IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2024-003453
First-tier Tribunal No:
HU/54469/2023
LH/02874/2024

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 08 October 2024

Before

UPPER TRIBUNAL JUDGE BLUNDELL

Between

AGRON XHEMA
(NO ANONYMITY ORDER MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Barnabas Lams, instructed by Oaks Solicitors
For the Respondent: Esen Tufan, Senior Presenting Officer

Heard at Field House on 7 October 2024

DECISION AND REASONS

1. The appellant appeals with the permission of Judge Turner against the decision of Judge Cartin ("the judge"), who dismissed his appeal against the respondent's refusal of his human rights claim.

Background

2. The appellant is an Albanian national who was born on 1 October 1988. He entered the United Kingdom illegally in May 2017 and took no action to regularise his immigration status. He was then joined by his wife, Klemirda Xhema. She and the appellant had married in Tirana in 2016. Like the appellant, she entered the UK unlawfully.

3. The appellant's wife is said to have had an affair with a British man named Lewis David Martin in 2021. A child, "A", was born of that relationship on 28 June 2022. Mr Martin's name appears on her birth certificate. She was consequently

accepted to have been a British citizen by birth, under section 1(1) of the British Nationality Act 1981.

4. The appellant and his wife are said to have separated as a result of her infidelity. They divorced in July 2022. She was granted leave to remain as A's parent on 19 August 2022. The appellant and she are said to have reconciled shortly thereafter and they were cohabiting again in October 2022. The appellant's ex-wife gave birth to twins on 23 November 2023. I will refer to the twins as "B" and "C" in this decision. It has been confirmed by DNA evidence that B and C are the appellant's biological children.

5. On 30 January 2023 (and therefore before the birth of the twins), the appellant applied for leave to remain on Article 8 ECHR grounds, referring in his application form to A and to her British citizenship. The application form was also accompanied by a helpful covering letter from the appellant's solicitors, setting out the background above and providing details of the supporting material which was provided with the application. The letter stated that A had had "no contact with her biological father since birth"; that the appellant was her *de facto* parent; and that her best interests were to remain in the UK, that being the country of her nationality.

6. The respondent refused the application on 20 March 2023. She did not accept that the appellant was eligible for leave as a parent or as a partner, and she did not consider that his removal would be unlawful under section 6 of the Human Rights Act 1998.

The Appeal to the First-tier Tribunal

7. The appellant appealed to the First-tier Tribunal. His appeal was heard by the judge, sitting at the Nottingham Justice Centre, on 5 June 2024. The appellant was represented by counsel, Mr Waheed. The respondent was represented by a Presenting Officer, Mr Kola. The judge heard oral evidence from the appellant and submissions from both advocates before reserving his decision.

8. The judge issued his reserved decision on 6 June 2024. He recorded at [8] that the Presenting Officer had submitted that the appellant was unable to meet the requirements of the Immigration Rules. As recorded at [8] of the judge's decision, that was accepted by the advocates on both sides. The judge therefore proceeded to consider the appeal on Article 8 ECHR grounds outside the Immigration Rules. He made the following findings.

9. At [13]-[15], the judge found that the appellant and his ex-wife were in a genuine and subsisting relationship. At [17]-[24], the judge found that the appellant's ex-wife had not been frank with the respondent in her application for leave to remain. At [25], the judge accepted that the appellant has a genuine and subsisting parental relationship with A. Having made those findings, the judge turned to consider Article 8 ECHR.

10. Having directed himself to Beoku-Betts v SSHD [2008] UKHL 39; [2009] 1 AC 115 and to EB (Kosovo) v SSHD [2008] UKHL 41; [2009] 1 AC 1159, the judge noted that a question of "particular importance is whether a spouse or a child can reasonably be expected to follow the removed parent to the country of removal". The judge then recalled what had been said by Baroness Hale about the role of nationality in that assessment at [31]-[32] of ZH (Tanzania) v SSHD [2011] UKSC

4; [2011] 2 AC 166. He did not consider there to be any real reason why it would be unreasonable for the twins to return to the country of their nationality with their Albanian parents: [31]. He noted that A is British and that her biological father was said not to be a part of her life: [31]. The judge then focussed on the question of whether it was reasonable for A to relocate to Albania despite her British citizenship. Having taken account of a range of factors, including her age and the circumstances in which she would likely be raised in the UK and Albania, the judge concluded that "it would be reasonable for [A] to grow up in Albania, with her Albanian family, notwithstanding that she is British, was born in the UK, and has spent all of her short life to date here.": [39].

11. The judge then undertook a balance sheet assessment of the factors for and against the appellant's removal, at [40], before concluding in the final paragraph of his decision that the public interest in the appellant's removal prevailed. The appeal was therefore dismissed.

The Appeal to the Upper Tribunal

12. The grounds of appeal were settled by Mr Lams of counsel, who appeared before me. There were three grounds:
    (i) The judge misdirected himself in law in finding that the appellant could not meet the Immigration Rules.
    (ii) The judge erred in his assessment of whether it was reasonable to expect A to leave the United Kingdom; and
    (iii) The judge failed to take account of A's British citizenship in deciding that it would be reasonable to expect her to leave the United Kingdom.

13. Judge Turner was persuaded that the first of those grounds was arguable. He considered that the matters set out in grounds two and three had been considered by the judge, however. At [4] of his decision, he concluded that the appellant had 'identified an arguable error of law on Ground 1 but not on grounds 2 or 3.'

14. Judge Turner's decision was issued on 25 July 2024. Two months later, on 26 September 2024, the appellant's solicitors made a renewed application for permission to appeal to the Upper Tribunal on the second and third grounds. It was frankly admitted that there had been a mistake, and that counsel had only realised in preparation for the hearing on 7 October 2024 that it might be necessary to make an application to amend the grounds. An extension of time was also sought, therefore, and the grounds and the accompanying notice fairly acknowledged that the hearing should be adjourned in the event that the application was granted and the respondent or the Tribunal was placed in difficulty.

15. The application was brought to my attention on 3 October 2024 but I was unable to deal with it on that day due to sitting commitments. On Friday, 4 October, I caused an email to be sent to the parties in the following terms:

> *Judge Turner's decision was that 'Permission to Appeal is Granted'. The position in respect of such decisions is clear from Safi & Ors [2018] UKUT 388; [2019] Imm AR 437. The observations made by Judge Turner in the 'Reasons' section of his decision do not serve to limit the grant of permission. All grounds may therefore be argued, and the*

Upper Tribunal will take no further action on the renewed application for permission to appeal."

16. As was explained in that email, Judge Turner's decision contains no effective limitation on the grounds of appeal. Whilst he expressed a view about the merits of grounds two and three in the 'Reasons' section of his decision, there was no such limitation expressed in the 'Decision' itself, which merely records that permission is granted. It has been clear for some years that such a decision does not restrict the grant of permission. Safi, to which I referred on Friday, has been followed in subsequent decisions, and also follows the approach adopted to such conflicts in other jurisdictions. I have therefore heard argument on each of the three grounds. Mr Tufan accepted that I should do so at the outset of the hearing.

Submissions

17. Mr Lams accepted at the start of his submissions that he could not pursue the first ground. He had remembered the decision of Upper Tribunal Judge Coker in Sabir (Appendix FM – EX1 not freestanding) [2014] UKUT 63 (IAC), and he accepted that paragraph EX1 was not a 'freestanding' provision, as had been suggested in the first ground. He was content to abandon that ground accordingly. He accepted that the judge had been correct to proceed on Article 8 ECHR grounds only.

18. In addressing the second and third grounds, Ms Lams accepted that there had been inconsistencies between what was said by the appellant's ex-wife in her application for leave to remain and what was said by the appellant in his own application. In Mr Lams' submission, however, the judge had erred in his assessment of the significance of those discrepancies. The judge had seemingly proceeded on the basis that the appellant's ex-wife had been granted leave to remain because the respondent had accepted that A continued to have a relationship with Mr Martin but that was a misunderstanding of the Immigration Rules. At the time, the appellant's ex-wife had sole responsibility for A and the Immigration Rules required no further analysis. In particular, they did not require that A continued to have contact with the other parent, and the judge had erred in concluding otherwise at [21] of his decision.

19. I suggested to Mr Lams that the judge's [21] might reflect a proper understanding of the Immigration Rules. Given that the appellant's ex-wife had no leave to remain at the date of her application, she would also have been required to show that it was not reasonable to expect A to leave the UK. Mr Lams accepted that the judge's reference to the reasonableness of expecting A to leave the UK might indicate an awareness of those provisions, but he submitted that the judge had not sufficiently 'unpacked' his reasoning in that regard. There remained a doubt as to whether the judge had misunderstood the Rules, he submitted.

20. Mr Lams also submitted that the judge had overlooked the potential role played by A's biological father. His name was on her birth certificate and he had parental responsibility for her in law. He would have to provide consent in the event that the appellant and his ex-wife were to remove A from the jurisdiction. This was a matter which added weight to A's connections to the UK, and was relevant to the reasonableness of expecting her to leave.

21. Mr Tufan submitted that the judge had considered the relevant authorities. He had evidently been aware that nationality was not a trump card but that it was an important consideration. There were five members of the family. One was British but all five were Albanian and the Upper Tribunal had given guidance on dual nationality in this context in SD (Sri Lanka) [2020] UKUT 43 (IAC); [2020] Imm AR 706. The finding which the judge had reached at [21] was reasonable and in accordance with the evidence.

22. Mr Lams indicated at the outset of his reply that he had sent a copy of the appellant's ex-wife's application for leave to remain to the Upper Tribunal. It had been before the FtT but had been omitted from the consolidated bundle for this hearing. He took me to the relevant parts of the form. He submitted that the judge had misunderstood the requirements for leave to remain because there was evidently no requirement that A should have had contact with her biological father. The judge's reasoning was inadequate and his decision should be set aside.

23. I reserved my decision at the end of the submissions.

Analysis

24. It is quite clear that the appellant cannot succeed under the Immigration Rules, and the first ground is misconceived in suggesting otherwise. Paragraph EX1 of the Immigration Rules is not a freestanding provision, as Judge Coker explained in Sabir (Appendix FM – EX1 not freestanding) [2014] UKUT 63 (IAC). Mr Lams was in error in submitting otherwise in his grounds of appeal, as he very properly accepted at the outset of the hearing before me.

25. Ground two is equally unmeritorious. It was open to the judge to find that the appellant's wife had secured her leave to remain by being 'less than frank' with the respondent. Mr Lams accepted before me that there were inconsistencies on the face of the documents. Given that the appellant's wife had said in her application form that Mr Martin had weekly contact with A, whereas the appellant had said in his application that A had had "no contact with her biological father since birth", the judge was plainly entitled to reach this finding for the detailed reasons that he gave. This was a finding of primary fact which was properly open to the judge at first instance and there is no proper reason for interfering with it, given the need for appellate restraint as emphasised in a range of authorities including Yalcin v SSHD [2024] EWCA Civ 74; [2024] 1 WLR 1626, at [50]-[52].

26. Mr Lams devoted much of his submissions to an attack on the findings made at [21] of the judge's decision. Given this focus, it is necessary to set out that paragraph in full:

> It was the contact [A] had with her father which was the basis for Mrs Xhema being given leave to remain in the UK. If her daughter was not having contact, as it is now said she has not been, then there was arguably no need for Mrs Xhema to be given leave to remain in the UK on that basis. It may well have been the respondent's conclusion at that stage, that Mrs Xhema could reasonably have returned to Albania with her British daughter.

27. Mr Lams submitted that this betrayed a lack of understanding of the Immigration Rules on the part of the judge. He drew attention to the Relationship Requirements in the section of Appendix FM which governs applications for limited leave to remain as a parent. He relied particularly on paragraph E-LTRPT 2.3(a), which related to a person such as the appellant's ex-wife, who was said at the time of her application to have sole responsibility for A. It was perfectly possible, he submitted, that the respondent had granted leave on that basis, and not because A was said to have contact with Mr Martin at the time.

28. I do not accept that submission. In my judgment, paragraph 21 of the judge's decision shows that he was clearly aware of the requirements of the route under which the appellant's ex-wife applied in August 2022. She was unable to meet the Immigration Status Requirement because she was in the UK unlawfully at the time she made her application. She was not on temporary admission or on immigration bail, and she had never been granted leave after arriving unlawfully in May 2017. All of that is clear from the application form which she completed, and which Mr Lams quite properly provided during the hearing before me (it having been before the FtT).

29. As a person who was unable to meet the Immigration Status requirement, the appellant's ex-wife was nevertheless able to secure leave to remain under the Ten Year Route to settlement (under paragraph D-LTRPT 1.2 of Appendix FM) if she satisfied paragraph EX1 of that appendix. In order to do so, she had to show that it would 'not be reasonable to expect [A] to leave the United Kingdom'.

30. Ultimately, therefore, the Secretary of State would not have granted the appellant's ex-wife's application merely because she was said at that stage to have sole responsibility for A; that fact alone was insufficient to meet the requirements of the Immigration Rules. She was also required to show that it would not be reasonable to expect A to leave the United Kingdom. The judge was clearly aware of that, as is apparent from the manner in which the final sentence of [21] is expressed. And it was clearly open to the judge to conclude that the Secretary of State had accepted that it would not be reasonable to expect A to leave the United Kingdom because that would bring to an end the weekly contact which she was said to enjoy with Mr Martin. That was a perfectly proper inference for the judge to draw, given the scheme of the Immigration Rules and what was said in the appellant's ex-wife's application form. The judge concluded, effectively, that the appellant's ex-wife's had hoodwinked the respondent into granting leave by misrepresenting the relationship between A and Mr Martin. That was relevant to the judge's assessment of the proportionality of expecting the appellant's ex-wife to leave the United Kingdom with him, and therefore to relinquish the pathway to settlement (GM (Sri Lanka) v SSHD [2019] EWCA Civ 1630; [2020] INLR 32 refers, at [34]-[35].)

31. I do not consider the judge to have erred in the manner contended by Mr Lams, therefore. The judge was not required to set out the requirements of the Immigration Rules under which the appellant's ex-wife was granted leave to remain. The way in which he expressed his conclusions demonstrated that he understood those requirements, and his analysis as a whole shows that he understood the significance of those events to the wider assessment he was required to perform.

32. By his third ground of appeal, Mr Lams submits that the judge overlooked what was said by Baroness Hale in ZH (Tanzania) v SSHD about the importance of

citizenship in assessing a child's nationality. But those passages were also set out by the judge, who clearly took careful account of everything said in that decision, including that nationality is not a 'trump card' for these purposes. The judge took account of all of the circumstances of the family. He was cognisant of the ages of the children, and of A in particular, and he noted that that the children were so young that "their entire world can properly be regarded as being centred around their parents". That observation reflected the judge's understanding of the principles recognised in cases such Azimi-Moayed [2013] UKUT 197 (IAC). The judge was clearly aware of the basis upon which he was to consider the best interests of the children, and of the role that their best interests played in the assessment of proportionality in a case such as this. I can discern nothing which was left out of account in the judge's cogently reasoned assessment, and the conclusion which the judge reached on the reasonableness of A relocating to Albania with the rest of the family was one which was open to him as a matter of law. Neither ZH (Tanzania) nor any other authority of which I am aware compelled a different conclusion.

33. Mr Lams' final argument in ground three is not one which was put to the First-tier Tribunal. It is that it cannot be said that Mr Martin has permanently abandoned A, and that it was relevant for the judge to consider that contact between them might resume. I reject that argument, which is flatly contrary to the way in which the case was presented to the judge. It was said in the FtT that Mr Martin had taken no interest in his daughter for the first two years of her life, and nothing was said in the statements or the submissions about that relationship. This submission cannot establish an error of law on the part of the judge because it was not a part of the case advanced before him and because it is in any event based entirely on speculation.

34. Mr Lams also submitted that the judge had overlooked the fact that Mr Martin has parental responsibility for his daughter because his name appears on her birth certificate. He was unable to take matters much further than that, however, and he was not able to substantiate his submission that Mr Martin would be required to give consent for A to leave the jurisdiction. It is in any event difficult to see where this submission takes the appellant. Even if it had been made to the judge, there was no evidence to show that Mr Martin would or would not provide his consent, and the judge would properly have been criticised for speculating either way. There having been no submission and no evidence on the point, I do not accept that the judge erred in failing to consider it.

35. Ultimately, therefore, the judge was entitled to find that it would be reasonable for A to relocate to Albania with the appellant and the rest of the family. That conclusion was properly open to the judge on the law and the evidence before him, and his decision is not vitiated by legal error in any of the ways contended by Mr Lams.

36. In the circumstances, the appeal to the Upper Tribunal will be dismissed.

Notice of Decision

The appeal to the Upper Tribunal is dismissed. The decision of Judge Cartin, dismissing the appeal on human rights grounds, stands.

M.J.Blundell

Case No: UI-2024-003453
First-tier Tribunal No: HU/54469/2023
LH/02874/2024
Judge of the Upper Tribunal
Immigration and Asylum Chamber

8 October 2024