IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-004519
First-tier Tribunal No: HU/18412/2019

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 17 July 2024

Before

UPPER TRIBUNAL JUDGE NORTON-TAYLOR
DEPUTY UPPER TRIBUNAL JUDGE LEWIS

Between

ERGYS PEPAJ
(NO ANONYMITY ORDER MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the appellant: Mr L Youssefian, Counsel, instructed by Prime Solicitors
For the respondent: Mr M Pavar, Senior Presenting Officer

Heard at Field House on 4 July 2024

RE-MAKING DECISION AND REASONS

Introduction

1. This is the re-making of the decision in the appellant's appeal against the respondent's refusal of his human rights claim, following an error of law decision made by Deputy Upper Tribunal Judge Woodcraft and myself, issued on 12 December 2023, by which we concluded that the First-tier Tribunal (Judge Aldridge – "the judge") had materially erred in law and

that his decision should be set aside. The error of law decision is annexed to this re-making decision and the two should be read together.

2. The appellant is an Albanian national, born in May 2002. He entered the United Kingdom unlawfully on 7 August 2015, accompanied by his mother and was included as a dependent of her asylum claim made shortly thereafter (the first Tier Tribunal's decision and the error of law decision erroneously state the year of entry as being 2012, but this has no material impact on the case). On 11 January 2016, this claim (together with the accompanying human rights claim) was refused and certified under section 94 of the Nationality, Immigration and Asylum Act 2002, as amended ("the 2002 Act"). There was no successful challenge to the certification decision and so the appellant was unable to appeal against the refusal of his claims.

3. On 24 May 2019, the appellant made an application for leave to remain outside of the Immigration Rules. This was treated as a human rights claim and its refusal, in a decision dated 4 November 2019, gave rise to a right of appeal under section 82 of the 2002 Act.

The error of law decision

4. Before the First-tier Tribunal, the appellant's case had been predicated on claimed family life with an "uncle", Mr Detar Hekuri ("Mr Hekuri"), other ties established in United Kingdom since 2015, and the existence of very significant obstacles to re-establishing himself in Albania. The judge concluded that the respondent's decision did not violate the appellant's Article 8 rights, whether in respect of family or private life. On appeal, the Upper Tribunal concluded that there was a material contradiction in the judge's reasoning: on the one hand, he had apparently found there to be no family life, whilst on the other, he regarded an interference with family life to be proportionate. In the alternative, the judge's analysis

lacked legally adequate reasons. The errors regarded as material because, if family life had in fact been found to exist, it might have made a difference to the overall proportionality exercise.

5. There was found to be no error in respect of the judge's assessment of the very significant obstacles issue under what was at the time 276ADE(1)(vi) of the Immigration Rules (a similar provision is now contained within Appendix Private Life to the Rules). Thus, the findings set out at [25]-[29] of the judge's decision were preserved: see [30] of the error of law decision.

6. It was decided that the appeal should be retained in the Upper Tribunal for a resumed hearing, rather than being remitted to the First-tier Tribunal. Case management directions were contained within the error of law decision.

Procedural history following the error of law decision

7. The appeal was listed for a resumed hearing on 29 February 2024. In advance of that hearing, the appellant had provided a supplementary bundle of evidence. This contained a brief witness statement from the appellant which asserted that he was in a relationship with a Bulgarian national with settled status in the United Kingdom, that she had two British citizen children from a previous relationship, and that they were living together as a family unit. Counsel for the appellant accepted that this constituted a "new matter" for the purposes of section 85 of the 2002 Act. The respondent sought further time in order to consider whether consent should be given for the issue to be considered. The hearing was adjourned with directions.

8. Those directions were complied with and the respondent confirmed that he had given consent for the "new matter" of the appellant's claimed

relationship with the partner (Ms Miroslava Balabanska – "Ms Balabanska") and her children to be considered in this appeal.

9. In a directions notice issued on 16 May 2024, I admitted the new evidence which had been provided by the appellant to the respondent and Tribunal in relation to the "new matter" and made additional case management directions. These included the provision of a consolidated bundle containing all evidence now relied on, together with skeleton arguments from the parties.

The issues

10. In a general sense, the appellant's case as it now stands is that his removal from United Kingdom would violate Article 8 because it would represent a disproportionate interference with his family and private life. The family life is said to be made up of his relationship with Ms Balabanska and her children, and relationship with Mr Hekuri and his children.

11. The core issues have now been refined. Following a useful discussion at the outset of the resumed hearing and in light of Mr Youssefian's skeleton argument, dated 1 July 2024, the primary basis on which the appellant now contends that his removal would violate Article 8 is section 117B(6) of the 2002 Act, which provides as follows:

> "In the case of a person who is not liable to deportation, the public interest does not require the person's removal where –
>
> (a) the person has a genuine and subsisting parental relationship with a qualifying child, and
>
> (b) it would not be reasonable to expect the child to leave the United Kingdom."

12. It is it is common ground between the parties that section 117B(6) operates as a benevolent provision and in one direction only. If the appellant can satisfy the requirements, he will succeed in his appeal: Runa v SSHD [2020] EWCA Civ 514, at [32]-[33].

13. During the preliminary discussion, Mr Pavar accepted that Ms Balabanska's two children are British citizens. That sensible concession was based on the undisputed fact that Ms Balabanska had been granted indefinite leave to remain under Appendix EU on 19 September 2019, prior to the children's birth. This meant that the two children were British citizens by birth.

14. During the course of his later submissions, Mr Pavar also conceded that if the appellant could satisfy section 117B(6)(a), it would not be reasonable to expect Ms Balabanska's two children to leave the United Kingdom.

15. It follows from the above that there is a single question to be determined in respect of section 117B(6), namely whether the appellant has a genuine and subsisting parental relationship with Ms Balabanska's two children.

16. The issue of the appellant's relationship with Ms Balabanska is relevant to the question under section 117B(6) and will need to be addressed.

17. Whilst Mr Pavar has assisted in narrowing the issues under section 117B(6), his skeleton argument, cross-examination, and oral submissions

have made it abundantly clear that the respondent disputes the claimed relationships.

18. If we find in the appellant's favour on section 117B(6), it is unnecessary for us to go on and consider the other aspects of the Article 8 claim. However, for the sake of completeness, we deem it appropriate to address these in any event.

19. The appellant accepts that he cannot satisfy any of the relevant Immigration Rules.

The evidence

20. We have been provided with a consolidated bundle, indexed and paginated 1-153. This bundle is admitted pursuant to rule 15(2A) of the Tribunal's procedure rules, without objection by the respondent.

21. The appellant, Ms Balabanska, and Mr Hekuri attended the resumed hearing and gave oral evidence. The appellant and Mr Hekuri gave their evidence in English, without any apparent difficulties.

22. Inexplicably, Prime Solicitors failed to request a Bulgarian interpreter for Ms Balabanska. It was clear to us and the two representatives, that she would have benefited from the assistance of an interpreter. The apparent lack of thought and/or action by Prime Solicitors on this issue is to be deprecated.

23. We had initial concerns that Ms Balabanska would not be able to fairly give her evidence without an interpreter. However, we decided that it was appropriate to proceed, having provided a clear introduction to the

witness and confirming that we would be alert to any difficulties which might prevent the hearing from continuing. Neither Mr Youssefian, nor Mr Pavar raised any objections to this course of action. We record here that Mr Youssefian did not request an adjournment for interpreter to be made available and he indicated a wish to proceed even if it were not possible to obtain clear evidence from Ms Balabanska.

24. In the event, we are satisfied that Ms Balabanska was able to understand the questions put to her (albeit that some had to be repeated and/or rephrased). We are satisfied that Mr Pavar was not prevented from properly cross-examining the witness in order to fairly present the respondent's case and we record here that he made no such assertion.

25. We will address relevant aspects of the oral evidence when setting out our findings, below.

The parties' submissions

26. Mr Pavar relied on his skeleton argument. In summary, this asserted that the appellant's relationship with Ms Balabanska was "a fabrication" and that there was no relationship with the two children at all. Beyond that, there was no significant relationship with Mr Hekuri. In terms of the appellant's other activities in this country, they could all be continued if he were in Albania.

27. In summary, Mr Pavar's oral submissions were as follows. The timing of the claimed relationship with Ms Balabanska was highly pertinent; it had only been raised after the hearing before the First-tier Tribunal. There was discrepant evidence as to when that relationship had started. There was an unexplained absence of evidence from other family members and friends. There was a lack of documentary evidence relating to the claimed cohabitation and in terms of communications between the

appellant and his Balabanska. The evidence of what the appellant did with the two children was thin. A single claimed occasion where the appellant had taken one or both of the children to the GP unaccompanied by Ms Balabanska had not been credibly evidenced. The appellant had no legal responsibility for the children.

28. In respect of other matters, Mr Pavar submitted that the relationship with Mr Hekuri was not nearly as strong as claimed. There were evidential problems relating to the 2019 application for leave to remain and where the appellant had been living over the course of time. Support could be provided to the appellant if he returned to Albania. The appellant could continue his social media activities in that country.

29. Mr Youssefian relied on his skeleton argument. We summarise his oral submissions as follows. He acknowledged the poor state of the documentary evidence, but urged us to conclude that this was down to a lack of preparation by the solicitors rather than untruthfulness on the part of the appellant and the witnesses. The oral evidence of the appellant and Ms Balabanska was “by and large consistent”. Despite the lack of an interpreter, he submitted Ms Balabanska’s evidence had been clear and compelling. The absence of more documentary evidence relating to cohabitation could be explained in part by the appellant’s unlawful presence in this country. As to the timing of its disclosure, in October 2022 the relationship was still in its infancy and there had been no real point in raising it before the First-tier Tribunal. Mr Youssefian described aspects of the oral evidence as having “organically” developed and this supported its credibility.

30. In relation to the genuine and subsisting parental relationship issue, we were referred to SR (subsisting parental relationship, s117B(6)) [2018] UKUT 00334 (IAC). The threshold for demonstrating a relevant

relationship is, it was submitted, relatively low. We were urged to find that the children's biological father had abandoned Ms Balabanska even before their birth. It was submitted that the appellant had taken on the role of father to the children.

31. As to other matters, it was submitted that Mr Hekuri had acted as a surrogate parent to the appellant from 2016 onwards and still provided emotional and financial support. There was enough to demonstrate family life. The appellant had made impressive efforts at improving his life over time and now provided a real benefit to the community of the United Kingdom. These were relevant considerations in any proportionality exercise.

32. At the end of the hearing we reserved our decision.

Findings and conclusions

33. In determining the facts as we find them to be, we have considered the evidence as a whole, with the burden of proof resting with the appellant and applying the balance of probabilities. We have reminded ourselves that the unreliability of evidence in relation to one issue is not necessarily render all other evidence unreliable. We have considered with care the competing arguments on the question of whether certain deficiencies in the evidence as a result of poor preparation from those representing the appellant, or simple untruthfulness on his part and that of the witnesses.

34. As in any case, we will not specifically address each and every aspect of the evidence before us.

General points on the evidence

35. It is apparent to us that the preparation of the evidence by Prime Solicitors leaves a fair amount to be desired. The failure to have requested a Bulgarian interpreter for Ms Balabanska is one example of this. The more recent witness statements in the bundle are, on any view, brief. Even if the appellant has entirely fabricated his relationship with Ms Balabanska, a good deal more detail might have been expected in order to bolster the case. We of course bear in mind the possibility that the lack of greater substance is a result of the appellant and Ms Balabanska refusing or being unable to provide more because there was nothing to say. However, on balance and having regard to the evidence as a whole, we incline to the view that some of the criticisms levelled against the appellant's case by the respondent can properly be directed to the solicitors rather than the truthfulness of the appellant and/or Ms Balabanska.

36. Whilst not of any great significance, we note that the appellant has not been the subject of particularly damaging adverse credibility findings in the past. The judge below found that there had been an underplaying of connections to Albania, but much of what the appellant said about his circumstances in the United Kingdom was apparently accepted. The appellant is not a person who has consistently lied over the course of time.

The relationship with Ms Balabanska

37. As a matter of common sense and logic, it is appropriate to consider the appellant's claimed relationship with Ms Balabanska before moving onto address any relationship with her two children. Mr Youssefian realistically acknowledged that if there was no genuine and subsisting relationship between the appellant and Ms Balabanska, it would be very unlikely indeed that a relevant relationship existed between the appellant and the children.

38. The first issue within this aspect of the case is that of timing and this can itself be separated into two questions: first, when did the claim relationship begin? secondly, why was the relationship not mentioned during the proceedings before the First-tier Tribunal in October 2022?

39. Very little detail about the inception of the relationship has been set out in the witness statements. As we have observed previously, our view is that this is more likely to be down to poor preparation by the solicitors than outright dishonesty by the appellant and Ms Balabanska, although that view is of secondary importance to the detailed analysis of the evidence which we conduct, below. For now, we reiterate the point that if the couple had been seeking to concoct the relationship it is likely they would have ensured that greater (fabricated) detail had been committed to writing. Whichever way one looks at it, the lack of detail in the written evidence clearly does not assist the appellant's case.

40. We have paid careful attention to the oral evidence provided by the appellant and Ms Balabanska. We have approached his evidence with a degree of caution, given the lack of detail in the written evidence and the timing of the disclosure of the relationship itself (to which we will return).

41. The appellant told us that he first "met" Ms Balabanska in around July or August 2022. He did not state in terms that this was when he and Ms Balabanska became "boyfriend and girlfriend" or, for example, intimately involved. We recognise that people might describe stages of a relationship in different ways. We also bear in mind that people will very often first meet each other and have a series of conversations before entering into the relationship itself: that to our mind is nothing more than a common sense recognition of human nature.

42. We note that the appellant's witness statement of 18 March 2024 states that he had met Ms Balabanska "almost close to 2 years now". That would place the very beginnings of the relationship in the spring of 2022, rather than July/August. This apparent discrepancy was not specifically put to the appellant, but we take it into account when assessing the evidence as a whole.

43. Ms Balabanska told us that the appellant became her boyfriend "from November" (2022) and that she had initially met him in "maybe June or July".

44. The couple's evidence is not watertight. It could be said that there is ambiguity as to when the relationship itself started, as opposed to initial meetings and suchlike. However, we do not need to be sure, only satisfied on the balance of probabilities. On this issue, we find that there is sufficient consistency. We are prepared to accept that the meetings and conversations which eventually led to the inception of the "boyfriend girlfriend" relationship probably began in the summer of 2022. We put the apparent discrepancy contained in the appellant's March 2024 witness statement down to a poor chronological calculation by him, rather than untruthfulness.

45. The second question arising from paragraph 38, above, would appear to present the appellant's case with real obstacles. A person would normally be expected to raise each and every matter in an appeal which might assist their claim to remain in the United Kingdom. On closer scrutiny, however, the non-disclosure of the relationship at the hearing before the judge is not of great adverse significance. Despite the lack of precision in the evidence as to when the relationship proper began, it is clear to us that it was, at most, only in the very initial stages at the time of the hearing in October 2022. We do not know what legal advice, if any,

was given concerning the relationship, or indeed whether the appellant's representatives were made aware of this. But in any event, disclosure of the relationship could not have had any material effect on the outcome of the appeal. In addition, there is some merit in the appellant's evidence that he had not wished to mention Ms Balabanska at the October 2022 hearing so as to avoid the perception that he was using her purely for immigration purposes. Overall, in our judgment, the non-disclosure does not of itself significantly undermine the appellant's case, although it is a consideration which we have weighed up in the round.

46. The appellant and Ms Balabanska have been consistent as to when the claimed cohabitation began, namely January 2023. That consistency is of some benefit to the appellant's claim.

47. The appellant and Ms Balabanska have been consistent as to the former's proposal to the latter in May 2024. It might seem odd that the appellant apparently invited friends to the proposal occasion, but if that had been contrived in order to provide witnesses in this appeal, one might have expected the friends to have actually turned up at the hearing: it was obvious to us that the appellant had paid no thought to asking them to provide evidence. On balance, we are inclined to accept the appellant's evidence that his friends did attended the event and this was because they were just that; good friends who the appellant wanted to be there.

48. When Ms Balabanska was asked about marriage plans, she provided what we consider to be candid evidence; a wedding might take place one day, but not now. This was an example of what we find to be Ms Balabanska's considered and mature take on the relationship, which we find in turn supports the reliability of her evidence in general.

49. Mr Pavar made a couple of references during the course of the hearing to the fact that Ms Balabanska is some 10 years older than the appellant. We take from that the suggestion that this was a matter of some concern. If indeed such a suggestion was being put forward, we reject it. The age difference is not particularly striking and we would be slow to draw adverse inferences on a matter such as this. If anything, Ms Balabanska's maturity counts in favour of her evidence being credible. Prior to meeting the appellant, she was a working single mother who had a good deal more life experience than him and it might be said that her overall maturity would make her more discerning as to whether a prospective partner held genuine intentions towards her and her children.

50. The documentary evidence on the claimed cohabitation is fairly thin, as emphasised by Mr Pavar. We do have Council Tax bills for 2023/2024 and 2024/2025, both of which are in the joint names of the appellant and Ms Balabanska. That is evidence to which we attribute some weight, given the importance of accurately declaring residence at any given property. Mr Pavar submitted that it was "staggering" that there were no further Council Tax bills relating to the period June 2023 to April 2024. We regard that submission as misconceived. The first of the two bills which have been provided covers the period to which he referred. It is not clear to us what more could have been demonstrated. It might have been possible to obtain a breakdown of specific monthly payments, but that would not have taken things very much further: payments would have had to have been made whether or not the appellant was actually living at the property.

51. The absence of, for example, bank statements in joint names is unsurprising, given the appellant's unlawful status in United Kingdom. It is possible for joint names to be put onto utility accounts, but we are not convinced that the failure to have done this detracts significantly from

the appellant's case. He moved into Ms Balabanska's property and it was presumably the case that everything was already in her name. As to the absence of correspondence relating to the appellant's social media activities, it is not apparent to us that there would necessarily be anything from, for example, Youtube or Instagram, stating a residential address as opposed to the online address, as it were.

52. It is true that more photographs could have been provided, but such photographs as there are, appear to show an ordinary couple. It is also the case that logs/printouts of communications between the appellant Ms Balabanska could have been included in the bundle, but have not. Again, we regard this as more a consequence of poor preparation than the absence of a genuine and subsisting relationship. A concerted effort to fabricate a relationship would very likely have involved providing very large quantities of, for example, WhatsApp messages, in order to project an image of genuine interactions. When viewed in the round, the absence of such evidence is, whilst a relevant consideration, not of particular significance in this case.

53. Another point relied on by Mr Pavar is a lack of the documentary evidence relating to Ms Balabanska's employment. We agree that evidence such as P60s and payslips would presumably have been available and should have been provided. We have weighed the absence of documentary evidence against the consistent evidence of the appellant, Mr Hekuri, and Ms Balabanska herself. All three confirmed that the latter is employed at the restaurant owned by Mr Hekuri, and was during the period when she and the appellant are said to have first met and developed their relationship. The appellant and Ms Balabanska were consistent as to the number of shifts worked in a week and the hours of each shift. They were consistent as to when the latest shift had been worked (the day before the hearing). Beyond that, it is plausible that the appellant would have helped Mr Hekuri out at the restaurant and that this

presented the opportunity of meeting Ms Balabanska there. Overall, we find that Ms Balabanska is employed at Mr Hekuri restaurant, as claimed, and it is more likely than not that this was the circumstantial connection which eventually led to the relationship between the appellant and Ms Balabanska.

54. In assessing whether the relationship is genuine and subsisting, we have borne in mind the fact that the appellant wishes to remain in the United Kingdom and there is a possibility that he is seeking to manipulate Ms Balabanska for those ends. In other words, the relationship might be genuine only in so far as Ms Balabanska is concerned. Her evidence is therefore important to the extent that it sheds probative light on the relationship overall, including why she believes that the appellant is genuinely committed to her and her children.

55. In this regard, we found Ms Balabanska's evidence to be candid and credible, notwithstanding some of the difficulties in expression resulting from the absence of an interpreter. We have no doubt that she is a devoted mother to her children and has their best interests at heart. We accept her evidence that she knows (as far as it is possible to do so) that her daughters love the appellant "too much". We accept her evidence that the appellant is "very, very, very good" for her and that he does not cause her "stress". We do so in part because of the manner in which she gave the evidence at the hearing, but also because of its context. For reasons set out below, we find that the children's biological father abandoned Ms Balabanska whilst she was still pregnant and it is highly likely that his actions caused her anguish and "stress". Committing to a relationship with a new partner (the appellant) who was, in her view, of a very different character to that of the children's biological father, is plausible and indicative of a careful consideration by Ms Balabanska of the appellant's intentions.

56. The evidence that the children's biological father abandoned Ms Balabanska is strong. He is not named on either of the children's birth certificates. Ms Balabanska was absolutely clear in her oral evidence: he disappeared some two months before the children were born, leaving her only a message. She categorically stated that her children had never met their biological father. This evidence was consistent with what the appellant told us.

57. During cross-examination, Ms Balabanska volunteered the information that the biological father was paying maintenance for the children. She told us that this had been arranged by what she described as a "service", following blood tests which she had requested because as the biological father had denied paternity. She told us that she had provided her own documents and the biological father's name and that the "service" had done the rest. She confirmed that the biological father had never requested to see his children.

58. We find that the "service" referred to by Ms Balabanska is highly likely to be the Child Maintenance Service. There is nothing implausible about Ms Balabanska's evidence that this agency was able to locate the biological father and require him to make relevant payments direct to her bank account.

59. In light of the above, we find that the biological father has never taken any interest in children and has never played a parental role in their lives.

60. A further aspect of Ms Balabanska evidence is relevant here. She confirmed that it was the appellant who cared for the children whilst she was at work. This was consistent with what the appellant told us. There is no suggestion in the evidence that the children are at a childminder or

nursery. Aside from visits to this country by her mother, Ms Balabanska does not have other family members here. We find it is more likely than not that the appellant provides the childcare. Given what we have said about Ms Balabanska's commitment to the children's best interests and her experience of being abandoned by her previous partner, it is to our mind supportive of the existence of a genuine relationship that she would trust the safety and well-being of her young children to the appellant on a regular basis.

61. Last, but certainly not least, we address the absence of supporting evidence from other individuals. Mr Pavar made the legitimate point that there were a number of people who could have attended the hearing, or at least have provided witness statements attesting to the genuineness of the relationship. These would have included: friends who attended the proposal occasion; a named friend of Ms Balabanska (who had in fact provided a brief letter in March 2024); and Ms Balabanska's mother and/or brother.

62. We agree that the absence of witness statements and/or attendance at the hearing is a material consideration when we assess the evidence as a whole. There is no clear explanation for all of the evidential omissions. Ms Balabanska told us that her friend was on holiday in Bulgaria at the time of the hearing. Having regard to the evidence as a whole, we are prepared to accept that, although it does not explain why greater detail could not been provided in the letter of March 2024. We have previously addressed the issue of the absence of the appellant's friends at the hearing. What is of more concern is the absence of any evidence from Ms Balabanska's mother and brother, both of whom are said to come to United Kingdom for visits and are aware of the relationship. They would presumably have been in a position to attest to the genuineness of that relationship. They would not have been able to give evidence from Bulgaria, however, and it is probable that the

respondent would have urged us to place little weight on their written evidence in the absence of it being tested at the hearing. In any event, written evidence should have been obtained from them and its absence is a fact which has some adverse impact on our overall assessment. Having said that, we reiterate here what has been said previously: the preparation of the evidence in this case by the appellant's solicitors leaves something to be desired and in our judgment the failure to have sought evidence from family members in Bulgaria is probably another example of this.

63. Bringing all of the above together, we find that despite certain evidential shortcomings, the appellant is in a genuine and subsisting relationship with Ms Balabanska. Whilst not of itself decisive, we regard Ms Balabanska evidence as being deserving of particular weight in this case for the reasons set out previously.

The appellant's relationship with the children

64. Our finding that the appellant is in a genuine and subsisting relationship with Ms Balabanska is, on the realistic approach we have adopted, a necessary, but not sufficient, element in the consideration of section 117B(6).

65. When considering the issue of whether there is a genuine and subsisting parental relationship between the appellant and Ms Balabanska's children, we have considered what was said by Upper Tribunal Judge Plimmer (as she then was) in SR, particularly at [35]-[39]. We note that Mr Pavar did not seek to suggest that SR was either wrong, or that its general conclusions were irrelevant to the present case.

66. We take the following points from what was said in SR:

(a) Cases are fact-specific;

(b) A genuine and subsisting parental relationship is not the same as a parent taking an active role in a child's upbringing;

(c) Such a relationship must have a real existence;

(d) A biological relationship is not of itself sufficient;

(e) Direct parental care is a good indicator of a genuine and subsisting relationship;

(f) The regularity of direct parental care may be relevant.

67. Nothing in SR precludes the possibility that a person other than a biological parent can step into the parental shoes, as it were, and satisfy the relationship requirement. We conclude that a person such as the appellant can indeed potentially establish a relevant relationship. That is supported by the case-law (SR, which applied what had been said in SSHD v VC (Sri Lanka) [2017] EWCA Civ 1967) and principle. As to the former, there is nothing to indicate that biological parentage is a necessary condition, albeit insufficient. It would seem to follow that a non-biological parental figure could, depending on the facts, demonstrate a genuine and subsisting parental relationship. As to principle, the wide variety of possible factual scenarios in cases concerning children must surely be able to cater for those involving the abandonment of responsibilities by a biological parent, so-called "blended" families, and fostering/adoption.

68. Mr Pavar did not seek to argue that a stepfather figure could never have a genuine and subsisting parental relationship with a child.

69. With the above in mind, we turn to the facts of this case.

70. The absence of any legal responsibility for Ms Balabanska children does not undermine his claim.

71. On the facts already found, the appellant is the only father figure known to the two children. Their biological father has played no part in their lives.

72. The appellant looks after the children by himself when Ms Balabanska is working her shifts at the restaurant; this amounts to three or four periods of four hours every week, a total of between 12-16 hours. That is a relatively significant amount of direct care for the children. By virtue of their young age, it is no stretch to assume that the care amounts to largely practical matters, as was the case in SR. We have accepted Ms Balabanska's evidence that, from her knowledge of them as a mother, her children love the appellant very much. That is indicative of an emotional bond having been formed, as opposed to nothing more than a purely functional relationship.

73. We accept that the appellant takes the children to the park whilst Ms Balabanska is at work. There is nothing unusual about that. Indeed, it is an obvious activity to undertake where small children are concerned. We regard this as supportive of direct care being provided in the absence of the children's mother.

74. A specific point arose during the oral evidence of both the appellant and Ms Balabanska relating to attendance at the GP. The appellant was asked about any specific tasks he did for the children. He initially stated that he had not gone to the GP with the children alone, but would go with Ms Balabanska as well. He then immediately corrected this, confirming that he had taken the children to the GP on a single

occasion when one of the girls had a stomach ache. Mr Pavar submitted that the initial answer was revealing and adverse. However, in her evidence, Ms Balabanska volunteered the information that the appellant had taken the children to the GP without her on one occasion. It is highly unlikely that she and the appellant would have concocted this evidence in advance of the hearing and she could not have known that the appellant had mentioned event in his oral evidence. It had not been contained in any of the witness statements. Assessing the evidence in the round, we find that the appellant did in fact take the children to the GP on one occasion without Ms Balabanska. That particular example represents a good indication of the appellant having provided direct parental care to the children.

75. Although we have not had any detail on the point, by way of inference we would accept that the appellant plays a part in the children's care when Ms Balabanska is around. This is consistent with her evidence that the appellant was very good for her and that the children love him.

Summary of conclusions on section 117B(6) of the 2002 Act

76. Drawing all of the above considerations together, we find that the appellant's relationship with the children is parental in nature and is both genuine and subsisting.

77. It follows that all of the requirements of section 117B(6) are made out, which in turn entitles the appellant to succeed in his appeal on that basis alone.

78. Whilst not strictly necessary, for the sake of completeness we go on and consider other matters relating to the issue of proportionality under Article 8(2)

The relationship with Mr Hekuri and his children

79. Having interrogated the evidence contained in the 2019 application for leave to remain and provided at certain other stages, we initially had a concern as to whether Mr Hekuri was in fact related to the appellant at all. He had at one point been described as a "close family friend", not a relative. The concern is rather beside the point because the judge below accepted that there was a familial connection and that formed part of the preserved findings: [26]-[27] of the judge's decision. In fact, the apparent attempts at distancing Mr Hekuri from the appellant in terms of any family bond was the subject of the only express adverse credibility findings made by the judge in the 2022 appeal. For the avoidance of any doubt, we find that Mr Hekuri is related to the appellant, albeit probably as a cousin as opposed to a blood uncle.

80. There is no dispute that the appellant went to live with Mr Hekuri at some point following his arrival in the United Kingdom in 2015. We have already found that the appellant is currently living with Ms Balabanska and has been since January 2023.

81. On balance, we are prepared to accept that the appellant was living with Mr Hekuri and his family from 2016 until January 2023. The judge below did not appear to reject the claimed residence with Mr Hekuri as at October 2022: see for example, [27], which in fact constitutes an aspect of the preserved findings. In any event, whilst there is a lack of absolute clarity as to the particular address at which the appellant was residing at certain times (with reference to the Harlow Road and Southbury Road addresses), it is more likely than not that he formed part of Mr Hekuri's household throughout. We bear in mind the fact that the appellant had been unable to lawfully earn money or rent

accommodation due to his status. There is nothing to suggest that he had in fact received income unlawfully.

82. We find that there was family life between the appellant and Mr Hekuri and his children during the period of the former's residence with the latter. The appellant began living with them as a child and spent formative years under Mr Hekuri's care. There is no dispute that the appellant's mother had effectively abandoned him and we find that it was Mr Hekuri who represented the directing hand in the appellant's life. We also find that there was a strong relationship between the appellant and Mr Hekuri's children.

83. The position following the appellant's departure from Mr Hekuri's household represents a material change in circumstances as regards family life. The appellant moved out with the intention to form an independent life. He was by that time aged 20. We are prepared to accept Mr Hekuri's evidence that he continues to provide some financial support to the appellant, but that is not decisive of the existence of family life. The tenor of Mr Hekuri's oral evidence was, in our view, that the appellant has indeed formed a separate life and that there was not the same engagement between the two as there had been previously. For example, Mr Hekuri did not at first seem entirely sure as to whether the appellant was engaged to Ms Balabanska and there was not very much detail provided as to any ongoing provision of emotional support.

84. We have not been provided with much of substance as regards the appellant's current relationship with Mr Hekuri's children. We accept that there is relatively regular contact and it is likely that the children see the appellant as a loving member of their extended family. Their best interests lie in remaining within their nuclear family unit. They would undoubtedly be upset if the appellant were to be removed to Albania, but

there has now been a period of time during which he has not lived with them and they will have the support of their parents, together with the ability to communicate with the appellant through Internet platforms.

85. We take account of Mr Hekuri's position. He has helped to raise the appellant over the course of some years and would no doubt be upset by a separation. However, given the current circumstances, there is no significant dependency of Mr Hekuri on the appellant or *vice versa*. Mr Hekuri travels to Albania and there is no reason at all why meaningful contact should not be possible in one form or another.

86. On balance, we find that there is no longer family life between the appellant and Mr Hekuri and his children. Having said that, there is still a relationship which clearly forms part of the appellant's private life.

The appellant's footballing and social media activities

87. There is no real dispute as to the fact of the appellant's involvement with football and his social media presence. We accept that he is a talented footballer who has harboured a genuine desire to play at the professional level. It is impossible to say whether his lack of immigration status has been the sole barrier to the fulfilment of his plans, but it may well have played a part. In any event, he has been, and continues to be, a valued member of Hertford Town Football Club.

88. We find that the appellant has a significant social media presence, with something approaching 2 million followers through Tik Tok, Instagram, YouTube, and Facebook. These activities involve football-related skills videos. It is entirely plausible that due to his large following, the appellant is provided with products by certain manufacturers in order to promote them on his various platforms. It is also plausible that he has accumulated funds through Tik Tok and YouTube, although he cannot at

present access these due to the lack of a bank account, which itself as a consequence of his unlawful status in this country.

89. We agree with Mr Youssefian's description of these activities as representing "impressive" efforts on the appellant's part. It is clear that he has utilised his talents whilst in the United Kingdom.

90. Having said that, we also agree with Mr Pavar's argument that, at least in respect of the social media activities, the appellant would be able to continue these in Albania. There is no evidence before us that they would have to cease for reasons relating to technology and/or state regulation. There has been no evidence to indicate that the appellant would not be able to access any existing funds held if he were in the country of his nationality and opened a bank account. We find that in many respects the appellant would be in a relatively good position if returned to Albania: although he has not resided there for some years and left when he was 13, he has a track record of acquiring skills and employing his talents. His English language ability and existing social media presence would probably be of real assistance to him in Albania.

91. Further, it is clear from the preserved findings and in the absence of any new evidence to undermine them, that the appellant would have access to familial support in Albania. He has immediate family members there and probably extended family as well. In addition, Mr Hekuri would be in a position to provide meaningful assistance of one sort or another.

92. As to the appellant's activities representing a benefit to the community of the United Kingdom, we do not accept Mr Youssefian's contention that they do. We remind ourselves of the relatively high threshold required for this factor to be of any meaningful significance in the balancing exercise under Article 8: see Thakrar (Cart JR; Art 8: value

to community) [2018] UKUT 00336 (IAC), at [106]-[119]. With respect, the appellant's activities cannot in our view properly be described as having a significant, let alone a very significant, benefit to the community of this country. They are no doubt of value in terms of entertainment and may well help to inspire young people to take up or continue playing football. Yet they cannot go very much beyond that.

Summary of conclusions on proportionality

93. The factors counting against the appellant in the balancing exercise include the following. He has been in this country unlawfully since his arrival in 2015. The private life he has established would normally be given "little weight" due to that unlawful status. In this case, we take into account the fact that the appellant was a child when he came to this country and spent his teenage years here. On this basis, we are prepared to apply a degree of flexibility and, to an extent, increase the weight attributable to the private life. The relationship with Ms Balabanska was formed at a time when the appellant's status was as precarious as it possibly could. The parties entered into the relationship with their eyes open, as it were. There are no very significant obstacles to the appellant's ability to re-establish himself in Albania. Finally, and importantly, there is a strong public interest in maintaining effective immigration control. That public interest is strengthened by the appellant's inability to meet the Immigration Rules.

94. In the appellant's favour are the following considerations. He has been in this country since the age of 13, a period now running to nearly 9 years. He has formed ties in this country and has put his time here to good use. He regards his life is now being in the United Kingdom and would view on return to Albania with trepidation.

95. Absent our conclusions on section 117B(6) of the 2002 Act, we conclude that it would not be disproportionate to remove the appellant to Albania. In this alternative scenario, we proceed on the hypothetical basis that there is no genuine and subsisting relationship with either Ms Balabanska or her children.

Anonymity

96. We have not been asked to make an anonymity direction in this case and there is no basis on which we should do so of our own volition.

Notice of Decision

The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law and that decision has been set aside.

The decision in this appeal is re-made and the appeal is allowed on the basis of section 117B(6) of Nationality, Immigration and Asylum Act 2002, as amended.

H Norton-Taylor

Judge of the Upper Tribunal

Immigration and Asylum Chamber

Dated: 11 July 2024

ANNEX: THE ERROR OF LAW DECISION

IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-004519

First-tier Tribunal No:
HU/18412/2019

THE IMMIGRATION ACTS

Decision & Reasons Issued:

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Before

UPPER TRIBUNAL JUDGE NORTON-TAYLOR
DEPUTY UPPER TRIBUNAL JUDGE WOODCRAFT

Between

ERGYS PEPAJ
(NO ANONYMITY ORDER MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr P Georget, Counsel, instructed by Prime Solicitors
For the Respondent: Ms S Lecointe, Senior Presenting Officer

Heard at Field House on 29 November 2023

DECISION AND REASONS

Introduction

1. The Appellant appeals with permission against the decision of First-tier Tribunal Judge Aldridge ("the judge"), promulgated on 23 November 2022 following a hearing on 28 October of that year. By that decision, the judge dismissed the Appellant's appeal against the Respondent's refusal of his human rights claim, a claim which was based on Article 8.

2. The Appellant is a national of Albania and was born in May 2002. He came to this country in August 2012 at the age of 11 accompanied by his mother and sister. He made an asylum claim in August 2015 which was refused and certified in January the following year. Time passed and in May 2019 he made an application for leave to remain which was deemed to constitute a human rights claim. The claim was refused by a decision dated 4 November 2019 and that decision has led to the current proceedings.

3. The reason why it has taken so long to reach this stage is that the Appellant's case has already been through the appellate system: his was one of the cohort of cases dealt with under rule 34 of the Tribunal's Procedure Rules during the Covid-19 pandemic. Indeed, the Appellant's case became the lead case on the issue of Rule 24 decisions and fairness: see EP (Albania) and Others (rule 34 decisions; setting aside) [2021] UKUT 00233 (IAC).

4. In any event, the Appellant's case was predicated on the two limbs of Article 8; family life and private life. In respect of the former, the Appellant asserted that since coming to the United Kingdom he had lived with his "uncle" (in fact a paternal cousin, but referred to throughout proceedings as "uncle" – we shall continue to use that term) and that individual's children. This was because the Appellant had effectively become estranged from his mother and sister because of the mother's difficulties with alcohol misuse. Thus, the Appellant asserted that he had family life with the uncle and his children, as they had become his surrogate family. In respect of private life, the Appellant asserted that he had lost any meaningful ties with Albania and had created a strong private life for himself in the United Kingdom, based in part on his love of football and an internet presence which had apparently resulted in a very large number of followers on well-known social media platforms.

The judge's decision

5. Having considered a number of factors relevant to paragraph 276ADE(1)(vi) of the Immigration Rules, the judge concluded that there no very significant obstacles to the Appellant reintegrating into Albanian society: paras 25–29. That assessment has not been challenged on appeal.

6. Two key passages in the judge's decision are paras 31 and 32. The second sentence of para 31 states that: "*The decision engages Article 8(1) because it will cause significant disruption to the appellant's current family and private life*". Para 32 reads as follows: "*I have not found that there is any relationship that is over and above the normal ties between adult relatives. However, I note that the appellant status in the UK has been unlawful*".

7. On the face of it, there appears to be a clear tension between paras 31 and 32 as to whether the judge had found family life between the appellant and his uncle (and the uncle's children) to exist.

8. The judge went on to consider a number of factors weighing for and against the Appellant, with a focus on what might be described as private life elements.

9. Having then set out at some length quotations from case law and reciting the provisions in section 117B of the Nationality, Immigration and Asylum Act 2002, as amended, the judge ultimately concluded as follows:

> "44. For the reasons already set out above in detail, I am satisfied that the appellant would be able to reintegrate into life in Albania, re-joining what family and friends he has left in Albania and continuing to forge friendships and relationships there. He could stay connected with any UK-based family and friends through visits and by modern means of communication.
>
> 45. Considering the appellant's case as a whole, I find that it has not been demonstrated that his case is exceptional. The balance sheet proportionality assessment is firmly against him. The strength of the public policy in maintaining immigration control is not outweighed by the strength of the appellant's Article 8 case. There is a very significant public interest in the removal of people who have no legal

right to be in the UK and I am satisfied that this means any interference in the appellant's family and private life is proportionate".

10. The appeal was accordingly dismissed.

The grounds of appeal

11. A single and narrowly drawn ground of appeal was put forward. It asserted that the judge had failed to make a finding as to the existence of family life. If the judge had intended to find that such family life did not exist, he had failed to provide any adequate reasons. If the judge had accepted the existence of family life, he had failed to weigh this in the balance when undertaking the proportionality exercise.

12. Permission to appeal was granted by the First-tier Tribunal. The grant of permission includes certain observations which added nothing to the nature of the Appellant's case before us, as recognised by Mr Georget and we need say nothing more about them.

The hearing

13. At the outset of the hearing, we observed that the composite bundle provided by the Appellant in line with the standard directions issued was close to being, but was not quite, compliant with those directions. The index was properly drawn up and the relevant materials had been included in the bundle. However, the bundle had not been bookmarked as required by the Presidential Guidance on CE-File and Electronic Bundles, dated 18 September 2023. Mr Georget confirmed that he would convey this omission back to those instructing him. We would hope that the representatives will in future provide a fully compliant bundle in all cases in which they are required to do so.

14. Mr Georget assisted us with concise submissions based on the single ground of appeal. He submitted that a finding on family life was important as it had constituted a central feature of the Appellant's case before the judge. If family life had existed it must have been a relevant

consideration in the proportionality assessment. It could not be said that the Appellant's case, including the element of family life, would have been bound to fail in any event.

15. Ms Lecointe appeared to accept that the judge had made an error by failing to reach a finding on family life, but submitted that it was not material. She submitted that in light of all other considerations, including certain adverse findings in respect of the Appellant's claimed lack of ties to Albania, the error could not have made a difference to the outcome.

16. At the end of the hearing we reserved our decision.

Conclusions

17. We acknowledge that appropriate restraint should be exercised before interfering with a decision of the First-tier Tribunal having regard to the judge's fact-finding task and his consideration of a variety of sources of evidence.

18. Nevertheless, we are satisfied that in this particular case the judge has erred in law and that the error is material. Our reasons for this conclusion are as follows.

19. It is clear that the claimed family life as between the Appellant and his uncle and his uncle's children did represent a central feature of the case put forward: see, for example, para 14. In our judgment, this indicated that the judge should have reached a clear finding on the point.

20. We have already referred to para 31 of the judge's decision. The passage in question reads to us as though the judge was accepting the existence of family life. For Article 8(1) to be engaged in respect of both family and private life, it follows that both of these protected rights must already have been found to exist. However, para 32 reads as though family life had been rejected: the judge's use of the phrase "*over and above the normal ties between adult relatives*" represented, as a matter of substance, the correct test as set out in Kugathas v SSHD [2003] EWCA Civ 31 and the conclusion appeared to be that the necessary

additional ties had not been demonstrated. There is, in our judgment, a contradiction between paras 31 and 32.

21. We have of course read the judge's decision sensibly and holistically. It is right that elsewhere the judge has referred to family in the United Kingdom: paras 33, 44 and 45. In respect of the last of these passages, the judge had concluded that any interference in the Appellant's "*family and private life*" was proportionate. However, the difficulty remains that there had been no clear finding as to whether family life existed or, if it did, what its significance was. In respect of the other passages, it is unclear to us whether the "*family*" referred to was based on family life within the meaning of Article 8(1) (which would involve a relatively substantial relationship, given the Kugathas test), or simply the fact that there were certain relatives living in the United Kingdom with whom the Appellant had contact.

22. Stepping back, we are satisfied that the judge made an error of law in failing to state a clear finding on the existence of family life. Alternatively, if the judge was in effect finding that family life did not exist, he failed to provide adequate reasons. In the further alternative, if the judge had found that family life did exist, he failed to explain its significance in the overall proportionality exercise.

23. The next question is whether this error was material. Ms Lecointe relied on certain adverse findings made by the judge to submit that it was not. The adverse findings related to the claimed lack of ties with Albania: para 26 The judge was entitled to make those findings, but they did not go to the issue of whether there was family life in the United Kingdom. It is right also that the judge considered a number of other factors which were plainly relevant to the proportionality exercise and which have not been challenged on appeal. There were clearly a number of factors weighing against the Appellant.

24. We are cognisant that the test for materiality is a relatively low one: it is not whether an error *would* have made a difference to the outcome, but whether it *could* or *might* have. Although not by a

significant margin, we conclude that the evidence before the judge was capable of supporting a finding of family life, that the family life could have been found to be relatively significant (given the Appellant's age when he started living with his uncle and the passage of time) and that it might, if properly considered, have made a difference to the overall proportionality exercise.

25. Accordingly, the judge's decision is set aside.

Disposal

26. Mr Georget submitted that if the judge's decision were to be set aside the appeal should be remitted to the First-tier Tribunal for a complete rehearing. Ms Lecointe submitted that it should be retained in the Upper Tribunal.

27. We have considered what was said by the Court of Appeal in AEB v SSHD [2022] Civ 1512 and the Upper Tribunal in Begum (Remaking or remittal) Bangladesh [2023] UKUT 00046 (IAC).

28. We are conscious of the Appellant's interest in preserving a potential level of appeal should the case go against him in the future. However, the challenge to the judge's decision was made on a very narrow basis. The error we have identified relates to the Appellant's circumstances in the United Kingdom, specifically the question of whether there is family life here and, if there is, its significance in the overall proportionality exercise. The Upper Tribunal is well-able to receive additional evidence and make relevant findings of fact on this issue before undertaking the proportionality exercise for itself when re-making the decision. There is no question of procedural unfairness in this case.

29. In the exercise of our discretion, we conclude that it is appropriate to retain this case in the Upper Tribunal.

30. We see no reason to interfere with the judge's findings at paras 25-29 in respect of paragraph 276ADE(1)(v) of the Rules and the absence of any very significant obstacles to the Appellant's reintegration into Albanian society. Those findings are accordingly preserved.

31. There will be a resumed hearing in due course at which the Appellant can present further evidence. However, that evidence shall, absent exceptional circumstances, be limited to his ties in the United Kingdom.

Notice of Decision

The decision of the First-tier Tribunal involved the making of an error of law and that decision is set aside.

This appeal is retained in the Upper Tribunal for a re-making decision in due course.

Directions

(1) No later than 10 January 2024, the appellant shall file (by uploading on to the CE-File system) and serve by email on the respondent a consolidated bundle of all evidence relied on;

(2) Any further evidence relied on by the respondent shall be filed and served (by the same methods as stated in Direction (1)) no later than 22 January 2024;

(3) No later than 7 days before the resumed hearing, the appellant shall file and serve (by the same methods as stated above) a concise skeleton argument addressing the relevant issues in this appeal;

(4) The respondent may file and serve a skeleton argument (by the same methods as stated above) no later than 3 days before the resumed hearing;

(5) Any application to vary these directions must be made promptly, copying in the other party.

H Norton-Taylor

Judge of the Upper Tribunal

Immigration and Asylum Chamber

Dated: 11 December 2023