Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/05575/2016

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 3rd September 2018	**On 18th December 2018**

Before

UPPER TRIBUNAL JUDGE RINTOUL
UPPER TRIBUNAL JUDGE JACKSON

Between

FM
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms S Iengar of Counsel, instructed by Karis Solicitors Limited
For the Respondent: Mr I Jarvis, Home Office Presenting Officer

DECISION AND REASONS

1. This is the decision of the Tribunal, to which both members have contributed. The Appellant appeals against the decision of First-tier Tribunal Judge Pedro promulgated on 3 April 2017, in which the Appellant's appeal against the decision to refuse his human rights claim dated 11 February 2016 was dismissed.

2. The Appellant is a national of Albania, born on 19 December 1981, who first entered the United Kingdom illegally in 2001. He claimed asylum, which was refused and his appeal against that refusal was dismissed. The Appellant retuned to Albania in 2004 and remained there until 2010, living in his family home which he resided in prior to coming to the United Kingdom.

3. The Appellant married his now ex-wife in Albania in 2001 and they had a son, [R], on 17 September 2005. The marriage was dissolved in Albania on 25 January 2012.

4. The Appellant re-entered the United Kingdom illegally in 2010. His ex-wife and son entered the United Kingdom illegally in around August 2012 but did not live with the Appellant in this country. The Appellant's ex-wife married a Latvian national on 22 March 2013 and they had a child on 8 May 2014. They live together as a family unit of four people.

5. The Respondent refused the application on 11 February 2016 the basis that the Appellant could not meet any of the requirements of a grant of leave to remain under the private and family life provisions in the Immigration Rules and there were no exceptional circumstances to warrant a grant of leave to remain outside of the Immigration Rules. The Respondent considered the Appellant's relationship with his son, but took into account the time spent away from him prior to his arrival in the United Kingdom and in any event considered that the relationship could be maintained via modern means of technology.

6. Judge Pedro dismissed the appeal in a decision promulgated on 3 April 2017 on all grounds. It was accepted before the First-tier Tribunal that the Appellant could not meet any of the requirements of the Immigration Rules for a grant of leave to remain and in the alternative relied upon Article 8 of the European Convention on Human Rights. In relation to family life, it was accepted that the Appellant had established family life with his son whom he did not live with but saw on an almost daily basis. The issue was whether the Appellant's removal would be a disproportionate interference with that family life.

7. The First-tier Tribunal began by assessing the best interests of the Appellant's son and found as follows:

> "12. The best interests of a child are to be with his or her parents. The appellant is required to return to Albania. The respondent does not of course currently require [R] to leave the United Kingdom, as he has extant leave to remain. I am told that [R] is happily part of a family unit that exists independently of the appellant. [R] has resided at all times with his mother since their unlawful entry into the United Kingdom in August 2012 and currently resides in a stable and happy family unit with his mother, his step-father and his half-sibling. Indeed, [L] has confirmed in her statement that she met her current spouse ([R]'s step-father) in late 2012, which was very shortly after her arrival in the United Kingdom with [R]. They married in March 2013. Therefore, [R] has known and had a good relationship with his

> stepfather within a family unit since shortly after arriving in the United Kingdom, almost 5 years ago. That family unit has now been added to by the birth of [R]'s half-sibling. Indeed, in the unsigned statement that has been produced and which I am asked to accept as the stepfather's statement, the stepfather says that he treats [R] as his son and that [R] gets on very well with his half-sibling. It follows that whilst [R] will obviously be disappointed and saddened by the appellant's return to Albania, his family life in a close and stable family unit with his mother, stepfather and half-sibling will continue without interruption, as will his education and all aspects of his social and private life save for his current contact with the Appellant. In such circumstances, I am satisfied that the best interests of [R] are to remain with his current family unit in the United Kingdom."

8. The First-tier Tribunal went on to find that the Appellant's relationship with his son could be maintained through modern methods of communication and that would be more than the Appellant had done prior to his son coming to the United Kingdom in 2012. In Albania, the Appellant did not live with his wife or son for the first five years of his life and then left for the United Kingdom in 2010 and only later re-established any contact in 2012 once his ex-wife and son came here. It was also found that visits could take place.

9. The factors in section 117B of the Nationality, Immigration and Asylum Act 2002 were then taken into account, in particular that the Appellant had a history of blatant disregard for UK laws and immigration control, having entered illegally twice, abusing the asylum system by claiming in a false nationality and has never had any leave to remain in the United Kingdom. The Appellant has also been convicted of an offence relating to the possession of a false document in the United Kingdom. At the same time, the Appellant had his own property and family in Albania. The First-tier Tribunal took into account that the Appellant spoke English but there was no evidence of his undertaking any lawful employment and his son is not a qualifying child. In conclusion, the First-tier Tribunal found that the Appellant's removal would be proportionate.

The appeal

10. The Appellant appeals on two grounds. First, that the First-tier Tribunal failed to engage with or determine the Appellant's reliance in his appeal on Article 24(3) of the EU Charter of Fundamental Rights and Freedoms ("CFFR") (a child's right to maintain on a regular basis a personal relationship and direct contact with both parents). Secondly, that the First-tier Tribunal erred in its assessment of the best interests of the Appellant's son in respect of his relationship with the Appellant.

11. Permission to appeal was granted by Judge McWilliam on 12 December 2017 on all grounds, albeit express reference was only made to the second ground in the reasons given.

12. Prior to the hearing before us on 3 September 2018, directions were issued to the parties to make written submissions on the first ground of appeal as to the basis on which CFFR is said to apply on the facts of this case. In the course of those submissions, the Respondent provided evidence of the Appellant's ex-wife and son's status in the United Kingdom as being here with discretionary leave to remain on the basis of exceptional circumstances valid to 23 December 2017, rather than with the benefit of an EEA Residence Card.

13. At the oral hearing, Ms Iengar was asked to confirm how EU law was engaged in this case given that the Appellant's son has at best only a derivative right based on his relationship with his step-father (an EEA national). She could only put the Appellant's case at its highest that his son was a child in an EU family but could not identify any provision of the TFEU treaty engaged on the facts of this case. Reliance was placed on regulation 7 of the Immigration (European Economic Area) Regulations 2016 to show that EU law was engaged, but accepted that the Appellant's son had no substantive rights as a non-EEA national, only rights as a family member derived from Directive 2004/38/EC and the Appellant himself was not the family (or even extended family) member (as defined in articles 2 and 3 of that Directive of an EEA national.

14. As to the second ground of appeal, Ms Iengar submitted that the findings of the First-tier Tribunal were contradictory in relation to family life, with a finding both that the Appellant had almost daily contact with his son but that it was in the child's best interests to remain within his separate family unit with his mother. The First-tier Tribunal gave no consideration to the son's relationship with his father or the effect of the Appellant's removal on him which was evidenced in the Appellant's ex-wife's statement. The oral submissions on the second ground of appeal that there was an error in the fact finding of the First-tier Tribunal in paragraphs 9, 10 and 10 of the decision.

15. On behalf of the Respondent, Mr Jarvis submitted for clarity that the Appellant's ex-wife had originally applied for an EEA Residence Card on the basis of her marriage to an EEA national in 2013 but that was refused on the basis that it was a sham marriage, a decision which was upheld on appeal. A subsequent application on the same basis was refused in 2018 and an appeal is listed against that refusal for November 2018. The Appellant's ex-wife and son were in the alternative granted discretionary leave to remain on the basis of the ex-wife's care for a British Citizen child in the United Kingdom. In any event it was submitted that EU law is not engaged in this case and not applicable to either the Appellant or his son such that the EU Charter of Fundamental Rights is not relevant.

16. As to the second ground of appeal, Mr Jarvis submitted that the First-tier Tribunal had made a lawful assessment of the best interests of the child and also in making the proportionality assessment with adequate reasons given for dismissing the appeal.

Findings and reasons

17. In relation to the first ground of appeal, whilst it is correct for the Appellant to say that the First-tier Tribunal failed to engage with or determine the issue before it as to the applicability of Article 24(3) of the CFFR, that is not a material error of law in this case for the following reasons.

18. The appeal concerns an Albanian national challenging a decision to refuse his application for leave to remain on human rights grounds. His circumstances do not in any way engage EU law and there is no EU decision in relation to him.

19. The Appellant claims that the CFFR is applicable because the decision under challenge in this appeal affects a family member (the Appellant's son) whose residence in the United Kingdom remains as a result of Union law as he is the family member of an EEA national under regulation 7 of the Immigration (European Economic Area) Regulations 2006. The Appellant has failed to establish the latter given the Appellant's son had in fact been in the United Kingdom with discretionary leave to remain and his claim to be the family member of an EEA national had been rejected.

20. In any event, the CFFR is only applicable in circumstances in which substantive EU law rights are engaged and even on the Appellant's case taken at its highest, they are not. The Appellant's son has (if the marriage and relationship are accepted which it has not been to date) only a derivative right of residence and no substantive EU law rights in his own right. The Appellant can not himself derive any EU law rights through his son in these circumstances. As such, even if the First-tier Tribunal had expressly considered the Appellant's reliance on Article 24(3) of the CFFR, it could not have found it to be applicable to the facts of this case and could not therefore have made any material difference to the outcome of the appeal.

21. In relation to the second ground of appeal, although it would have been preferable for the First-tier Tribunal to expressly include an additional finding on whether it was in the best interests of the Appellant's son for the Appellant to remain in the United Kingdom (thereby maintaining the regular face-to-face contact they had) and not just whether it was in his best interests to remain within his immediate family unit; the relationship was sufficiently considered with no inconsistent findings and the outcome of the appeal could not have been materially different in any event.

22. In paragraph 13 of the First-tier Tribunal decision, detailed consideration was given to the history of Appellant's relationship with his son, or more specifically, his lack of relationship with him prior to 2012 and as to how the relationship could be maintained even if the Appellant were removed. If, even in light of this, it was in the Appellant's son's best interests for the Appellant to remain in the United Kingdom, that is not determinative of the proportionality assessment or the appeal.

23. The Appellant's son is not a qualifying child and therefore section 117B(6) of the Nationality, Immigration and Asylum Act 2002 can not assist the Appellant. The other factors in section 117B were considered in detail in paragraphs 14 and 15 of the First-tier Tribunal decision showing a significant public interest in the Appellant's removal in light of his very poor immigration history and criminal conviction. In addition, Appellant's continuing links with Albania were taken into account. Overall, even if it was in the Appellant's son's best interests for the Appellant to remain in the United Kingdom, on the facts of this case that could not outweigh the significant public interest in removal such that there would not be a disproportionate interference with his right to respect for private and family life under Article 8 of the European Convention on Human Rights.

Notice of Decision

The making of the decision of the First-tier Tribunal did not involve the making of a material error of law. As such it is not necessary to set aside the decision.

The decision to dismiss the appeal is therefore confirmed.

Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of their family. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed Date 12th November 2018

Upper Tribunal Judge Jackson