IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2024-0001925

First-tier Tribunal No: HU/58017/2023

THE IMMIGRATION ACTS

Decision & Reasons Issued:

5th March 2024

Before

UPPER TRIBUNAL JUDGE HANSON

Between

AMIRALD SHYTI
(NO ANONYMITY ORDER MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Saleem of Malik & Malik Solicitors.
For the Respondent: Mr Diwnycz, a Senior Home Office Presenting Officer.

Heard at Phoenix House (Bradford) on 26 February 2024

DECISION AND REASONS

1. The appellant appeals with permission a decision of First-tier Tribunal Judge Curtis ('the Judge'), promulgated on 28 November 2023, in which the Judge dismissed the appellant's appeal against the refusal of his application for leave to remain in the United Kingdom on human rights grounds.
2. The appellant is an Albanian national who claims to have entered the UK unlawfully in June 2020. The application which led to the impugned decision was made on 27th April 2023.
3. Having considered the documentary and oral evidence the Judge sets out his findings from [15] of the decision under challenge. In that paragraph the Judge writes: *"I have looked at the evidence in the round taking into account all that was relevant, both oral and written, whether I refer to it specifically or not. In light of my assessment of the evidence, I make the findings below*."
4. The Judge records it being conceded at the outset of the hearing that the sole basis on which the appeal had been brought is that the appellant claimed he should have succeeded outside the Immigration Rules.

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5. The Judge notes the appellant cohabits with a Ms Pasare, but that he could not satisfy the definition of a “partner” as defined in GEN.1.2 and could not therefore avail himself of the exemption in paragraph EX.1(b). Their child, a Romanian national as is the appellant’s partner, has pre-settled status in the UK and is 14 months old, but the appellant could not avail himself of the exemption in paragraph EX.1 (a)(i) and the child is not a “qualifying child”.
6. The issue in relation to Article 8 ECHR outside the Rules was the proportionality of the decision. The Judge states he adopts the balance sheet approach in order to achieve a fair balance between the private rights and public interest and had considered section 117 B Nationality, Immigration Asylum Act 2002 [18].
7. Following an analysis of the evidence and balancing of the competing interests, and having found at [32] that no unjustifiably harsh consequences would result in refusing the application to any party, the Judge writes at [33]:

> 33. In the circumstances of this appeal, the strength of the public interest in maintaining effective immigration controls is greater than the strength of the Appellant and the sponsor’s family life and the Appellant’s private life. The interference by the Respondent with the rights to respect for that family/private life is both necessary and proportionate to the legitimate aim of promoting the economic well-being of the UK through the maintenance of effective immigration controls.

8. The Judge notes as appellant cannot satisfy the requirements of paragraph 276ADE at [35], leading to the appeal being dismissed.
9. The appellant sought permission to appeal arguing that the Judge should have found that the appellant can speak English to the threshold envisaged by section 117B(2) of the 2002 Act which was a factor that should have been taken into consideration in order to reach a fair balance between private rights of public interest.
10. The Judge found that was not an issue on which he could attach significant weight. The appellant fails to establish anything arguably irrational or wrong in that conclusion when it is settled law that if a person is able to speak English that is a neutral factor. Similarly in relation to whether a person is financially independent. The relevance of a person demonstrating they are financially independent or that they can speak English is that it will mean it will not be treated as a negative factor. The Judges statement he did not attach significant weight to the factor is recognition of the fact the appellant’s ability to speak English or be financially independent does not warrant a positive finding. No legal error is made out.
11. The main thrust of the challenge is an argument the Judge failed to appreciate or to give weight to the fact that although the appellant’s partner only had pre-settled status, it did lead her into a settlement route after she had exercised treaty rights for five years. The grounds argue that she entered the UK as a European national with the expectation of being granted settlement in the UK. The appellant’s partner had also left Romania with a view to settling in the UK and it is argued that the fact she has pre-settled status should carry significant weight, leading to settling the UK, which the Judge should have given greater weight to as part of the balancing exercise. It is also argued that the Judge erred as it was asserted he failed to consider it being in the best interests of the child to remain in the UK as he has also been granted pre-settled status and will be able to apply for settled status with his mother; and that by relocating to Albania he would lose out on his rights to access good health care and education provisions.
12. The grounds assert the Judge did not give for the proper consideration to the best interests of the child and failed to appreciate the appeal would cause unjustifiably harsh consequences.

13. Permission to appeal was refused by a Designated Judge of the First-tier Tribunal on 4 January 2024, the operative part of that decision being in the following terms:

> 3. The grounds are without merit. The Appellant is an illegal entrant who since his arrival in the United Kingdom has developed a relationship with a Romanian national and the couple have a child together, now 15 months old ,who is also a Romanian national.
> 4. The Judge very clearly, carefully and meticulously carries out a balancing exercise in accordance with the Razgar principles and gives due weight to all the positive factors including the Appellant’s relationship, his financial independence, his ability to speak English and to his relationship with his child. As the Judge rightly points out the family unit can be preserved in Albania (where the Appellant’s partner had recently visited) or as an alternative in Romania.
> 5. There is no arguable error of law. Permission to appeal is refused.

14. The appellant renewed the application to the Upper Tribunal. Permission to appeal was granted by Upper Tribunal Judge Sheridan on 24 January 2024, the operative part of the grant being in the following terms:

> 2. It is arguable that the article 8 proportionality assessment is deficient because of a failure to take into consideration that a consequence of the appellant’s partner and child leaving the UK with the appellant in order for their family life to persist is that the appellant’s partner and child would lose their route to settled status under the EU Settlement Scheme. Arguably, these circumstances are analogous to those considered in GM (Sri Lanka) v The Secretary of State for the Home Department [2019] EWCA Civ 1630 at [34], where family members being on a pathway to settlement was found to be a factor that needed to be considered in the proportionality assessment.

<u>Discussion and analysis</u>

15. Mr Saleem was asked where there is reference in the pleadings to the issue of the appellant’s partner’s and child’s status being taken before the Judge. Mr Saleem referred me to [11] of the appellant’s skeleton argument where it is written:

> 11. In the instant case it is submitted that a fair balance has not been struck. In this regard the Tribunal is referred to GM (Sri Lanka) v Secretary of State for the Home Department [2019] EWCA Civ 1930 where Green LJ giving the judgment of the Court held:
>
> > 25. Before turning to the arguments, we make six preliminary observations about the test to be applied.
> > 26. First, the IR and section 117B must be construed to ensure consistency with Article 8. This accords with ordinary principles of legality whereby Parliament is assumed to intend to make legislation which is lawful (see for example R v SSHD ex p. Simms 2 AC 115 at page 131; and Bennion on Statutory Interpretation (7th Edition) at page 718 – there is "a high threshold for rebutting this presumption"). Were it otherwise then domestic legislation could become inconsistent with the HRA 1998 and the ECHR and be at risk of a declaration of incompatibility.
> > 27. Second, national authorities have a margin of appreciation when setting the weighting to be applied to various factors in the proportionality assessment: Agyarko (ibid) paragraph [46]. That margin of appreciation is not unlimited but is nonetheless real and important (ibid). Immigration control is an intensely political matter and "within limits" it can accommodate different approaches adopted by different national authorities. A court must accord "considerable

weight" to the policy of the Secretary of State at a "general level": Agyarko paragraph [47] and paragraphs [56] - [57]; and see also Ali paragraphs [44] - [46], [50] and [53]. This includes the policy weightings set out in Section 117B. To ensure consistency with the HRA 1998 and the ECHR, section 117B must, however, have injected into it a limited degree of flexibility so that the application of the statutory provisions would always lead to an end result consistent with Article 8: Rhuppiah (ibid) paragraphs [36] and [49].

28. Third, the test for an assessment outside the IR is whether a "fair balance" is struck between competing public and private interests. This is a proportionality test: Agyarko (ibid) paragraphs [41] and [60]; see also Ali paragraphs [32], [47] - [49]. In order to ensure that references in the IR and in policy to a case having to be "exceptional" before leave to remain can be granted, are consistent with Article 8, they must be construed as not imposing any incremental requirement over and above that arising out of the application of an Article 8 proportionality test, for instance that there be "some highly unusual" or "unique" factor or feature: Agyarko (ibid) paragraphs [56] and [60].

29. Fourth, the proportionality test is to be applied on the "circumstances of the individual case": Agyarko (ibid) paragraphs [47] and [60]. The facts must be evaluated in a "real world" sense: EV (Philippines) v SSHD [2014] EWCA Civ 874 at paragraph [58] ("EV Philippines").

30. Fifth, there is a requirement for proper evidence. Mere assertion by an applicant as to his/her personal circumstances and as to the evidence will not however necessarily be accepted as adequate: In Mudibo v SSHD [2017] EWCA Civ 1949 at paragraph [31] the applicant did not give oral evidence during the appeal hearing and relied upon assertions unsupported by documentary evidence which were neither self-evident nor necessarily logical in the context of other evidence. The FTT and the Court of Appeal rejected the evidence as mere "assertion".

31. Sixth, the list of relevant factors to be considered in a proportionality assessment is "not closed". There is in principle no limit to the factors which 7 might, in a given case, be relevant to an evaluation under Article 8, which is a fact sensitive exercise. This obvious point was recognised by the Supreme Court in Ali (ibid) at paragraphs [115ff]] and by the Court of Appeal in TZ (Pakistan) and PG (India) v SSHD [2018] EWCA Civ 1109 ("TZ") at paragraph [29]. Nonetheless, there is in practice a relatively well trodden list of factors which tend to arise in the cases. We address those of relevance to this appeal below. But others exist, identified in Strasbourg and domestic case law, such as the personal conduct of an applicant or family member in relation to immigration control eg. breach of immigration rules or criminal law, or public order considerations; the extent of social and economic ties to the UK; and the existence of prolonged delay in removing the applicant during which time the individual develops strong family and social ties: See generally Ali paragraph [28] citing with approval Jeunesse v The Netherlands (2014) 60 EHRR 17 ("Jeunesse").

16. The above paragraph does not refer to the specific point being taken in relation to immigration status but rather is generic guidance provided in relation to matters that should be considered when undertaking an Article 8 assessment.

17. There is within GM at [34] the following:

34. The first point focuses upon the nature of the rights held by the husband and children. Mr Jafferji argues that the FTT failed to address a relevant consideration, namely the nature of the rights that (non-Appellant) family members might have to relinquish in order to leave and reside with the Appellant in Sri Lanka. It was pointed out that if the husband and children returned to Sri Lanka then under the present law, they stood to lose their present DLR and any advantages, such as legacy rights and a pathway to settlement, that such rights conferred (cf the point made in the TWAN letter set out at paragraph [17] above). In *KO* (ibid) at paragraph [18] Lord

> Reed observed that a relevant question was always "*where the parents … are expected to be*" since it was generally reasonable for children to reside with them. The Court cited with approval the Scottish judgment in *SA Bangladesh v SHHD* 2017 SLT 1245 paragraph [22] ("*SA Bangladesh*") where in answering the question: why would a child be expected to leave the United Kingdom, it was held that a court had to consider whether the parents had a right to remain. In answering this latter question a court will need to evaluate the nature of the family's residence rights in the United Kingdom. A similar point was also made by the Court of Appeal in *EV (Philippines)* (ibid) at paragraph [58] per Lewison LJ cited with approval in *KO* by Lord Reed at paragraph [19]. In *Ali* (ibid paragraph [32]) the Supreme Court held that a person's immigration status could "*greatly affect the weight*" to be given to that person's Article 8 rights. Lord Reed (ibid paragraph [34]) made the important point (of relevance to the present case) that there might not be very much difference in practice between a person with settled status and one lacking such settled status but who would have been permitted to reside in the UK if an application was made, for instance from outside the United Kingdom. The underlying point is a practical one: the law is not concerned with form but with the practical substance of the actual immigration status of the person in issue. It is for this reason that case law has indicated that even if a person has a "*settled*" status that might not be construed as inalienable if for instance the settled person then commits serious crimes which would nonetheless warrant removal on public order grounds (see the discussion in *Rhuppiah* paragraphs [39(e)] and [47]). It follows that a person who could be said to be on a pathway to settled status might, in relative terms, be in a stronger position than one with DLR who was not on such a pathway and this relative position needs at least to be taken into account in the proportionality, fair balance, assessment. It might be correct that in both cases the rights may still be said to be "*precarious*" but nonetheless the nature of the rights *actually* held was a relevant consideration to be taken into account. Yet here they were not.

18. That was not found by the Court of Appeal to be a determinative issue, however, as it was found that even though in that case omitting to consider that point amounted to a failure to address a relevant consideration, the Court could not say that the failure was material or immaterial.
19. It does not appear from the other evidence, including the witness statements made available to the Judge that the issue it is alleged the Judge failed to consider was even raised before him as a matter requiring determination.
20. The Judge was well aware of the immigration status of the appellant's partner and their child and makes specific reference to the fact that they had been granted pre-settled status in the United Kingdom.
21. It is not disputed that an individual may not be able to get settled status after having five years of pre-settled status if they spent more than six months outside the UK in any 12 month period.
22. Mr Saleem was asked, in light of the detailed and firm findings made by the Judge in relation to the strength to be given to the public interest, if the Judge had erred as alleged in relation to the status point it was material to the decision to dismiss the appeal. Mr Saleem referred to the loss of benefits that will be available to the family if they are able to remain in the UK, but they were clearly factors that the Judge considered in any event. It is also the case that the Judge specifically confirms that all the matters relevant to the decision were taken into account.
23. Unlike the situation in GM (Sri Lanka) I do not find it made out the Judge failed to consider relevant facts or misapplied the appropriate test in relation to those matters he was specifically asked to consider.
24. The appellant's own barrister before the Judge submitted the respondent has suggested the appellant could return to Albania and apply for entry clearance. If he chose to do so his partner and child could remain in the UK or could

accompany him to Albania and remain so long as they are not out of the UK for longer than six months whilst he makes an application. It is an option available to them, but the Judge's core finding is that it would not be disproportionate for the family unit to relocate to Albania.

25. The Judge's findings are supported by adequate reasons. Its ahs not been made out that any error by the Judge is material. The overall conclusion has not been shown to be rationally objectionable.

Notice of Decision

26. No legal error material to the decision of the First-tier Tribunal has been made out. The determination shall stand.

C J Hanson

Judge of the Upper Tribunal
Immigration and Asylum Chamber

26 February 2024