IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-001075

First-tier Tribunal No:
HU/56042/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:

19th October 2023

Before

UPPER TRIBUNAL JUDGE RINTOUL

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

SIBORA ISMAIL
(NO ANONYMITY ORDER MADE)

Respondent

Representation:
For the Appellant: Mr M Diwnycz, Senior Home Office Presenting Officer
For the Respondent: Mr P Farell, solicitor

Heard at Melville Street, Edinburgh on 11 October 2023

DECISION AND REASONS

1. The Secretary of State appeals with permission against the decision of First-tier Tribunal Judge A M S Green, allowing the respondent's appeal against the decision of the Secretary of State to refuse her human rights application.

2. The respondent is a citizen of Albania who is married to K I ("the sponsor"), also an Albanian citizen, who is settled in the United Kingdom. Their relationship began in 2012 in Albania but her parents did not

approve as they wanted her to have an arranged marriage. The respondent became pregnant, and the sponsor supported her although he was living in the United Kingdom. Their daughter was born in 2014. The respondent and her daughter arrived in the United Kingdom unlawfully in 2918, and on 2019 the sponsor was able to divorce his wife.

3. It is the respondent's case that she and her daughter cannot return to Albania, and that it would be unduly harsh to expect them to do so; the daughter has just started school and it would be in her best interests for her to be able to stay in the United Kingdom.

4. The Secretary of State refused the application on the basis that the requirements of EX.1 were not met as there were no insurmountable obstacles to family life continuing in Albania. It was, however , accepted that the appellant met the requirements of E-LTRP.2.1 to 2.2 and that under GEN 3.2 there were no exceptional circumstances such that she or her daughter should be granted leave. She also considered that it would not be a breach of article 8 to return the respondent and her daughter to Albania.

5. The judge directed himself [23] – [26] as to the law and as to what was meant by "insurmountable obstacles" in the context of paragraph EX.1 and also as to the best interests of children. He commenced his decision by considering the daughter's best interests, noting that she would have to leave the UK for at lest a year, a significant period for a child, and that she had fewer ties to Albania than to the UK. He found removal to Albnaia would be harmful to her best interests, given the difficulties the family would face. He concluded that he would not have allowed the appeal but for the bests interests of the child which had to be factors into the respondent's appeal [29].

6. The Secretary of State sought permission to appeal on the grounds that the judge had erred:

   (i) By elevating the best interests of the child into a paramount consideration, contrary to established law
   (ii) In failing to have any regard to the public interest under section 117B of the 2002 Act, failing to identify anything exceptional about the case, and failing to consider the respondent's poor immigration history contrary to Younas (section 117B(6) (Chikwamba, Zambrano) [2020] UKUT 129.

7. On 13 April 2023, Judge Monaghan granted permission to appeal.

8. I heard submissions from both representatives. Mr Diwnycz accepted that there were problems in how the grounds had been drafted, having read the respondent's rule 24 statement. He added little to the grounds,

9. In assessing the grounds of appeal, I remind myself of the principles set out in HA (Iraq) v SSHD [2022] UKSC 22 at [72]:

> 72.It is well established that judicial caution and restraint is required when considering whether to set aside a decision of a specialist fact finding tribunal. In particular:
>
> (i) They alone are the judges of the facts. Their decisions should be respected unless it is quite clear that they have misdirected themselves in law. It is probable that in understanding and applying the law in their specialised field the tribunal will have got it right. Appellate courts should not rush to find misdirections simply because they might have reached a different conclusion on the facts or expressed themselves differently - see AH (Sudan) v Secretary of State for the Home Department [2007] UKHL 49; [2008] AC 678 per Baroness Hale of Richmond at para 30.
>
> (ii) Where a relevant point is not expressly mentioned by the tribunal, the court should be slow to infer that it has not been taken into account - see MA (Somalia) v Secretary of State for the Home Department [2010] UKSC 49; [2011] 2 All ER 65 at para 45 per Sir John Dyson.
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> (iii) When it comes to the reasons given by the tribunal, the court should exercise judicial restraint and should not assume that the tribunal misdirected itself just because not every step in its reasoning is fully set out - see R (Jones) v First-tier Tribunal (Social Entitlement Chamber) [2013] UKSC 19; [2013] 2 AC 48 at para 25 per Lord Hope.

10. The decision is poorly structured. The judge has not said whether he accepts that paragraph EX.1 is made out, although it is implicit in how he approached the situation of the child that he did not; nor is there any express reference to section 117B of the 2002 Act. While that is not strictly necessary, so long as that section is applied, it is difficult to discern why the judge considered that the public interest was outweighed. Whether or not the immigration rules were met should have been the starting point.

11. There is little merit in ground (i) as pleaded. The fact that the judge found, having directed himself properly as to the law, that a child's best interests tipped the balance is not evidence that the child's best interests were elevated into a paramount consideration.

12. As regards ground (ii), Mr Diwnycz accepted that, as is set out in the rule 24 response, it had been conceded that section 117B(4) did not apply as the relationship began before the respondent and her daughter came to the United Kingdom.

13. There is, however, little or no consideration of the other factors. While it is apparent that the respondent speaks English, and she and her daughter are not reliant on public funds, there is no proper consideration of the weight to be attached to the public interest in removal that would

flow from the respondent not meeting the requirements of the Immigration Rules.

14. With respect to what is averred about Younas, it is implicit in the finding that the separation of at least a year would be damaging and the finding that relocation would be difficult, that the judge had some regard to the relevant principles. In that regard it is appropriate to note that absence from the United Kingdom was seen as a relevant factor; it is also of note that here, as Mr Diwnycz accepted, the child and her mother had a family life which pre-existed arrival in the United Kingdom.

15. It is clear from the determination that the judge was aware of the respondent's illegal entry to the United Kingdom, but what is averred – that there was a misdirection in law – is not made out. It is also unlikely that the judge, having properly directed himself as to the law, was not aware of the great weight to be attached to the maintenance of immigration control.

16. In conclusion, I am (just) satisfied, applying the principles, set out in HA (Iraq) that the decision of the First-tier Tribunal is sustainable, on the basis that the judge gave adequate reasons for concluding that removal would, on the particular facts of this case, be disproportionate.

Notice of Decision

1. The decision of the First-tier Tribunal did not involved the making of an error of law and I uphold it.

Signed Date: 11 October 2023

Jeremy K H Rintoul

Judge of the Upper Tribunal