Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: IA/10209/2014**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & reasons Promulgated**
On 14 May 2015	**On 12 June 2015**

Before

DEPUTY JUDGE OF THE UPPER TRIBUNAL CHANA

Between

MR BLERIM KASTRATI
(anonymity direction not made)

Appellant

and

THE SECRETARY Of STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the appellant: Mr S Iqbal of Counsel
For the respondent: Ms A Fijiwala, Senior Presenting Officer

DECISION AND REASONS

1. The appellant, who is a national of Albania, born on 10 September 1990 appealed against the decision of the respondent dated 9 February 2014 to refuse him leave to remain in United Kingdom outside the Immigration Rules and pursuant to Article 8 of the European Convention on Human Rights. First-tier Tribunal Judge Ievins dismissed his appeal in a determination dated 22 September 2014.

2. First-tier Tribunal Judge Mark Davies refused permission to appeal on 12 November 2014. Permission to appeal was however granted by Deputy Upper Tribunal Judge Sheridan on 9 March 2015 stating that it was arguable that the Judge made a material

error of law with respect to its application of the case of **Chickwamba [2008] UK HL 42** on the facts in this appeal.

The First-Tier Tribunal Judges Findings

3. It is not in dispute that this is a genuine relationship. The couple are married and do intend to live together as husband and wife. That the appellant's difficulty is that he came to this country illegally. He met his wife in Albania so she must have visited there although she is of Kosovan and not Albanian origin, and they formed a relationship and wanted to get married. The appellant tried five times by legal means to come to the United Kingdom but when he was unsuccessful, he took the illegal route. This is why his application must fail under the Immigration Rules. When the appellant made his application, the refusal which gives rights to this appeal, he did not have any leave it all to enter or remain in the United Kingdom.

4. The appellant relied on EX1 of appendix FM (c) which applies where the applicant has a genuine and subsisting relationship with a partner who is in the UK and is a British citizen, settled in the UK or in the UK with refugee leave or humanitarian protection, and there are insurmountable obstacles to family life with that partner continuing outside the UK. Paragraph EX2 goes on to define insurmountable obstacles as meaning "the very significant difficulties which would be faced by the applicant or their partner in continuing their family life together outside the UK and which could not be overcome all would entail very serious hardship for the applicant or their partner". "I do not consider that the obstacles to the couple's family life continuing outside the United Kingdom can properly be described as insurmountable."

5. The appellant does have a separate right of appeal an Article 8 grounds outside the Immigration Rules.

6. "I must also take into account the provisions of section 117A and B of the immigration act 2014". "The relevant part of Section 117B in this case is subsection (4) (b) which requires that little weight should be given to "a relationship formed with a qualifying partner, that is established by a person that time when the person is in the United Kingdom unlawfully".

7. The Judge took into account the appellant's wife's right in respect to a family life and said that there are no children involved.

8. The Judge took into account the case of **Chikwamba** and stated "it is not necessarily unlawful to require an appellant relies on human rights grounds to return to his country of origin to make an application for entry clearance". The prospective length and degree of family disruption involved in growing abroad for an entry clearance application is a highly relevant factor. "I am told that the financial requirements are met. If that is right, it might not necessarily be long that the couple are required to live apart while the appellant makes his application from Albania. Or his wife could accompany him to Albania while he does so. The interference with the right to respect for family life of both parties to the marriage required by the refusal of this application is proportionate to the legitimate aim of the United Kingdom in its economic well-being and maintenance of immigration control.

9. The judge dismissed the appellant's appeal.

The grounds of appeal

10. The appellants' grounds of appeal state the following. The appellant is in a genuine, durable and loving relationship with his wife and their relationship is subsisting means that they have formed a family life in the UK. The appellant has the right to continue with this family life in the UK. The appellant's wife is working, generating an income of £19,000 per annum working at the Rainbow school and alblofts. The appellant's wife therefore does meet the maintenance requirement. The appellant also has work-related skills and therefore they will not require any recourse to public funds to maintain themselves in the United Kingdom.

11. The judge fell into material error when he concluded that the obstacles to the couple's family life continuing outside the United Kingdom cannot be properly described as insurmountable. This is clearly not a reflection of the appellant and his wife's already established private and family life in the UK.

12. The judge has not taken into account that the appellant's wife has a job which makes a positive difference, to many children's lives. The appellant wife also intends to study for her PhD in the United Kingdom. Therefore the appellant's wife's expectations and ambition cannot be broken. It is an integral part of the Immigration Rules to consider all family members who will be affected by not granting the appellant leave to remain in the United Kingdom. The appellant's wife should not be deprived of his basic and fundamental human right.

13. As the appellant has apologised and is remorseful for his actions he should have been granted leave to remain in the United Kingdom. It is important to note that the appellant has previously made five applications to enter the United Kingdom lawfully which were all refused. The appellant had initially applied for a student visa in to study and to be together with his wife. The applications were refused. The appellant then applied for a tourist visa in order to spend time with his wife in this country and this was also refused. At the time the appellant could not apply for a spouse Visa as he was not 21 years of age. Consequently the appellant came to the United Kingdom and humbly apologises for the same. At a tender age of 20, the appellant was just coming out of his teenage years. He did not have sufficient capacity to understand the implication of his decision to enter the country unlawfully. The appellant is otherwise a good character and intends to uphold the laws of this great country. Discretion should therefore be applied in his favour and he be granted leave to remain in the United Kingdom.

14. The factors that should be taken into account in respect of proportionality is that the appellant came to the UK in November 2011 and has since been living together with his wife in a subsisting relationship. At the time the appellant was 20 years old so he has spent his formative years in the United Kingdom. The appellant's wife is a British citizen. The appellant was engaged to his wife in the summer of 2011. She came to the United Kingdom when she was very young from Kosovo. Her parents and siblings are British citizen's present and settled in the United Kingdom. The appellant's wife was to progress her career in educational psychology and complete her PhD.

The respondent's Rule 24 response

15. The respondent's rule 24 response states the following which I summarise. In terms of **Chikwamba**, it must be noted that the appellant had decided to enter the United Kingdom, notwithstanding five previous refusal of entry clearance. And failed both for want of a valid application and on suitability grounds, and so it is submitted that this is more than a simple procedural ground and more akin to **Ekinci**.

16. The comments of Elias LJ I **Hayat versus Secretary of State for the home Department** states that the situation is fact sensitive and there may be circumstances where they would be a disruption to family life with particular importance where children are involved. This is not the position in the instant appeal. The sponsor while Kosovan appears to be ethnically Albanian and indeed the parties met in Albania where the sponsor holidays. No evidence appears to have been placed on the length of any disruption in the British Embassy in Tirana deciding the application or indeed any qualitative assessment of the sponsor being able to meet the substantive Immigration Rules by the first-tier Judge which is merely limited to "I am told that the financial requirements are met" at paragraph 23 of the determination.

17. The Judge of the first-tier Tribunal directed himself as a two the whole of section 1 170 of the Nationality Immigration and Asylum Act 2002 as amended but simply considered that section 117B (4) (b) as the most pertinent. It is not readily apparent as to how the Judge erred by not considering the whole of the section.

18. The grounds are a disagreement with the findings made by the Judge considered all the evidence applying the correct burden and standard of proof. The judge directed himself properly.

Findings on Error of Law

19. I have considered the first-tier Tribunal's determination with all due care and find that the judge did not make a material error of law. The Judge took into account all the evidence and came to a sustainable conclusion and dismissed the appellant's appeal.

20. The Judge in his determination considered the case of **Chikwamba** at paragraph 23 and stated "it is not necessarily unlawful to require an applicant who relies on human rights grounds to return to his country of origin to make an application for entry clearance".

21. It would be helpful to set out the case of **Chikwamba** where the issue for determination was framed thus:

> "In determining an appeal under section 65 of the Immigration and Asylum Act 1999 (the 1999 Act) (now sections 82 and 84 of the Nationality, Immigration and Asylum Act 2002 (2002 Act)) against the Secretary of State's refusal of leave to remain on the ground that to remove the appellant would interfere disproportionately with his article 8 right to respect for his family life, when, if ever, is it appropriate to dismiss the appeal on the basis that the appellant should be required to leave the country and seek leave to enter from an entry clearance officer abroad?"

In that case the appeal was allowed and it was said that:

> "I am far from suggesting that the Secretary of State *should* routinely apply this policy in all but exceptional cases. Rather it seems to me that only comparatively rarely, certainly in family cases involving children, should an article 8 appeal be dismissed on the basis that it would be proportionate and more appropriate for the appellant to apply for leave from abroad."

22. The effect of this passage in **Chikwamba** was subsequently considered by the Court of Appeal in **TG (Central African Republic) v Secretary of State for the Home Department [2008] EWCA Civ 997**. In that case, Keene LJ said that:

> "These are fact-sensitive issues and inevitably there are factual differences between this case and Chikwamba, not all to this appellant's advantage. For example, just to take two matters, Mrs Chikwamba had married at a time when removals to Zimbabwe were suspended. This appellant, during some of the time when he has been living with his partner in this country, seems to have disappeared from the official radar screen for a period of something around two years. Such matters as the immigration history of an appellant are clearly relevant, as Lord Brown indicated himself at paragraph 42. Then Mrs Chikwamba, it was accepted, could not realistically leave her child behind in order to seek entry clearance from Zimbabwe, so in that case there would have been an impact on the child who had a right to remain in the United Kingdom."

Buxton LJ added that:

> "... it is quite clear that a very strong consideration in Chikwamba was the fact that it was the wife who was to be removed from the country, inevitably in the companionship of her four-year-old child. That is made absolutely plain as the determining factor in paragraph 8 of the speech of Baroness Hale of Richmond."

23. **Chikwamba** was again considered in **R (Forrester) v Secretary of State for the Home Department [2008] EWHC 2307** in which Sullivan J said at paragraphs 13-14:

> "… what is the purpose of requiring the claimant and her daughter to return to Jamaica? I readily accept that there is a general need to maintain a fair and firm immigration system and to deter those, who do not have entry clearance, from coming to this country without entry clearance and, as it were, jumping or bypassing the queue. However, there is no question of the claimant jumping the queue in the present case. There is no question of her coming to this country when she did not have entry clearance. She came to this country entirely lawfully. She was in this country lawfully for a number of years and the only reason why her continued presence was not lawful was the fact that a cheque [sent with her application for further leave to remain as the spouse of someone who was present and settled in the United Kingdom] was not honoured by her bank. It is one thing to say that one should have a fair and firm immigration policy, it is quite another to say that one should have an immigration policy which is utterly inflexible and rigid and pays not the slightest regard to the particular circumstances of the individual case."

In paragraph 41 of the speech of Lord Brown [in **Chikwamba**] he asked whether the real rationale for the policy was:

> "... perhaps the rather different one of deterring people from coming to this country in the first place without having obtained entry clearance and to do so by subjecting those who do come to the very substantial disruption of their lives involved in returning them abroad?"

24. The Judge in his determination found that the case of **Chikwanba** does not exempt the appellant from satisfying the requirement to obtain an entry clearance from his home country. The Judge clearly did not understand **Chikwamba** to say that an appellant can circumvent the requirements of the Immigration Rules if he is already in the country and therefore should not be required to return to his home country to make an application in the appropriate category. **Chikwamba** states that only in exceptional cases and cases which normally involve children that it would not be proportionate and more appropriate for the appellant to apply for leave from abroad.

25. The Judge in a comprehensive assessment of the appellant circumstances was entitled to find that the appellant should return to Albania to make his entry clearance application. This is a sustainable conclusion take into account the circumstances of the appellant.

26. The Judge considered the case of **Beoku-Betts (FC) (Appellant) v Secretary of State for the Home Department [2008] UKHL 39** and took into account the appellant's wife's rights pursuant to Article 8 and found that she could either accompany the appellant to Albania for him to make his entry clearance application or remain in the United Kingdom. The important fact that the Judge took into account is that there are no children to be taken into account.

27. Although the Judge referred only to subparagraph (4) (b) of section 117B as the relevant part of the section to be taken into account, I find this is not a material error of law because the Judge clearly understood that he has to take into account the respondent's interest.

28. I find that there is no error of law in the determination of the first-tier Tribunal Judge and I uphold the decision.

Decision

Appeal dismissed

Signed by,

Dated this 9th day of June 2015

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A Deputy Judge of the Upper Tribunal
Mrs S Chana