IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-006008

First-tier Tribunal No:
HU/52397/2022; IA/03780/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 15 July 2023

Before

UPPER TRIBUNAL JUDGE LESLEY SMITH

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR QAZIM MECINI

Respondent

Representation:
For the Appellant: Mr T Melvin, Senior Home Office Presenting Officer
For the Respondent: Mr A Slatter, Counsel instructed by TMC Solicitors Ltd

Heard at Field House on 29 June 2023

DECISION AND REASONS

BACKGROUND

1. This is an appeal brought by the Secretary of State. For ease of reference, I refer to the parties as they were in the First-tier Tribunal. The Respondent appeals against the decision of First-tier Tribunal Judge Parkes dated 21 November 2022 ("the Decision") allowing the Appellant's appeal against the Respondent's decision dated 4 April 2022, refusing the Appellant's human rights claim. The Appellant's claim was made in the context of an application to remain as the partner of Ms Klodiana Gogo, who is a British citizen. Ms Gogo has two children from her previous marriage. Her son, [A], is now an adult. [A] suffers from OCD, anxiety and depression. Her daughter, [J] is currently aged sixteen years.

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2. The Respondent did not accept that the Appellant meets the eligibility requirements of the Immigration Rules ("the Rules") to be found in Appendix FM to the Rules ("Appendix FM") for two main reasons.

3. First, she decided that the Appellant did not meet the eligibility relationship requirement because, by reason of Gen.1.2 of Appendix FM, a "partner" is defined as a person who has been living with the applicant in a relationship akin to marriage for at least two years prior to the date of application. Although the Appellant met Ms Gogo in 2014, and they began a relationship in 2016, he did not move in with her and her children until March 2020. He made the application which led to the decision under appeal on 29 July 2021. The Respondent therefore decided that the Appellant did not meet the eligibility requirements in paragraphs E-LTRP.1.1. to 1.12. of Appendix FM.

4. Second, the Appellant did not meet the eligibility criteria due to his immigration status. He entered the UK illegally from Albania (on two occasions). Accordingly, he could not meet paragraphs E-LTRP.2.2. of Appendix FM unless paragraph EX.1. applied. Paragraph EX.1. of Appendix FM ("Paragraph EX.1.") applies in two circumstances. The first arises where an applicant has a genuine and subsisting relationship with a child who is a British citizen or has been in the UK for seven years or more and it would not be reasonable to expect the child to leave the UK (Paragraph EX.1.(a)). The second applies where an applicant has a genuine and subsisting relationship with a partner who is a British citizen and there are insurmountable obstacles to family life continuing with that partner in the applicant's home country (Paragraph EX.1.(b)).

5. In order to qualify for limited leave to remain (E-LTRP.1.1.) all of the requirements of E-LTRP.1.2. to 4.2. must be met.

6. The Respondent also relied on paragraphs E-LTRP.4.1. to 4.2. of Appendix FM as the Appellant had not provided evidence of a qualification in English. The Respondent accepted that the Appellant meets the financial requirements in Appendix FM and no issue was taken in relation to suitability.

7. The Judge found at [12] to [16] of the Decision that the Appellant had a genuine and subsisting parental relationship with [J] and that it would not be reasonable to expect her to leave the UK. Based on those findings, he found at [17] of the Decision that, because the Appellant satisfied the Rules, it would not be proportionate for him to be removed. He therefore allowed the appeal, finding Paragraph EX.1.(a) to be met (wrongly cited as "paragraph EX.1(cc)(ii)").

8. The Respondent appealed the Decision on grounds under the general heading "Failing to give reasons or adequate reasons/Making a material misdirection of law". Properly understood those grounds can be grouped into three issues:

   (1) That the Judge erred by finding the Rules to be met given that the Appellant could not succeed under other of the requirements of E-

LTRP.1.2 to 4.2. (because of the length of his cohabitation with Ms Gogo and lack of evidence in relation to English language ability).

(2) That the Judge erred by failing to make a finding whether the relationship with Ms Gogo was itself genuine and subsisting.

(3) That the Judge erred when finding the Appellant's relationship with [J] to be a genuine parental one, particularly in light of the finding at [13] of the Decision that parental responsibility for [J] still rested with her biological father.

9. Permission to appeal was granted by First-tier Tribunal Judge Carolyn Scott on 3 January 2022 in the following terms:

> "1. The in-time grounds of appeal alleged that the Judge erred in failing to give reasons or adequate reasons for finding on material matters.
>
> 2. There is an arguable error of law. It is arguable that the Judge has made no findings and/or given reasons as to whether the appellant and his partner's relationship is genuine and subsisting, notwithstanding the respondent's position as per the refusal decision that it is not. Further, it is arguable that the Judge has failed to give adequate reasons in (1) finding that the appellant has a parental relationship with [J]; and (2) finding that it would not be reasonable to expect [J] to leave the UK."

10. The matter comes before me to decide whether the Decision contains an error of law. If I conclude that it does, I must then decide whether the Decision should be set aside in consequence. If the Decision is set aside, I must then either re-make the decision in this Tribunal or remit the appeal to the First-tier Tribunal for re-determination.

11. I had before me a core bundle of documents relating to the appeal, the Appellant's bundle ([AB/xx]) and Respondent's bundle before the First-tier Tribunal together with the Appellant's skeleton argument before the First-tier Tribunal. I also received a skeleton argument from Mr Melvin.

12. Having heard submissions from Mr Melvin and Mr Slatter, I indicated that I would reserve my decision and provide that and my reasons in writing which I now turn to do.

DISCUSSION

13. Mr Melvin relied on the grounds as pleaded. He focussed on there being a lack of finding as to the Appellant's relationship with Ms Gogo and the lack of reasons for the finding that the Appellant has a genuine, parental relationship with [J].

14. I was unimpressed by the first of those points. If the Judge accepted that there was a genuine relationship between the Appellant and [J] who is Ms Gogo's minor daughter, then it must be inferred that he accepted that the Appellant has a genuine and subsisting relationship with that child's mother as the Appellant is not the child's biological father. If the

Judge had relied upon the relationship between the Appellant and Ms Gogo as reason for allowing the appeal, he would of course have had to consider whether the Appellant and Ms Gogo could continue their family life together in Albania. However, having found that the Appellant had a genuine, parental relationship with [J], he did not need to deal with that issue (although I observe that the Judge appears to have accepted in any event that Ms Gogo could go to live in Albania – see [15] of the Decision set out below).

15. I turn then to the way in which the Judge reasoned the finding that the Appellant has a genuine, parental relationship with [J] before returning to what I have categorised as issue (1) above.

16. The Judge set out his reasons for the finding about the relationship between the Appellant and [J] at [12] to [16] of the Decision as follows:

> "12. The Appellant's partner's daughter, [J], gave evidence. Consistent with the evidence of the Appellant and her mother she said that she her biological father [sic] once a month and does not stay overnight with him, he travels to their area for the visits. [J] added that she sees the Appellant has [sic] her father and from their evidence he provides her with a lot of support including cooking and taking her to and from school. If the Appellant left she would feel there is something missing and she observed he gets on very well with her mother. The only question in cross-examination was to establish that there are occasions when she walks with her friends.
>
> 13. The Appellant does not have parental responsibility for [J] as that remains with her father. Her father's contact with her is limited and while he retains a position in her life the evidence is that it is limited and overshadowed by the role played by the Appellant. This is a situation that has been developing for some years now and it appears to have strengthened as time has gone on.
>
> 14. The Appellant's partner works at 2 jobs and long hours placing a great deal of responsibility on the shoulders of the Appellant. Given the time over which it has been established and the degree of input and support that the Appellant gives to [J] I am satisfied that the relationship can properly be described as parental in nature.
>
> 15. The question then is whether it would be reasonable to expect [J] to go and live in Albania. While the Appellant's partner is apparently Kosovan of Albanian ethnicity and I have found that she could live in Albania with the Appellant [J] is a British citizen and has not lived outside the UK. Born on the * [sic] she is now * [sic] years old and approaching her A levels. From other cases involving Albania I am aware that the educational opportunities are significantly less effective than those in the UK.
>
> 16. At her age and with the limited contact with her own father it would not be reasonable for her to remain in the UK without continuity of adult care and to achieve that would require her mother to remain. That would separate the Appellant and the Sponsor and that would not be in her best interests. In reality if the family unit is to remain together [J] would have to go with them to Albania and in the circumstances I am satisfied that would not be reasonable. On that basis the Appellant satisfies paragraph EX.1."

17. Mr Melvin drew my attention to the guidance given in SR (subsisting parental relationship – s117B(6)) Pakistan [2018] UKUT 334 (IAC) ("SR"). That guidance makes clear that whether a parental relationship exists turn on "the particular facts of the case". The point is made at [10] of the decision in SR (by reference to the relevant Immigration Directorate Instruction) that "an applicant living with a child of their partner and taking a step-parent role in the child's life could have a 'genuine and subsisting parental relationship' with them, even if they had not formally adopted the child and if the other biological parent played some part in the child's life".

18. The point is also made at [13] of the decision in SR (by reference to the decision of R (RK) v SSHD (s.117B(6); "parental relationship") IJR [2016] UKUT 31 (IAC)) that "it is not necessary for an individual to have 'parental responsibility' in law for there to exist a 'parental relationship', although whether or not that is the case will be a relevant factor". Contrary to the suggestion in the Respondent's grounds, therefore, there is no inconsistency between the finding at [13] of the Decision that [J]'s biological father continues to have parental responsibility and the finding that the Appellant has a genuine and subsisting parental relationship with [J]. The Judge has taken that into account as a factor as he should but ultimately has concluded that the Appellant's involvement in [J]'s life is sufficient to establish a parental relationship.

19. As is made clear in SR, the ultimate question is whether the Appellant plays an active role in [J]'s life. Mr Melvin's submission that all the Appellant does is cook for [J] and take her to school minimises the reasons given by the Judge. The reasons include the developing emotional relationship between [J] and the Appellant as shown by [J]'s evidence that she would feel there was something missing if the Appellant were to leave.

20. The nature of the relationship is also reinforced by the witness statements to which Mr Slatter took me. In his witness statement ([AB/5-10]), the Appellant says this:

> "31. My family and I cannot bear to be separated. I have parental responsibilities over my step-children. I take them for holidays, to the park, for shopping and get involved with them as much as I can."

21. Likewise in her statement ([AB/11-15]), the Appellant's partner says this:

> "13. When I introduced Qazim to my children, they were very accepting of each other and got along perfectly. Qazim fulfilled the absence of a fatherly figure in my children's life. He has always treated them like his own children. He ensures the wellbeing of my children at all times and fulfils all duties of a father. Qazim plays an active and significant role of a father in my children's life."

Ms Gogo also mentions the emotional support which the Appellant gives to her son [A] who suffers from OCD, anxiety and depression. That is

confirmed by a statement from [A] at [AB/16-17] (although of course that relationship has less relevance to this appeal as [A] is now an adult).

22. Finally, [J] has written a letter ([AB/200]) which reads as follows:

> "My stepfather Qazim Mecini is a very caring and very funny man, he looks after me and my brother with care, we play board games together, he cooks dinner for us, He takes me to school every morning, on Sundays we have a family out time and it is all very nice. I feel looked after and very secured at home having him leaving [sic] with us, I know I have a stepfather who will always be happy to hear about my problems and try to solve them."

23. Whilst I accept that the Judge's reasoning does not refer to that evidence in detail and the reasons given are brief, based on that evidence, the Judge was perfectly entitled to reach the conclusion that the relationship between the Appellant and [J] is a genuine and subsisting parental relationship.

24. The remainder of Paragraph EX.1.(a) is concerned with whether it would be reasonable for [J] to leave the UK if the Appellant were to be removed. Mr Melvin did not make submissions in this regard and the Judge's finding in this regard is not directly challenged in the Respondent's grounds. For the reasons given at [15] and [16] of the Decision, the Judge was entitled to find that it would not be reasonable for [J] to leave the UK if the Appellant were removed.

25. For the foregoing reasons, I find that there is no error of law in the Judge's finding that the Appellant has a genuine and subsisting parental relationship with [J] and that it would not be reasonable for her to leave if he were removed.

26. That though is not the end of the matter. I have to return to what I have categorised at [8] above as the first issue which is whether the Appellant could succeed based on Paragraph EX.1.(a). Although, as Mr Melvin accepted, the issue is not very clearly articulated in the Respondent's grounds, I accept that it is to be inferred from what is said at [1] to [3] of the grounds. Mr Slatter did not take any objection to my consideration of this issue.

27. Mr Slatter accepted that the Appellant and Ms Gogo had not been in a relationship of cohabitation for two years as at the date of application. If the definition of "partner" in Gen.1.2 applies to the eligibility requirements under Appendix FM, he accepted that the Appellant could not meet that requirement. He very fairly also drew my attention to the decision in Sabir (Appendix FM – EX.1 not free standing) [2014] UKUT 63 which gives the following guidance:

> "It is plain from the architecture of the Rules as regards partners that EX.1 is 'parasitic' on the relevant Rule within Appendix FM that otherwise grants leave to remain. If EX.1 was intended to be a free- standing element some mechanism of identification would have been used. The structure of the Rules as presently drafted requires it to be a component part of the leave

granting Rule. This is now made plain by the respondent's guidance dated October 2013."

28. Whether or not the Appellant could meet the eligibility requirements as to his relationship is not something I have to determine as the Appellant also failed to meet the English language requirement. E-LTRP.1.1 requires the Appellant to meet all of the provisions of the Rules at E-LTRP.1.2. to E-LTRP.4.2. That includes the English language requirement. Even if (as the Judge found) the Appellant meets EX.1.(a) therefore, the Appellant still cannot succeed within the Rules.

29. However, that is not the end of the matter. As Mr Melvin very fairly accepted, the findings made by the Judge under EX.1. apply equally to section 117B (6) Nationality, Immigration and Asylum Act 2002 ("Section 117B (6)"). Mr Melvin of course submitted that Section 117B (6) was not met for the reasons he said that the Judge's findings in relation to Paragraph EX.1. were in error. However, having accepted that the Judge was entitled to reach those findings, they apply equally to Section 117B (6). Unlike Paragraph EX.1., Section 117B (6) is freestanding. If it applies, then the person with the genuine and subsisting parental relationship with a qualifying child is not required to leave the UK. It would be disproportionate to remove that person. That issue has to be determined at the date of hearing (as part of the Article 8 ECHR consideration) rather than at date of application.

30. As I canvassed with both representatives, that appeared to me to mean that the error made by the Judge is not material. As I understand the Respondent's policy, she grants applicants leave to remain on the ten-year route if Paragraph EX.1. applies rather than on the five-year route (as not all the Rules are fully satisfied). The ten-year route applies also to cases which succeed outside the Rules as is the case applying Section 117B (6).

31. As Mr Slatter submitted and I accept, the question of what leave should be granted in consequence of the appeal outcome is a matter for the Respondent. It might however be relevant if the alternative route which I have outlined would lead to a different consequence from the outcome reached in the Decision (as the error might then be material). As it is, however, I do not need to reach a firm conclusion on that point since, if I had concluded that the error was material, I would still have preserved the findings that the Appellant has a genuine and subsisting parental relationship with [J] and that it would not be reasonable to expect her to leave the UK if the Appellant were removed. I would therefore have substituted a decision that Section 117B (6) applies and that the Appellant's appeal succeeds based on Article 8 ECHR outside the Rules.

32. Further, and in any event, the only issue for the Tribunal is whether removal would breach the Appellant's human rights. For the reasons given above, Judge Parkes was entitled to reach that conclusion although not for all the reasons he gave. Removal of the Appellant would

ultimately be disproportionate based on his findings for the reasons I have given. The error of law which I have accepted to be made out is therefore immaterial.

NOTICE OF DECISION

The Decision of First-tier Tribunal Judge Parkes dated 21 November 2022 does not contain a material error of law. I therefore uphold the Decision with the consequence that the Appellant's appeal remains allowed.

L K Smith

Upper Tribunal Judge Lesley smith

Judge of the Upper Tribunal
Immigration and Asylum Chamber

4 July 2023