind in the future*" by withdrawing his refusal of consent to allow the children to go and live in Albania. It was "*a matter for Ms Dias*" as to whether she tried to persuade him to do so, or made relevant applications to the courts in this country or Romania to allow the children to relocate.

22. If there were no insurmountable obstacles, Mr Parvar submitted that there would be no unjustifiably harsh consequences either. The appellant has been in the United Kingdom unlawfully, there would be family support in Albania, and Ms Dias' desire not to relocate was insufficient. The children could have indirect contact with their biological father. The evidence on their contact with him at present was "*thin*". There is also a concern that the biological father "*is a paedophile*".

23. Ms Bustani relied on her skeleton argument. She submitted that Ms Dias remained a credible witness. It was "*far-fetched*" that she would have made up a number of things and lied to Dr Galappathie and/or in her witness statement. Whilst there had been no expert medical evidence before the First-tier Tribunal, Dr Galappathie's report was deserving of real weight. The Social Worker's report was good evidence. It should be accepted that the biological father had refused consent to the children living in Albania. In any event, Ms Bustani submitted that even if they did relocate, they would then be separated from him, after having re-established contact in early 2023.

24. If the children's biological father had indeed had a relationship with a minor in Romania, it did not follow that he would be a risk of abusing his own children. There was no reason why Ms Dias would have simply made this up in order to help the appellant's case. Similarly, it was submitted that there was no need for her to have invented the sexual abuse claim.

Findings of fact

25. I have of course considered very carefully all of the evidence before me, with particular reference to the witness statements and the reports of Dr Galappathie and Mr Chester.

26. It is for the appellant to prove the primary facts relied on and the standard of proof is that of the balance of probabilities.

27. I begin by re-stating the preservation of a number of findings made by the judge, as set out at [20]-[29] of his decision and [5] of this re-making decision. These are important and, in my view, the respondent has at times come close to overlooking their significance.

28. One aspect of the preserved findings is that Ms Dias was found to be an entirely credible witness. That of course does not mean that she

has necessarily been truthful in relation to her evidence before me, but it is a positive indicator. If she had been found incredible, the respondent would understandably be urging me to take this into account when assessing her evidence at this stage.

29. I had the advantage of listening to and seeing Ms Dias giving her evidence. I found her to be a straightforward and, indeed, compelling witness. She did not seek to avoid answering questions, even when these related to sensitive matters. She spoke with passion, not only about her relationship with the appellant, but also her personal history and her children's interests. Her evidence was essentially consistent with what is said in her new witness statement and what she had said previously.

30. I address the particular criticisms made of her by Mr Parvar.

31. First, it is true that she has an interest in the appellant remaining in the United Kingdom: she quite clearly wants to remain in a loving family unit, as is currently the case, and she does not want this unit to be in Albania. Having said that, it does not follow that she has been prepared to lie or even exaggerate to me or others.

32. Second, I accept her explanation for not having mentioned the sexual abuse previously. I accept that she has found it very difficult to speak about that particular issue: as she put it in evidence, "*I wasn't ready and I was still healing.... It is getting a bit easier*". That is credible. I note also that she has previously mentioned other forms of abuse and the sexual aspect is consistent with the other mistreatment.

33. Third, I do not accept that Ms Dias lied to Dr Galappathie. Indeed, I am not entirely clear as to what it is said that she lied about. I see no basis for any suggestion that she deliberately withheld GP records from him (I will return to the report as a whole later). It is misconceived simply to state that the report came "out of the blue" and that, by inference, Ms Dias just invented a history and/or symptoms. The report was commissioned for the purposes of the resumed hearing: whilst a report could potentially have been obtained before the First-tier Tribunal hearing, the fact that it was not is not necessarily indicative of Ms Dias having concocted a mental health problem. In this regard I also note the section of Dr Galappathie's report which specifically addresses the issue of whether Ms Dias was malingering or had feigned symptoms. He concluded that there were no indications of her having done so: [18] and

[89]-[90]. Although that assessment is not of course water-tight, it is of probative value to my overall assessment of Ms Dias' credibility.

34. Fourth, I reject this submission that Ms Dias lied about her belief that her ex-partner had had a relationship with a minor in Romania. As she said in her evidence, there was simply no reason why she would make this up. It would not help the appellant's case. The assertion was essentially consistent with the ex-partner's general misbehaviour and abuse. I do not accept that it "*defies any sense of belief*" that Ms Dias would allow her children to see their father in light of his conduct. There is no reason to find that she is a wholly irresponsible parent who does not have the best interests of her children at heart. She has taken the position that the children should see their father (as I understand it, in a setting in which their paternal grandfather and other family members are, or are normally, present) and I am satisfied that she holds a clear belief that he would not think of abusing his own children. There is no reliable evidence to suggest that he is a material risk to his own children and I find that no such risk exists.

35. Overall, I find Ms Dias to be an entirely credible witness.

36. Having found Ms Dias to be credible, I am able to rely on her evidence in a number of respects. I find that she is the victim of significant abuse over the course of her life, both physical, emotional, and sexual. On any view, she has experienced traumatic events as a child and then during her relationship with the children's biological father. I find that this history is consistent with the development of mental health conditions, which in turn feeds into my assessment of Dr Galappathie's report, to which I will return. I find as a fact that she has recently started taking Sertraline medication again. This is consistent with her "on-off" approach to medication previously, as in the medical report.

37. I find that Ms Dias is entirely committed to her relationship with the appellant, but holds a firm and considered view that she would not go to Albania. I find that this position is not limited to her inability to speak Albanian and/or concerns about integrating into a new society, but concerns the family connections in the United Kingdom and the position of the children's biological father.

38. I accept that Ms Dias has her parents, brothers and a sister residing in this country. More importantly in the context of this appeal, are the

connections on the biological father's side. I find that there is a large extended paternal family, including a grandmother, numerous aunts, and cousins of a similar age to the two children.

39. I find that the two children see their biological father and their paternal relatives on a regular basis. I find that pursuant to this schedule they stay at the paternal grandmother's house from Friday to Sunday. In addition, they attend other celebratory events as and when they take place. This state of affairs has been ongoing since early 2023 or soon thereafter.

40. Mr Parvar described the evidence relating to contact with the biological father as "thin". On one view, he might be right in that there is no evidence from that individual or other members of the extended family, save for a statutory declaration from a paternal aunt, dated 8 November 2023. That declaration confirms, amongst other matters, the interaction between the two children and other family members, and the author's good relationship with Ms Dias. For the sake of completeness, I accept Ms Dias' explanation as to why there is no new evidence from that source, namely that the aunt had been away in Romania for an extended period and that, in any event, the aunt does not want to be seen to be helping the appellant to stay in this country.

41. The absence of detailed evidence from paternal family members does not in my view detract from the basic factual situation: the two children see their biological father and his family members frequently, and have been doing so now for close to two years. Combined with the preserved findings made by the judge as to the "active" role played by the biological father in the two children's lives and that he has parental responsibility, I find that over the course of time this is likely to have increased, or at least remained at a similar level, but be fully embedded in their lives. The best interests of the two children, as found by the judge and now by me, very clearly lies in having both biological parents in their lives, together with the presence of the appellant as their step-father.

42. I turn now to the question of the biological father's consent to the two children going to live in Albania. The first matter to note relates to the preserved findings. It will be recalled that the judge found Ms Dias to be credible. One aspect of her evidence which was included within the preserved findings was that the children's biological father had confirmed through an aunt he did not consent to the children being taken out of the United Kingdom to live: [20(8)] of the judge's decision. Ms Dias' evidence before me is that this position has not changed. There is no proper basis

on which to disbelieve her and good reasons to accept what she has said. Above and beyond the preserved finding, I have found her to be a generally credible witness and it is entirely plausible that the biological father would continue to withhold consent for the children to relocate, given the continuing regular contact between him and them.

43. I find as a fact that the children's biological father refuses to consent to the children going to live in Albania or anywhere else outside of the United Kingdom.

44. Mr Parvar chose not to address the specific issue as to whether an extant absence of consent by the biological father represented an insurmountable obstacle to the children going to live in Albania, with reference to section 1 of the Child Abduction Act 1984, a legislative provision referred to by Mr Chester in his report.

45. As far as is relevant, section 1(1)-(3) of the Child Abduction Act provides as follows:

> "1. Offence of abduction of child by parent, etc.
>
> (1) Subject to subsections(5) and (8) below, a person connected with a child under the age of sixteen commits an offence if he takes or sends the child out of the United Kingdom without the appropriate consent.
>
> (2) A person is connected with a child for the purposes of this section if—
>
> (a) he is a parent of the child; or
>
> …
>
> (3) In this section 'the appropriate consent', in relation to a child, means —
>
> (a) the consent of each of the following—
>
> (i) The child's mother;
>
> (ii) the child's father, if he has parental responsibility for him;
>
> …"

46. There is in my view no need for any expert evidence from a Family Law expert on the application of section 1 of the 1984 Act: on the facts of this case, it speaks for itself.

47. Mr Parvar has instead submitted that Ms Dias could/should seek to persuade the biological father to change his mind and/or make applications to any relevant courts in either the United Kingdom or Romania in order to permit her to take the two children to live in Albania without committing a criminal offence.

48. I find as a fact that Ms Dias has not entered into some form of negotiations with her ex-partner in order to try to persuade him to change his mind. That is hardly surprising given the history of abuse she has suffered at his hands. Her credible evidence is that she has no direct contact with him and that the only contact between her and his family's through the paternal aunt. I also find that Ms Dias has not as yet made any applications to courts in this country or Romania to obtain some form of order which would permit the two children to relocate to Albania without their father's consent.

49. Frankly, even adopting a speculative view of what might occur in the future, as urged upon me by Mr Parvar (which is not, in my judgment, the appropriate approach to take), it is extremely unlikely that the biological father would change his mind and it is at least unlikely that a court would make an appropriate order within a reasonably foreseeable timeframe.

50. I find that the two children do not currently have valid Romanian passports. Acknowledging the absence of expert evidence on the point, I nevertheless accept the unchallenged evidence from Ms Dias as to the need for the biological father's consent before the two children could obtain new Romanian passports. I also accept her evidence that the children would not be able to obtain Portuguese passports without the permission of their biological father. I find that the biological father has not given consent in relation to any applications for new passports.

51. Therefore, even on the most basic practical level, the two children cannot leave the United Kingdom and go to live in Albania.

52. The report of Dr Galappathie does suffer from a shortcoming, but I nevertheless place relatively significant weight on it. I accept that he was not provided with a full set of Ms Dias' GP records. However, that was not the fault of Dr Galappathie. It appears as though he only had records from around 2013 and then some from 2018. The explanation for this is not entirely clear to me, but on balance, and in light of my generally favourable view of Ms Dias' credibility, I am prepared to accept her

account that there was a mix-up with her NHS number at some point in the past and this course difficulties in obtaining a full set of the records. The absence of a full set of GP records reduces the weight I would otherwise have been prepared to place on the report.

53. Having said that, Dr Galappathie is a suitably qualified Consultant Psychiatrist. He conducted a detailed assessment of Ms Dias and applied his own professional standards to that assessment. Contrary to Mr Parvar's submission, I have already found that Ms Dias did not lie during the assessment. The author's assessment therefore proceeded on a factually accurate basis. He had also been provided with relevant witness statements, the First-tier Tribunal decision, and the respondent's reasons for refusal letter. He confirmed that he had read and considered the important decision in HA (expert evidence; mental health) Sri Lanka [2022] UKUT 00111 (IAC). He also confirmed that he had approached his assessment with an "*appropriate degree of scepticism*" given that Ms Dias had an incentive to portray herself in a way so as to assist the appellant's case. I have already referred to those parts of the report in which Dr Galappathie addressed the issue of malingering and/or feigning symptoms (he concluded that there were no indications of that having occurred).

54. Having considered the report as a whole, in conjunction with all other evidence before me, I disagree with Mr Parvar's submission that it is "*overly generous*" to Ms Dias. Apart from the obvious absence of any professional basis on which that submission could be based, I regard the report as being founded on a credible history and an assessment of presentation and diagnostic tools which have been deemed relevant by a person who is appropriately qualified. I am satisfied that alternative causes for the various symptoms displayed were properly considered by Dr Galappathie. Overall, I accept the following diagnoses relating to Ms Dias' current circumstances:

(a) A single episode of moderate depressive disorder without psychotic symptoms;

(b) Generalised anxiety disorder; and

(c) PTSD.

55. I place relatively significant weight on Dr Galappathie's opinion that a separation of Ms Dias from her two children would have a "*severe adverse impact upon her mental health*." I place similar weight on his opinion that a separation of Ms Dias from the appellant would result in a "*substantial deterioration in her mental health*" because of the removal of emotional and practical support currently provided by the appellant.

56. I place significant weight on the report of Mr Chester. There is no dispute that he is suitably qualified to have written the report. On my understanding, there has been no suggestion that either the appellant or Ms Dias lied to the author. In any event, I find that they told the truth and did not seek to contrive their relationship. Certainly, I find that there is no merit in any suggestion that the children either affected greater connections to the appellant, or were encouraged to do so by him or their mother.

57. As far as I am concerned, the report is well-structured, and the analysis is based on appropriate evidence gathered by Mr Chester. There has been no substantial criticism made by Mr Parvar. There is no merit in his suggestion that there was "*not much basis*" for Mr Chester to have concluded that there would be adverse effects for the children if the appellant had to return to Albania alone. There is, with respect, even less merit in his suggestion that the children "*will cope*". That is not the test with which I am concerned and it appears to overlook ignore what Mr Chester has said and the concept of best interests.

58. I need not set out each and every aspect of Dr Chester's report. The following will suffice. The appellant and the children have a "*very close bond*". That is entirely consistent with the preserved finding and the credible evidence put forward by the appellant and Ms Dias. A separation of the appellant from the two children would have "*long lasting detrimental effects on their overall development [and they would] feel a significant loss [if there was a separation]*". It would be "*disingenuous*" to assert that virtual contact between the two children and the appellant could mitigate the "*significant emotional harm the children will experience from losing their stepfather from their day-to-day lives*." It is in the best interests of the children and the family "*as a whole*" that the appellant remains in the United Kingdom. The appellant having to leave the United Kingdom alone "*would be likely to destabilise the whole family*." The author was "*highly concerned*" about the risks to the children's emotional well-being if the appellant went to Albania alone. Such a scenario would also have an impact on Ms Dias, which in turn would have a "*secondary impact*" on the children. Currently, Ms Dias was only "*barely coping*" with the emotional challenges of her situation. A separation of the children from the appellant would result in the former suffering "*significant harm*" as defined by section 31 of the Children Act 1989.

59. It is important to note that Mr Chester was not concerned with the children's relationship with their biological father. He was not instructed

to address that matter and he of course had no interaction with the children in that alternative setting. I do not intend to engage in undue speculation and I am not of course an expert, but in the absence of any suggestion that the two children actually dislike having a relationship with their biological father and extended family members on his side, it stands to reason that this aspect of their lives is likely to be of importance to them. For them to have to relocate to Albania would entail effectively losing the relationships and discontinuing their relationship with their biological father for a second time. It is close to fanciful to suggest that a further separation would have no adverse impact on the two children.

60. Having regard to my assessment of the evidence thus far, in combination with the preserved findings, and my impression of Ms Dias and the appellant at the hearing, I am left in no doubt whatsoever that they have a particularly strong relationship. I find that there are a number of probable reasons which have contributed to this: Ms Dias' very difficult past and her current mental health, the importance of the two children's best interests to the couple, and the appellant's commitment to providing emotional and practical support to his wife in light of the first two considerations.

61. I re-iterate the preserved finding that, taken in isolation, there are no very significant obstacles to the appellant re-establishing himself in Albania. He has family members there and I find that there has been no hostility expressed by them to Ms Dias or the two children. I find that, in principle, the appellant could find reasonable employment in Albania.

62. I find that Ms Dias does not speak Albanian and has never visited that country. The same applies to her two children.

63. There is no evidence of any medical or other conditions affecting the two children and I find that there are none.

Conclusions

EX. 1: insurmountable obstacles

64. For the avoidance of any doubt, there is quite clearly a genuine and subsisting relationship between the appellant and Ms Dias. There is family life under Article 8(1). For the purposes of EX.1(b), Ms Dias is settled in the United Kingdom (she has indefinite leave to remain).

65. Are there insurmountable obstacles to the family life enjoyed by the appellant and Ms Dias continuing outside of United Kingdom (i.e. in Albania)?

66. In answering that central question, I apply the relevant facts to this question, bearing in mind EX.2, the high threshold applicable, and the guidance set out in the authorities referred to earlier in this decision.

67. In undertaking my assessment, I place no material weight on Ms Dias' inability to speak Albanian, or her concerns about employment. I take into account the fact that the appellant has family in that country and there is no reason to suggest that they would not provide support in one form or another. Taking the appellant's circumstances in isolation, there are clearly no particular problems in the way of him re-establishing himself which in turn would permit him to support his family in Albania.

68. I take account of Ms Dias' firmly-held position that she would not go to live in Albania. That is relevant to an extent, but I remind myself that the insurmountable obstacles test is not ultimately subjective.

69. As I have discussed earlier, my assessment under EX.1 is not to be undertaken on the highly speculative and improbable basis that the biological father may at some unknown point in the future change his mind and/or that Ms Dias may at some unknown point in the future obtain a relevant court order.

70. There is in my judgment an objectively-founded insurmountable obstacle to the family life continuing in Albania. It is, as was described at [28] of the error of law decision, fanciful to suppose that Ms Dias would leave her two children behind the United Kingdom and accompany the appellant to live in Albania. She is self-evidently their primary carer, there has never been any suggestion that they could somehow go and live permanently with their biological father's family, and such a separation would obviously have profound adverse consequences for her mental health and overall well-being. In fairness to the respondent, that scenario has not been pursued before me. Therefore, Ms Dias would, as a matter of fact, potentially go to Albania only if accompanied by her two children.

71. I have found that the children's biological father continues to refuse to consent to the children going to live in Albania. For Ms Dias to ignore that fact and attempt to take the children to Albania in any event would

involve her committing a criminal offence under the Child Abduction Act 1984. That state of affairs represents a very significant difficulty. That difficulty would make it effectively impossible for Ms Dias to go and live in Albania unless she knowingly committed a criminal offence by abducting the children from the jurisdiction. Even if the difficulty did not make relocation impossible as such, I can see no way in which she could take any reasonable steps to avoid the committal of a criminal offence and any other adverse consequences which might flow from that, including the possibility of family law proceedings against Ms Dias. Any attempt to seek a relevant court order would be confronted with numerous and significant hurdles: proceedings would no doubt be contested by the biological father; proceedings would very probably take a considerable period of time; there may have to be proceedings initiated in the Romanian courts instead of, or as well as, in this country.

72. All-told, I conclude that the withholding of consent by the children's biological father constitutes an insurmountable obstacle to Ms Dias going to live in Albania with the appellant.

73. There is a further very significant difficulty in play here. If Ms Dias and her children relocated to Albania (leaving aside for the moment the first insurmountable obstacle I have identified), she would be having to effectively discontinue the relationship of her two children with their biological father and his family. There is obviously no possibility of the biological father going to live in Albania. The fortnightly weekend visits would cease, as would most if not all of the other celebratory get-togethers. Having been separated from their biological father once before, they would then be faced with a repetition. That would be, as Ms Dias is clearly aware, contrary to the children's best interests. Importantly for my assessment of EX.1(b), it is in my judgment manifestly the case that a decision by Ms Dias to force her children to leave the United Kingdom, sever their relationship with their biological father and his family, and then for her to have to live with that decision, would constitute very serious hardship for her, taking into account her past, her current mental health, and her commitment to the children. In terms of taking reasonable steps to avoid or mitigate the very significant difficulty, I conclude that the possibility of virtual contact between the children and their biological father and his family would not, in the circumstances of this case, sufficiently reduce the severity of the hardship caused to this Dias.

74. The stringent test under EX.1(b) and EX.2 has been satisfied on one or other of the two cases identified above. The appellant satisfies the

relevant Rules and, in light of TZ (Pakistan), his appeal falls to be allowed.

Exceptional circumstances

75. If for some reason I was wrong in concluding that insurmountable obstacles existed, I would in any event conclude that there are exceptional circumstances on the facts of this case.

76. I take full account of the points raised against the appellant by the respondent: for example, the importance of maintaining effective immigration control, his unlawful status in this country (section 117B(4) of the 2002 Act), and the absence of very significant obstacles to re-integration.

77. On the other side of the balance sheet, I take account of the respondent's guidance on Family Life (as a partner or parent) and Exceptional Circumstances, published on 17 May 2024. Page 68 contains the following example of when unjustifiably harsh consequences may exist:

> "**The applicant's partner has a genuine and subsisting parental relationship with a child in the UK** of a former relationship, is taking an active role in the child's upbringing, and the particular circumstances of the case mean that (taking into account the child's best interests as a primary consideration) it would be unjustifiably harsh to expect the child to relocate overseas with the applicant's partner, or for the applicant's partner to do so without the child."

78. That example would appear to cover the circumstances arising in the present case, albeit that Ms Dias is the primary carer of the children from the former relationship. The respondent has not attempted to explain why her guidance should not provide some assistance to the appellant's case.

79. I also take into account the following factors:

(a) The best interests of the two children as a primary consideration.

(b) The relationships between the children and their biological father and his family;

(c) The relationships between the children and their mother's side of the family;

(d) Ms Dias' general vulnerability, her current mental health, and the emotional and practical support provided to her by the appellant;

(e) Ms Dias' relationships with her family members in this country;

(f) The supportive expert evidence in this case, particularly as it relates to the consequences of separating Ms Dias and/or her children from the appellant;

80. Overall, the high threshold is met. The appellant's appeal would fall to be allowed on this alternative basis.

Comment

81. It is unclear to me at what point the appellant's representatives served the bundle on the respondent. It appears as though this was only done late in the day. Ms Bustani did not have all the information to hand (I mean no criticism of her), but there is a possibility that the solicitors failed to appreciate, at least initially, that uploading materials onto CE-File does not constitute service on the respondent. Such service is only affected by way of email. All practitioners operating in this jurisdiction should know that.

Anonymity

82. There has been no anonymity direction in place until now and none is necessary at this stage. The important principle of open justice is not displaced by other considerations.

Notice of Decision

The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law and that decision has been set aside.

The decision in this appeal is re-made and the appeal is allowed.

H Norton-Taylor

Judge of the Upper Tribunal

Immigration and Asylum Chamber

Dated: 12 November 2024

ANNEX: THE ERROR OF LAW DECISION

IN THE UPPER TRIBUNAL Case No: UI-2024-001177

IMMIGRATION AND ASYLUM CHAMBER

FtT No: HU/58724/2023

THE IMMIGRATION ACTS

Decision & Reasons Issued:

.....

Before

UPPER TRIBUNAL JUDGE NORTON-TAYLOR

DEPUTY UPPER TRIBUNAL JUDGE LEWIS

Between

RAMAZAN MORINA

(NO ANONYMITY ORDER MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the appellant: Ms N Bustani, Counsel, instructed by Oaks Solicitors

For the respondent: Ms S McKenzie, Senior Presenting Officer

Heard at Field House on 31 May 2024

DECISION AND REASONS

Introduction

1. The appellant appeals with permission against the decision of First-tier Tribunal Judge Chapman ("the judge"), promulgated on 22 January 2024 following a remote hearing on 19 January of that year. By that decision, the judge dismissed the appellant's appeal against the respondent's refusal of his human rights claim. That claim was made on 5 July 2022 and the refusal thereof was issued on 7 June 2023.

Factual background

2. The appellant is a national of Albania, born in 1997. He entered the United Kingdom illegally in November 2013 at the age of 16 and claimed asylum shortly thereafter. That claim was refused in 2014. Further submissions were put forward in 2019 and these were rejected without a right of appeal. In November 2020, the appellant met Ms Soraia Dias, a Portuguese national, and they began relationship which subsists to this day. The couple were married in November 2021. Ms Dias was previously married to a Romanian national, with whom she had two children, born in 2017 and 2018. That marriage broke down as result of domestic abuse. The children are Romanian nationals and both reside with their mother.

3. The appellant's human rights claim was based on family and private life under Article 8, it being said that the couple could not go and live in Albania, that separation would be disproportionate, and that there would also be very significant obstacles to reintegration into Albanian society.

4. In refusing the human rights claim, the respondent concluded that: the appellant could not satisfy Appendix FM to the Immigration Rules ("the Rules") due to his immigration status; there were no insurmountable obstacles to the couple going to live in Albania, with reference to EX.1 of Appendix FM; there were no very significant obstacles to the appellant reintegrating into Albanian society; and there were no exceptional circumstances in the case.

The judge's decision in summary

5. The judge set out the background to the appeal and noted the absence of a Presenting Officer. He heard evidence from the appellant and Ms Dias, together with submissions from the representative. The core issues in dispute were set out at [12]: these reflected the bases of the respondent's refusal.

6. The judge's findings of fact are set out at [20]-[29]. As confirmed at the hearing before us, there is no material dispute as to these findings. In summary form, they consist of the following:

   (a) Ms Dias' evidence was found to be entirely credible;

   (b) The appellant had resided in the United Kingdom unlawfully since his arrival in 2013;

   (c) The appellant faced no risk of harm on return to Albania;

   (d) The appellant has no family members residing in the United Kingdom;

   (e) Ms Dias has resided continuously in the United Kingdom since 2013, save for a fairly brief period in Romania during which her two children were born (we were informed that she had previously resided in the United Kingdom between 2003 and 2007 before returning to Portugal for some time - this additional information has not been disputed by the respondent);

   (f) The appellant's relationship with Ms Dias is genuine and subsisting and the former has played an "*active*" and "*important*" role in the lives of the two children;

   (g) In January 2023, the children's biological father started having contact with them on the basis of an informal arrangement between Ms Dias and a paternal aunt. Thereafter, the children have seen their biological father and other members of his family on a fortnightly basis and other important occasions. He now plays an "*active role*" in their lives. Ms Dias does not have direct contact with the biological father. He has indicated through the aunt that he does not consent to the children going to live in Albania;

   (h) The appellant does have close family members residing in Albania from whom he could obtain support;

   (i) Because the biological father is now playing an active role in the children's lives, the appellant does not have parental responsibility for them;

   (j) The best interests of the children lie in remaining in the United Kingdom, where they have resided for more than half of their lives and have familial ties. In addition, the best interests are served by the children remaining in their current circumstances, which include the presence of the appellant in their lives;

7. At [30]-[38], the judge dealt with the insurmountable obstacles issue under EX.1(a) of Appendix FM. He concluded that this provision did not apply to the children because they were neither British citizens, nor had

they lived in this country continuously for seven years. Similarly, section 117B(6) of the Nationality, Immigration and Asylum Act 2002 ("NIAA 2002") had no application.

8. The judge then considered the issue of insurmountable obstacles as it related to the appellant and Ms Dias as a couple, with reference to EX.1(b). Having considered a number of factors pertaining to the applicant and his wife, the judge accepted that relocation might be "*difficult*", but concluded that any obstacles would not be insurmountable. The only reference to the children was at [35], where it was noted that they had not been to Albania and had extended family residing in the United Kingdom. EX.1 was not satisfied.

9. The very significant obstacles issue under paragraph 276ADE(1)(vi) of the Rules (as then was) was considered at [39]-[41]. The judge concluded that, having regard to the applicant's overall circumstances, no such obstacles existed. That particular conclusion has not been challenged.

10. Having concluded that none of the relevant Rules were satisfied, the judge considered Article 8 at [42]-[53]. Family and private life existed and the respondent's decision constituted an interference. The judge then applied his findings of fact and previous conclusions based thereon to the question of proportionality. He adopted a "balance sheet" approach, listing the factors for and against the appellant's case. In the latter category, the judge noted, amongst other matters, the appellant's unlawful status in United Kingdom at all times and the consequent "little weight" consideration under section 117B(4) NIAA 2002, together with the inability to satisfy the Rules, which was deemed to attract "*significant weight*".

11. In the appellant's favour, the judge took account of, amongst other matters, the children's relationship with the biological father and extended family in United Kingdom, and the children's best interests.

12. The judge then set out what he considered to be three possible scenarios: first, that Ms Dias would go to Albania with the appellant and leave the children in the United Kingdom; secondly, the entire family unit would relocate to Albania; thirdly, the appellant would return to Albania alone and either live there permanently or apply for entry clearance.

13. The first scenario was deemed to be unlikely and was not addressed in any detail. In respect of the second scenario, at [50] the

judge concluded that, having already found there to be no insurmountable obstacles to the relocation of the family, there would be no unjustifiably harsh consequences either. There was insufficient evidence to show that relocation would result in such consequences for the children. The separation from the biological father would occur, but this had happened in the past without evidence of them coming to harm. The judge considered that the third scenario was the most likely, given that Ms Dias had expressly stated that she would not go to Albania with the children. The judge concluded that such an eventuality would not be disproportionate because contact could be maintained through modern methods of communications and visits. Alternatively, the appellant could apply for entry clearance.

14. Bringing all considerations together, the judge concluded that the respondent's decision would not result in a disproportionate interference with the appellant's protected rights and the appeal was accordingly dismissed.

The grounds of appeal

15. Concise grounds of appeal were put forward on two bases: first, it was said that the judge erred in his consideration of insurmountable obstacles under EX.1 by failing to take any or any adequate account of the children's circumstances; secondly, the judge's proportionality assessment was flawed, with particular reference to the children. Reference was made to the respondent's guidance on Family Life as a partner or parent (August 2022), in which an example of what might constitute unjustifiably harsh consequences was analogous to the circumstances of the present case.

The permission decision

16. Permission to appeal was refused by the First-tier Tribunal but granted on renewal to the Upper Tribunal. In relation to the first ground, Upper Tribunal Judge Jackson observed that:

> "Although the test in paragraph EX.1 of Appendix FM refers to family life continuing between a spouse or partner, on the facts of this appeal, the First-tier Tribunal arguably erred in law in failing to consider as part of this assessment [Ms Dias'] children who would logically be a considerable factor in whether she could leave the United Kingdom with or without them (particularly as their father has indicated he does not consent to them moving abroad) and as such whether there would be insurmountable obstacles to her continuing family life in Albania."

Rule 24 response

17. The respondent did not provide a rule 24 response in this case.

The hearing

18. Ms Bustani relied on the grounds. She submitted that the judge's finding on the contact between the children and the biological father and the fact that Ms Dias would not go to Albania, went to show that there were insurmountable obstacles under EX.1(b). If the first ground was made out, the judge's decision should be set aside. Further or alternatively, the proportionality exercise was flawed in part because the judge had failed to account for the strength of the relationship between the appellant and the children from the perspective of a young child.

19. Ms McKenzie submitted that the children had been mentioned in the section on insurmountable obstacles at [35] and that the judge was not required to set out each and every aspect of his assessment. She acknowledged that the consideration of the children had been "*very oddly put*", but contended that the overall analysis was sufficient. She submitted that the children's circumstances had been considered in more detail at [50] and the judge's decision had to be read holistically. In respect of the proportionality exercise, it was submitted that the judge had taken all relevant considerations into account.

20. Having risen to consider our decision, we announced to the parties that we would allow the appeal and set the judge's decision aside in respect of the conclusions on EX.1 and proportionality, with reasons to follow. We also confirmed that, in the absence of any material dispute, the findings of fact made by the judge should be preserved in their entirety and that these would form the starting point for the next stage in proceedings.

21. We now set out our reasons for that decision.

Reasons

22. As in all error of law cases, we have had due regard to the need for appropriate judicial restraint before setting aside a decision of the First-tier Tribunal. We acknowledge that the judge considered a range of evidential materials and undertook an evaluative assessment on what were the correctly identified core issues in the case.

23. We are not interfering with the judge's finding of fact. Nor is any basis on which to interfere with his assessment of the very significant obstacles issue under paragraph 276ADE(1)(vi) of the Rules (an equivalent provision is now contained in Appendix Private Life). It has not been challenged and the conclusion reached was clearly open to him.

24. It is common ground that the appellant could not satisfy the immigration status requirement under paragraph R-LTRP.1.1, with reference to paragraphs E-LTRP.2.1-2.2 of Appendix FM.

25. The primary error of law relates to the judge's consideration of insurmountable obstacles under EX.1, in combination with EX.2, in Appendix FM. At the date of the judge's decision, these provisions stated as follows:

> "EX.1. This paragraph applies if
>
> (a)(i) the applicant has a genuine and subsisting parental relationship with a child who-
>
> (aa) is under the age of 18 years, or was under the age of 18 years when the applicant was first granted leave on the basis that this paragraph applied;
>
> (bb) is in the UK;
>
> (cc) is a British Citizen or has lived in the UK continuously for at least the 7 years immediately preceding the date of application; and
>
> (ii) taking into account their best interests as a primary consideration, it would not be reasonable to expect the child to leave the UK; or
>
> (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 protection status, in the UK with limited leave under Appendix EU in accordance with paragraph GEN.1.3.(d), or in the UK with limited leave as a worker or business person under Appendix ECAA Extension of Stay in accordance with paragraph GEN.1.3.(e), 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."

26. The judge was correct to conclude that EX.1(a) did not apply to the two children because they were neither British citizens, nor had they resided continuously in the United Kingdom for seven years.

27. The judge was also correct in concluding that EX.1(b) was in play: Ms Dias had limited leave to remain under Appendix EU to the Rules.

28. It is clear from EX.1(b) that the question of whether there are insurmountable obstacles to family life continuing outside of the United Kingdom involves consideration of circumstances of both parties to the relationship. On the accepted evidence, a significant element of Ms Dias' circumstances was the ongoing contact between her children and their biological father: the judge had found that he was playing an "*active role*" in their lives. This factor was, in our judgment, capable of demonstrating an insurmountable obstacle to Ms Dias and her children relocating to Albania in order to continue their family life with the appellant (we leave out of account the first scenario described by the judge at [49]: its occurrence was fanciful). At the very least, the issue of contact with the biological father had to be properly assessed in the context of EX.1(b) and EX.2.

29. The question which then arises is whether the judge did give adequate consideration to this factor. In our judgment, he did not. We have considered what was said at [35]-[38] with care and without undertaking an unnecessarily forensic analysis. It is, however, clear to us that the sole reference to the children in this section of the judge's decision relates to their unfamiliarity with Albania and "*the extended fam*ily" residing in the United Kingdom. With respect, this does not adequately address the significant issue of the re-established relationship between the children and their biological father. It says nothing about the importance attached by Ms Dias to that relationship and the relevance of its effective severance to the question of whether there were insurmountable obstacles to her relocating to Albania.

30. Ms McKenzie submitted that the judge was not required to address each and every matter which had been considered. As a general proposition, we agree. However, in any given case there will normally be certain factors which are of more significance than others and which, as result, require specific consideration. Here, the relationship with the biological father had been the subject of evidence and specific findings by the judge at [20(8)] and [24]. It cannot in our view properly be described as peripheral or otherwise not requiring express consideration.

31. Ms McKenzie also submitted that any shortcomings in the insurmountable obstacles assessment were in effect cured or rendered immaterial by what the judge said at [50] in relation to proportionality. We disagree. First, it is sufficiently clear to us that the conclusion on unjustifiably harsh consequences for the appellant, Ms Dias, and the children, was predicated in part on the previous conclusion on insurmountable obstacles: *"... and having found there not to be insurmountable or very significant obstacles, I find that there is insufficient evidence to satisfy me that there would be unjustifiably harsh consequences..."*. If, as we have found, the judge failed to properly consider the relationship with the biological father under EX.1(b), it follows that the consideration of that relationship under proportionality was founded on a (at least) partially flawed premise.

32. Secondly, it is important to keep in mind the significance of an error relating to the application of the Rules, notwithstanding that this was a human rights appeal. The ability to satisfy the requirements of Appendix FM is effectively determinative of an Article 8 claim: TZ (Pakistan) v SSHD [2018] EWCA Civ 1109. In the present case, no countervailing factors have been identified by the respondent to suggest that a different outcome would apply here.

33. Our conclusion on the first ground is sufficient for the judge's decision to be set aside.

34. Although the second ground of appeal has less substance to it if viewed in complete isolation from the first, we conclude that it must in fact be considered in the context of the overall challenge and that, in so doing it is made out. As discussed at paragraph 31, above, the erroneous consideration of EX.1(b) formed at least part of the basis on which the proportionality exercise was undertaken. On the one hand, the judge placed weight on the appellant's inability to satisfy the Rules, whilst on the other he arguably underplayed the significance of the children's relationship with their biological father.

35. As to the last point, we make the following observation. At [50], the judge found that no significant harm had been done to the children following the initial separation from their biological father. Nothing was said about the potential harm of a second separation if the children were to go to Albania, although we cannot be sure as to what, if any, evidence on this point was before the judge.

Disposal

36. There is no basis for remitting this case to the First-tier Tribunal and indeed neither party urged us to adopt that course of action.

37. This case will be retained in the Upper Tribunal. We had been of the provisional view that the decision could be re-made based on the findings of fact made by the judge, together with the evidence already before us. However, Ms Bustani confirmed that the appellant was seeking to obtain expert evidence from an independent social worker and a psychologist. This would entail the need for a resumed hearing in due course. That is the method of disposal we adopt.

38. In preparation for that hearing, we confirm the following:

(a) With reference to [20]-[29] of the judge's decision and the summary at paragraph 6 of this error of law decision, the findings of fact are preserved;

(b) The judge's conclusion on very significant obstacles is preserved;

(c) The issues for determination at the re-making stage are therefore:

(i) Whether EX.1(b) and EX.2 of Appendix FM can be satisfied;

(ii) If not, whether the appellant's removal in consequence of the respondent's decision would have unjustifiably harsh consequences for him, Ms Dias, and/or the two children.

39. The nature of any new evidence provided by the appellant is a matter for him. His representatives will no doubt take note of what we have said in this error of law decision in relation to the circumstances of the two children and how these are linked to those of Ms Dias.

40. We are willing to accede to Ms Bustani's request for the resumed hearing to be listed according to her availability. The Tribunal will arrange for an Albanian interpreter. There is no need for a Portuguese interpreter.

Anonymity

41. The First-tier Tribunal did not make an anonymity direction, we have not been asked to at this stage, and there is in any event no basis on which such a direction could properly be made.

Notice of Decision

The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law.

We exercise our discretion under section 12(2)(a) of the Tribunals, Courts and Enforcement Act 2007 and set aside the decision of the First-tier Tribunal.

This case is retained in the Upper Tribunal and the decision will be re-made following a resumed hearing in due course.

Directions to the parties

1. **No later than 42 days after this error of law decision is sent out, the appellant shall file and serve an indexed and paginated consolidated bundle of all evidence now relied on. That evidence should reflect the analysis and conclusions set out in the error of law decision. The bundle must be properly bookmarked;**

2. **No later than 14 days thereafter, the respondent shall file and serve any further evidence relied on;**

3. **No later than 10 days before the resumed hearing, the appellant shall file and serve a concise skeleton argument;**

4. **No later than 3 days before the resumed hearing, the respondent may if so advised file and serve a concise skeleton argument;**

5. **The parties are at liberty to apply to vary these directions, copying in the other side.**

H Norton-Taylor

Judge of the Upper Tribunal

Immigration and Asylum Chamber

Dated: 7 June 2024