IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-001025
First-tier Tribunal Nos:
HU/52495/2022
IA/03894/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 03 July 2023

Before

UPPER TRIBUNAL JUDGE NORTON-TAYLOR

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MUHAMET DAKU
(NO ANONYMITY ORDER MADE)

Respondent

Representation:
For the Appellant: Mr T Melvin, Senior Home Office Presenting Officer
For the Respondent: Mr P Richardson, Counsel, instructed by Malik and Malik Chambers

Heard at Field House on 13 June 2023

DECISION AND REASONS

1. I shall refer to the parties as they were before the First-tier Tribunal: the Secretary of State is once more "the Respondent" and Mr Daku is "the Appellant".

Introduction

2. The Respondent appeals against the decision of First-tier Tribunal Judge Chong ("the judge"), promulgated on 10 March 2023 following a hearing

on 27 February 2023. By that decision, the judge allowed the Appellant's appeal against the Respondent's refusal of his human rights claim.

3. In brief, the Appellant is a citizen of Albania who came to the United Kingdom unlawfully in October 2011, unsuccessfully claimed asylum, was granted discretionary leave as a minor, and then lost a subsequent appeal against a refusal to extend that leave in 2015. He left the United Kingdom in 2016 but then re-entered unlawfully in December of that year. An application for leave to remain was refused in 2019 and the subsequent appeal dismissed in 2020. The latest application was made at the end of December 2021. This was based on his marriage to an Albanian national ("the Sponsor") who was and remains in the United Kingdom as a Tier 2 skilled worker with limited leave to remain in that category. The couple had a child, born to the Sponsor in December 2022.

4. In summary, having considered a range of factors the judge concluded that there were exceptional circumstances in the Appellant's case and that the appeal fell to be allowed on that basis.

The grounds of appeal and permission

5. The Respondent put forward two grounds of appeal. Firstly, it was said that the judge had been wrong to consider the issue of the couple's child because it was a "new matter". Secondly, the judge allegedly made a material misdirection in law and/or failed to give adequate reasons for her conclusions on proportionality.

6. Permission was granted by the Upper Tribunal.

The hearing

7. At the hearing Mr Melvin relied on his skeleton argument and the grounds of appeal. He submitted that the new matter point was relevant because consent had only been given for the judge to consider the child in respect of the proportionality exercise, not GEN.3.2. within the Immigration Rules. In respect of the second ground Mr Melvin confirmed that the Respondent

was not relying on a rationality challenge. However, the judge had not considered why the couple could not live together in Albania and had inadequately reasoned her conclusions. The judge had not considered or provided reasons in respect of why the Sponsor could not continue to work in the United Kingdom and put her baby in childcare. The judge had misdirected herself as to the relevant authorities.

8. In response, Mr Richardson submitted that the Respondent's challenges were nothing more than disagreements. The judge had directed herself properly in law and taken all relevant matters into account and left none out of account.

9. In reply Mr Melvin submitted that the childcare issue had been an "obvious" point even if it had not been argued before the judge. Further, the judge had paid insufficient weight to the relevant Immigration Rules.

10. At the end of the hearing I reserved my decision.

Conclusions

11. The Upper Tribunal should not lightly interfere with a decision of the First-tier Tribunal. I can only do so where there are identifiable errors of law which could have made a difference to the outcome. In this case and having considered the judge's decision sensibly and holistically I am satisfied there are no such errors.

12. In respect of the Respondent's first ground of appeal, it is clear that the Presenting Officer had given consent for the judge to consider the couple's child in the context of the proportionality exercise: [21]. It is equally clear that this is precisely what the judge then proceeded to do. With respect, Mr Melvin's attempt to differentiate between GEN.3.2. and a proportionality exercise is, in the circumstances of this case, misconceived. GEN.3.2., whilst within the Rules (Appendix FM) specifically deals with a situation in which an individual cannot meet the requirements of relevant Rules and involves the assessment of whether

there are exceptional circumstances. That is to all intents and purposes a proportionality exercise. Mr Melvin was unable to show that there would be any substantive difference between an assessment under GEN.3.2. and a proportionality exercise entirely outside of the Rules.

13. I am satisfied that the Presenting Officer's position adopted at the hearing before the judge meant that the judge herself committed no error when considering the couple's child as part of the assessment of whether exceptional circumstances (which in effect constituted the proportionality exercise) existed in the Appellant's case.

14. Turning to the second ground of appeal, I agree with Mr Richardson's characteristically candid acceptance that the judge's decision was "generous" to the Appellant. Generosity does not of itself, however, constitute an error of law. The Respondent has not put forward a perversity challenge and although aspects of ground 2 appear to be something akin to such a challenge, I am not prepared to read into the Respondent's case a head of challenge which has not been expressly pleaded.

15. The judge addressed a range of factors relating to the three key individuals, namely the Appellant, the Sponsor, and their child, as well as matters connected to the important public interest in maintaining effective immigration control.

16. At [39], the judge was entitled to take account of the mandatory ban on re-entry for the Appellant if he was to leave the United Kingdom. She was also entitled to conclude that the period of separation would be at least 15 months or so. At [41] the judge was entitled to refer to the Sponsor's preference to remain in the United Kingdom, but I agree with Mr Richardson that this was not the sole basis for attributing weight to her circumstances. The relevance of an individual pursuing a route to settlement to a proportionality exercise has been recognised in the authorities: see, for example, GM (Sri Lanka) [2019] EWCA Civ 1630. The

judge addressed additional issues relating to a separation of the couple and the adverse effect that would have on the baby: [43]–[46].

17. In respect of childcare, it is entirely unclear to me as to whether this was even raised before the judge. It is certainly not apparent from the face of the decision and Mr Melvin was unable to assist. He submitted that it was an "obvious" point. In the first instance, I disagree. Specific factors or possibilities need to be clearly stated by a party in order that a judge can seek further information or hear argument. Mr Melvin submitted that the Sponsor would have put her child into some form of childcare upon completion of maternity leave in due course. That rather misses the point that the judge was addressing the situation at the date of hearing when the Sponsor was still on maternity leave and the baby was still only 3 months old.

18. The judge took proper account of the mandatory considerations set out in section 117B of the Nationality, Immigration and Asylum Act 2002, as amended. This included confirmation that the public interest weighed "heavily" against the Appellant: [48]. Little weight was placed on the Appellant's private life and the judge correctly noted that the Sponsor was not a qualifying partner for the purposes of either the Rules or the 2002 Act: [48]. The judge took account of the child's best interests and was entitled to place substantial weight on those: [50]. The judge specifically stated that "strong weight" was attributed to the Appellant's inability to meet the Rules (implicitly, that must have related to Appendix FM and/or the PBS dependency provisions), and she also took account of the fact that the Appellant had undertaken some work in the United Kingdom without permission: [51]. As the judge herself stated, she adopted a balance sheet approach, which has of course been endorsed in the authorities over the course of time.

19. Contrary to the Respondent's submissions, the judge has provided legally adequate reasons in respect of the various factors considered. Questions of weight were a matter for the judge, subject to any

limitations imposed by rationality, in respect of which there has been no challenge. Factors counting against the Appellant were expressly taken into account and significant weight attributed to them. Overall, the judge's approach was consistent with both statutory provisions and the relevant authorities. Again, I emphasise that the judge's decision was generous, but is not erroneous as a matter of law.

Anonymity

20. There is no basis for an anonymity direction in this case.

Notice of Decision

The decision of the First-tier Tribunal did not involve the making of an error of law. That decision stands.

The appeal to the Upper Tribunal is accordingly dismissed.

H Norton-Taylor

Judge of the Upper Tribunal
Immigration and Asylum Chamber

Dated: 21 June 2023